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Court of Appeals
Division III
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No. 36807-6-III

IN THE COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

BRANDON CATE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

THE HONORABLE JUDGE CHRISTOPHER CULP

Okanogan County Cause No. 17-1-00040-8
Okanogan County Cause No. 17-1-00039-4

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

A. The Judgment and Sentence For The Conviction For Theft In The Second Degree and Malicious Mischief Second Degree Must Be Corrected To Reflect The Proper Standard Range.

B. The Exceptional Sentence Must Be Reversed.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A. The standard range sentence for a crime with a seriousness level of 1 and an offender score of 8 is 17-22 months. Where the court mistakenly imposes 38 months must the matter be remanded to the trial court to correct the sentence?

B. Where the legislature has considered factors in computing the standard range, does the trial court err when it duplicates those factors and imposes an exceptional sentence?

C. Were the court's reasons legally adequate to sustain its conclusion of law to impose an exceptional sentence?

III. STATEMENT OF FACTS

Okanogan County prosecutors tried Brandon Cate in two separate trials on unrelated alleged crimes. In cause No. 17-1-00039-4, a jury found him guilty of one count of burglary second degree, malicious mischief second degree, and theft second

degree. 1CP 13[1]. In the second trial, cause No 17-1-00040-8, a jury found him guilty of two counts of burglary second degree, theft in the second degree, and two gross misdemeanors. 2CP 13.

The sentences for the separate trials were imposed on the same day. The trial court did not count the convictions as other current offenses and imposed consecutive sentences without following the statutory procedures for an exceptional sentence. The court did not enter findings of fact or conclusions of law. *See unpublished opinion State v. Brandon Cate,* 7 Wn.App.2d 1024 (2019); *unpublished opinion State v. Brandon Cate,* 7 Wn.App.2d 1056 (2019).

This Court remanded with instructions for the trial court to change the count of theft in the second degree to a theft in the third degree, in cause number 17-1-00040-8. The trial court was instructed to resentence both causes at a combined hearing and to reassess whether to impose a consecutive or concurrent sentence with the sentence imposed under 17-1-00039-4. *Cate,* 7 Wn.App.2d

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[1] Because there are two sets of clerk's papers, for clarity and convenience the citations for cause number 17-1-00039-4 will be referred to as 1CP and cause number 17-1-00040-8 as 2CP.

at 1024 at *9[2]. This Court held that because sentence in each trial were imposed on the same day, the offenses from each trial should be counted as part of the offender score for each cause number.

The resentencing hearing is the subject of this appeal. At the hearing, defense counsel pointed out that if both causes were not sentenced on the same day, Mr. Cate's offender scores for the earlier of the two causes would have been lower. RP 36. The court understood but determined that because the crimes occurred at different times, with separate victims the two causes should be scored as current offenses against the other. Further, the court wanted to exercise its discretion to impose an exceptional sentence, lest some of Mr. Cate's crimes go unpunished. RP 37.

For 17-1-00039-4 the current offenses were listed:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	BURGLARY IN THE SECOND DEGREE	RCW 9A.52.030(1)	FB	December 10, 2016
2	MALICIOUS MISCHIEF IN THE SECOND DEGREE -- PHYSICAL DAMAGE EXCEEDING $750	RCW 9A.48.080(1)(a)	FC	December 10, 2016
3	THEFT IN THE SECOND DEGREE -- OTHER THAN A FIREARM -- WRONGFULLY OBTAIN OR EXERT UNAUTHORIZED CONTROL	RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(a)	FC	December 10, 2016

1CP 2.

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[2] This Court made a similar ruling in the unrelated case found at 7 Wn.App.2d 1056 at *9.

Other current offenses, which had occurred in January 2017, were listed as follows:

	Crime	Cause Number	Court (county & state)	DV* Yes
1.	Burglary in the Second Degree	17-1-00040-8	Okanogan, WA	
2.	Burglary in the Second Degreee	17-1-00040-8	Okanogan, WA	

1CP 3. Mr. Cate had an offender score of '5' from prior criminal history for the burglary second degree conviction, and '4' for the remaining two convictions. 1CP 4. Adding the two cause numbers and prior history the court obtained an offender score of 9+ for the burglary second degree charge, with a standard range of 51-68 months[3]. 1CP 4.[4]

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	9+	3	51-68 months		51-68 months	10 years
2	8	1	17-22 months		22-29 months	5 years
3	8	1	33-43 months		22-29 months	5 years

The judgment and sentence from 17-1-00039-4 specified all counts were within the standard range. CP 5. The court imposed: 1CP 5.

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[3] Counts 2 and 3 were scored as an "8" because the prior and current burglary in the second-degree convictions did not count as two points each.
[4] The underline in the Sentencing Data has been added for emphasis.

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

59.5 months on Count 1 _____ months on Count _____

19.5 months on Count 2 _____ months on Count _____

38 months on Count 3 _____ months on Count _____

When imposing sentence, the court said, "For the malicious mischief and *theft first* here with an offender score of eight, the malicious mischief 19 ½ months, for the theft 38 months. Those will run concurrently…" RP 38. (emphasis added). There was no discussion or explanation on the record why counts 2 and 3 had different standard ranges in the respective charts. No one corrected the court the conviction was for theft in the second degree, not first degree.

The court conducted a similar process for 17-1-00040-8.

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	BURGLARY IN THE SECOND DEGREE	RCW 9A.52.030(1)	FB	January 07, 2017
2	THEFT IN THE THIRD DEGREE	RCW 9A.56.050	GM	January 07, 2017
3	MALICIOUS MISCHIEF IN THE THIRD DEGREE -- PROPERTY DAMAGE (LESS THAN $750)	RCW 9A.48.090(1)(a)	GM	January 07, 2017
4	BURGLARY IN THE SECOND DEGREE	RCW 9A.52.030(1)	FB	January 08, 2017
5	THEFT IN THE THIRD DEGREE	RCW 9A.56.050	GM	January 08, 2017

2CP 1. Other current offenses.

1.	Burglary in the Second Degree	17-1-00039-4	Okanogan, WA	
2.	Malicious Mischief in the Second Degree	17-1-00039-4	Okanogan, WA	
3.	Theft in the Second Degree	17-1-00039-4	Okanogan, WA	

2CP 3.

2.3 Sentencing Data:

Count No.	*Offender Score*	*Seriousness Level*	*Standard Range (not including enhancements)*	*Plus Enhancements**	*Total Standard Range (including enhancements)*	*Maximum Term*
1	9+	3	51-68 months		51-68 months	10 years
2	\N/A	Gross Misdemeanor	0-364 days		0-364 days	364 day
3	N/A	Gross misdemeanor	0-364 days		0-364 days	364 days
4	9+	3	51 – 68 months		51- 68 months	10 years
5	N/A	Gross misdemeanor	0-364 days		0-364 days	364 days

2CP 4. The court imposed a sentence of 59.5 months consecutive to the 59.5 months imposed for 17-1-00039-4 for a total of 119 months. 2CP 5,6. In its written findings of fact, the court entered findings of fact (f):

> Each case involved separate and distinct acts as well as different victims and separate loss to the victims committed on separate days.

And findings of fact (g):

> The offenses were separated in time sufficiently that they need to be sentenced consecutively.

2CP 25.

The trial court entered conclusions of law:

> Both cases were sentenced on the same day and are presumed to run concurrent per statute. RCW .94A.589 (sic). Had each case been sentenced on separate days, this Court in its discretion could have run the sentences consecutively. RCW 9.94A.589. 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) if the sentences were run concurrently.
> There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

2CP 25.

This timely appeal is made assigning error to the standard sentencing range for malicious mischief second degree and theft in the second degree from Cause No. 17-1-00039-4; the incorrect sentencing for the theft second degree conviction. 1CP 45-57; 2CP 50-63, and the court's imposition of an exceptional sentence.

IV. ARGUMENT

A. The Judgment and Sentence Must Be Corrected for Cause Number 17-1-00039-4.

Whether a trial court exceeded its statutory authority under the Sentencing Reform Act is reviewed de novo. *State v. Smith,* 159 Wn. App. 694, 699, 247 P.3d 775 (2011). When a sentence

has been imposed for which there is no authority in law, the court has the power and duty to correct the erroneous sentence. *In re Matter of Swagerty,* 186 Wn.2d 801, 810, 383 P.3d 454 (2016).

Here, the court calculated an offender score of ‘8’ for the malicious mischief and theft charges in cause no 17-1-00039-4. Malicious mischief second degree and theft second degree are both class C felonies. RCW 9A.48.080; RCW 9A.56.040 (2)s. The statutory seriousness level of each crime was a ‘1’. RCW 9.94A.515. For level ‘1’ crimes, with an offender score of ‘8’, the standard range sentence is 17-22 months. RCW 9.94A.510.

The judgment and sentence listed two different standard ranges for malicious mischief: in one column, 17-22 months, and in the second column, 22-29 months. Although the court imposed a 19.5-month sentence, the judgment and sentence must still be corrected to accurately reflect the standard range.

The judgment and sentence also incorrectly listed the standard range for theft second degree. One column lists the standard range as 33-43 months, and a second column lists the standard range as 22-29 months. Both are incorrect. The correct range is 17-22 months. And the court imposed a 38-month sentence for the theft second degree, which is outside of the

standard range and was not part of the court's exceptional sentence findings.

The proper remedy is to remand for correction of the clerical errors, and for the court to resentence Mr. Cate on the second-degree theft conviction within the standard range. *In re Pers. Restraint of Mayer,* 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

B. The Exceptional Sentences Must Be Reversed.

The SRA places limits on sentencing courts which protect against over punishing or under punishing an individual offender. Generally, a court must impose a sentence within the standard range and a sentence for two or more current offenses is to be served concurrently. RCW 9.94A.505(2)(a)(i); *State v. Fowler,* 145 Wn.2d 400, 404, 38 P.3d 335 (2002).

In its opinion, this Court held that RCW 9.94A.525(1) requires the court to deem all offenses sentenced on the same date to be current offenses, regardless of whether the convictions resulted from separate trials. This Court noted the legislature could have written, but did not, that only offenses within the same court filing shall be deemed current offenses. And because the sentencing court entered sentence for both prosecutions on the

same date, the court could not impose any consecutive sentences without declaring an exceptional sentence and entering findings of fact. *See Cate,* 7 Wn.App.2d 1056 * 8. However, the result is that Mr. Cate's sentence overly punishes him.

1. The Scoring Of Mr. Cate's Convictions Resulted In An Inflated Offender Score For The Earlier Convictions.

The Legislature has considered a subsequent conviction for burglary in the sentencing scheme. To adequately punish an individual for subsequent burglary convictions, the legislature set out a multiplying factor for more one burglary count in an offender's criminal history. For the subsequent convictions for burglary the prior or current burglary convictions count as two points. RCW 9.94A.525(16). The additional points to the offender score results in a higher standard range sentence. Thus, a more severe punishment has been included in the offender score calculation. Here, by counting the second set of convictions into Mr. Cate's offender score on the first set, his offender score was artificially raised.

Second, the original sentence the court imposed used the separate cause numbers and arrived at a sentencing of 38 months for the earlier cause number and 50 months for the second cause

number, to be run consecutive, for a total of 88 months[5]. In the findings and conclusions entered on remand, the sentencing court stated that had it sentenced the causes on different days, it could have run the sentences consecutively. The difference, however, is that Mr. Cate's sentence would have been 88 months instead of 119 months for the first in time offenses. The court would not have included the second set burglary conviction multiplier in the earlier cause.

Where it is simply a matter of convenience and time management for a court to sentence two unrelated separate causes on the same day, the higher combined offender score on the earlier cause and harsher sentence is arbitrarily imposed and results in over punishment. A higher offender score and longer punishment should not be based on the random chance that two separate causes will be sentenced on the same day because of convenience. The matter should be remanded for the trial court to reassess the offender score for the first in time convictions to not include the later convictions.

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[5] This was prior to the ruling by the Court of Appeals that all offenses were to be treated as current offenses.

2. The Court's Reasons For An Exceptional Sentence Are Not Substantial and Compelling To Sustain Its Conclusion of Law.

An exceptional sentence may be imposed only where the sentencing court determines there are substantial and compelling reasons to justify an exceptional sentence and "does not duplicate factors necessarily considered by the Legislature in computing the standard range." RCW 9.94A.535; *State v. Jacobson,* 92 Wn.App. 958, 965, 965 P,2d 1140 (1998).

Using a de novo standard of review, the Court asks whether the reasons articulated justify a departure from the standard range. RCW 9.94A.585(4); *State v. Ferguson,* 142 Wn.2d 631, 15 P3d 1271 (2001). The court's reasons of (f) and (g) were already considered by the Legislature[6]. There is nothing in the statute which differentiates between offenses committed close or far apart in time that justifies a consecutive sentence. Rather, unless the court makes a specific finding of same criminal conduct, the assumption

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[6] (f) Each case involved separate and distinct acts as well as different victims and separate loss to those victims committed on separate days.
(g) The offenses were separated in time sufficiently that they need to be sentenced consecutively.
1CP 24; 2CP 25

is there are separate victims with separate injuries. RCW 9.94A.525(5)(a)(1). The reasons the court articulated do not amount to substantial and compelling reasons which distinguish Mr. Cate's crimes from other burglaries. *State v. Grewe,*117 Wn.2d 211, 215-16, 813 P.2d 1238(1991).

Finally, a sentence outside of the standard range is subject to strict procedures. RCW 9.94A.535 authorizes a court to impose an exceptional sentence without findings by a jury where a defendant has committed multiple current offenses and the defendant's high offender score results in some of the offenses going unpunished. The provision is called the "free crimes" aggravator. *See State v. France,* 176 Wn. App. 463, 469, 308 P.3d 812 (2013). The court may impose the exceptional sentence under those circumstances "if the number of current offenses 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." *Id.*

A sentencing court may determine the length of an exceptional sentence. Using an abuse of discretion standard, a reviewing court may reverse a sentence outside the standard range

if the sentence imposed is clearly excessive. RCW 9.94A.585 (4)(b). *State v. Ferguson,*142 Wn.2d 631, 15 P.3d 1271 (2001).

Discretion is abused when the court's decision is manifestly unreasonable or based on untenable grounds when it is outside the range of acceptable choices, given the facts and the applicable legal standard. It is untenable if it is based on an incorrect standard or the facts to not meet the requirement of the correct standard, or the factual findings are unsupported by the record. *Grandmaster Sheng-Yen Lu v. King County,*110 Wn.App.92, 99, 38 P.3d 1040 (2002).

As argued above, the offenses of the later cause number should not have been included in the earlier cause number and rendered an incorrect calculation. Even if the trial court determined the offender score from the second cause left some of Mr. Cate's offenses go unpunished and ran the sentences consecutively, the sentence would still have been shorter than the 119 month-sentence the court imposed. On that basis the 119-month sentence was excessive, and an abuse of discretion.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Cate respectfully asks the Court to remand to the trial court for resentencing.

Respectfully submitted this 18th day of November 2019.

Marie Trombley
WSBA 41410

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on November 18, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Okanogan County Prosecuting Attorney at anoma@co.okanogan.wa.us and sfield@co.okanogan.wa.us and to Brandon Cate/DOC#894326, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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