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67910-4

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NO. 67910-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON KELLY BELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1) Once a jury finds an aggravating fact beyond a reasonable doubt, a court that finds substantial and compelling reasons to do so, can impose an exceptional sentence. In determining the structure of a sentence, the court will consider all of the facts reasonably before it and apply its discretion. The court may create findings of fact and conclusions of law justifying the entire sentence. A jury found Bell guilty of an aggravating factor and the resentencing court relied on this as its basis for an exceptional sentence upward. The court memorialized the basis for the exceptional sentence and for its length in its Findings and Conclusions. By arguing that those Findings and Conclusions are unfounded and provide an improper basis for the exceptional sentence, does Bell fundamentally misperceive the resentencing court's Findings and Conclusions?

2) A resentencing court's exceptional sentence is proper when there are substantial and compelling reasons to impose it, it is based on an aggravating fact found by a jury, its length does not shock the conscience, and it is not vindictive. No presumption of vindictiveness applies when a different judge imposes sentence, even though the resentencing judge's sentence is longer. There is no constitutional guarantee to a particular sentence at resentencing. Here, the resentencing court imposed a longer

exceptional sentence than the original judge. Where the new sentence was imposed by a different judge, with some new information, was the harsher sentence reasonable and constitutional?

3) An exceptional sentence may be outside the standard range or it may be consecutive to another sentence. No statute or case law requires a separate basis for either of these respects. The resentencing court here imposed a sentence outside the substantial range and ran it consecutively to the other counts. In so doing, did the court act within its discretion when it imposed sentence?

4) A defendant has a right to effective appellate counsel. A defense counsel is ineffective when his deficient performance prejudices the defendant. A new judge has discretion to sentence a defendant differently upon remand. Bell's appeal successfully vacated three felony convictions, but he received a longer sentence afterward. Does a longer sentence upon remand mean that Bell's appellate counsel was ineffective?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Clifton Bell with 14 counts of domestic violence against his former girlfriend, J.F. CP 61. The jury found Bell guilty of every count, including an aggravating factor as to count I:

...that there is evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(h)(i); CP 61.

Bell's standard range on the most serious crimes, Counts I and XII, was 63-84 months. CP 335. While Bell's defense counsel did not request a sentence of a specific length, he did present mitigating factors and asked for a more lenient sentence. CP 292-99. Judge Mertel imposed an exceptional sentence of 144 months,¹ saying:

There is little question that this defendant nearly beat this young lady within an inch of her life, and that the jury so found. And I think the evidence was overwhelming with regard to his abuse of her.

CP 315-16.

On appeal, Bell raised many points of error, including a unit of prosecution argument for the five counts of Witness Tampering. CP 61-62. The State conceded the unit of prosecution issue under the newly-filed opinion in State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010). In Hall, this Court held that only one count of Witness Tampering could be charged. CP 62. All of the other convictions were affirmed, and the case was remanded for resentencing on Counts I-IV and IX-XIV.

CP 62.

¹ Appendix B provides a grid of Judge Mertel's sentence on each count.

Because Judge Mertel had retired, his successor, Judge Bradshaw, presided over Bell's resentencing. Like Judge Mertel, Judge Bradshaw imposed an exceptional sentence, but Judge Bradshaw's sentence was 24 months longer, totaling 168 months.² CP 124-34. Bell now appeals this second exceptional sentence.

2. SUBSTANTIVE FACTS.

J.F. met Clifton Bell when she was 17 years old and he was 18. CP 62. Bell stood six-feet-one-inch tall and weighed about 270 pounds, while she stood five-feet-two-inches tall and weighed 125 pounds. CP 439-40. Bell soon became abusive. CP 62. His first assault occurred on J.F. at a party when Bell, angry because he believed J.F. had failed to respect him, ripped out her nose ring and grabbed her by the neck. CP 62. This assault was not charged at trial but was offered, among other reasons, to prove the aggravating factor.

On February 17, 2006, Bell grabbed J.F. by her arm and threw her, dislocating her shoulder. CP 63. This was the basis for Count XII (Assault in the Second Degree). That summer, J.F. had moved into her own apartment. CP 63. One day, as she and Bell were arguing, he began to beat her and bolted the door so she could not flee. CP 63. She ran toward her balcony to flag down some help, but Bell, trying to drag her

² Appendix B also provides a grid of Judge Bradshaw's sentence on each count.

back inside, flipped her over the balcony and onto the pavement 15 feet below. J.F. fractured her hip and lacerated her liver. CP 63. While this incident, which occurred in Snohomish County, was uncharged, it also provided evidence to prove the aggravating factor for Count I. CP 63, 69.

Around September 30, 2006, Bell thought that J.F. had wiped ketchup on his jeans, so he threw a glass plate against her head, causing blood to flow down her face. CP 64. That night, Bell wanted sex, but J.F. refused, so Bell pinned her down and raped her. CP 64. During another incident, Bell anally raped her while she wept and asked him to stop. CP 65. The September 30, 2006 assault and rape were the basis for Counts XIII and XIV, while the anal rape, which occurred in Snohomish County, was uncharged. It was offered to prove the aggravator charged in Count I. CP 69.

On September 23, 2007, an intoxicated Bell came to J.F.'s apartment late at night, they argued and Bell broke her cellular phone and punched her in the face. CP 65. He then pinned her down, asked her if she wanted to "see stars," and strangled her. CP 65. Afterward, Bell consoled her for a time, but then grabbed her hair, pulling it out at the scalp. CP 66. Every time J.F. tried to leave, Bell dragged her back inside. CP 66. When Bell finally fell asleep, she snuck out and called police from a gas station. CP 67. This incident was the basis for Counts I-III.

After his arrest, Bell repeatedly called J.F. from jail, apologizing and trying to convince her not to testify. CP 68. He also called his friends and family, asking them to participate in his campaign to stop J.F. from testifying. CP 68. These calls were the basis for the four witness tampering convictions in Counts IV-VIII.

At trial, during J.F.'s testimony about her fractured hip and lacerated liver, Bell interrupted her, calling her a "psycho bitch" in the presence of the jury. CP 406. Bell testified and either denied or offered explanations or defenses to each charge. During cross examination, he called the prosecutor a "piece of shit." CP 589. Bell admitted, while on the stand, to recruiting his friends to attempt to change J.F.'s testimony. CP 586-600. The jury found Bell guilty of all counts, and found the aggravator for a pattern of abuse against J.F. CP 337, 341-42, 344-45.

3. FACTS AT RESENTENCING.

After three counts of witness tampering were vacated under Hall, Bell's offender score was recalculated. For Counts I and XII (Assault in the Second Degree), his range was now 43-57 months versus the original 63-84 month range. CP 125, 131. Because this Court affirmed the aggravator charged in Count I, Bell's potential sentence on Count I remained as high as 120 months. Bell's new counsel asked the court to

impose a 104 month exceptional sentence, while the State requested a 177 month exceptional sentence (the high end on all counts). CP 111.

Bell's resentencing was assigned to Judge Bradshaw and his attorney did not object. CP 128; 2RP 3-62.³ Judge Bradshaw began the hearing by making a record of all the material he reviewed in anticipation of the sentencing, including transcripts of the first sentencing hearings, the Court of Appeals opinion, transcripts of the victim's testimony, Bell's testimony, and witness Ryan Anderson's testimony.⁴ The judge also reviewed transcripts of jail phone calls made by Bell, photographs of J.F.'s injuries, and letters from Bell's family and a friend. 2RP 4. The State played some of the jail calls between Bell and J.F. admitted at trial. In one, Bell called J.F. and was affectionate and apologetic as he asked her to recant to the prosecutor. But in Bell's calls to a friend, his manner was different:

show up at [J.F.'s] fucking work, man! Beat the bitch in the fucking face! She's a fucking rat! Jesus Christ!.. can you do that?

³ This brief will cite the 9/29/2008 Sentencing as "1RP" and the 10/28/2011 Resentencing as "2RP."

⁴ Ryan Anderson was a coworker of J.F.'s who testified about seeing her injuries following Bell's beatings. CP 688-94.

2RP 17. In another call played at the resentencing hearing, Bell ordered the same friend to rape J.F. to ensure she does not testify, saying, “fucking put it in her, dog.” 2RP 17.

J.F. did not attend the first sentencing, but she submitted a letter written for the resentencing that was read aloud by the prosecutor, which conveyed to the court the lasting impact of the assaults. 1RP 2-51. In this new letter, J.F. described the permanence of her injuries, including lower back pain from the fractured hip. 2RP 27. J.F. also described for the court some of Bell’s behavior during her testimony at trial.

When I was on the stand testifying in his trial he would pretend to cough and say bitch and liar. Though this was distracting and embarrassing to me I was almost glad he did it because the Judge and jury got to see what his best behavior for court consisted of. He conducted himself this way in a courtroom, in front of Judge and jury, imagine how he acts behind closed doors.

2RP 30. In another portion of the letter, she commented on why she stayed in the relationship in the first place:

Looking back, I can’t believe I stayed with someone like him for as long as I did. However, Clifton is very manipulative and good in getting what he wants. I was young and thought that I was in love, so every time Clifton would punch me in the face or strangle me to the point of hysterical crying, his demeanor would change from scary to calm and nice. He would hug me, wipe tears and tell me how sorry he was for losing his temper. When you think you’re in love you want to believe what he is saying is true.

...

At the time when Clifton would act sweet he'd tell me he'd never do anything to hurt me again, I believed him. And now looking back, I'm certain that he only said those things so I would not get him into trouble.

2RP 29. J.F.'s letter to the resentencing court ended with a request that the judge consider Bell's dangerousness:

Please consider everything you have heard in considering his resentencing. I know that no one in this courtroom today would wish this torture on their daughters, and with Clifton roaming the streets, it's likely that I will not be his last victim. He will do this to someone else. I only hope that the next girl will see the warning signs sooner than I did and get as far away from him as she can. I don't believe this is the last crime Clifton Bell commits on a female. I only pray that the next one does not end in a murder trial, for the woman's sake.

2RP 31.

In support of a mitigated sentence, Bell's lawyer presented records from the Department of Corrections and argued that Bell had been productive and well-behaved during his time in custody. 2RP 34-35. The State countered these letters with a list of Bell's infractions while in custody, but the court declined to consider the State's rebuttal evidence. 2RP 34-35. During his allocution, Bell told the court that his situation with J.F. was unique because she "kind of instigated and irritated it," but added that he "in no way blame[d] her for what happened." 2RP 45.

In his oral ruling, Judge Bradshaw stated that the Court of Appeals, in its opinion, did not "place any confines or restrictions on [his]

discretion on remand,” adding that the “parties agree...” that the resentencing court is not “bound by Judge Mertel’s sentence”:

The question is not, therefore, what Judge Mertel would do today. It’s not asking you to speculate about what that answer is and I am not here so speculating. It is not my job to consider what Judge Mertel would do on the 28th of October 2011. It is my job as his successor [in] the Superior Court to exercise my discretion based on what I can glean from the facts and the applicable law... I tried to look at the facts from both sides of perspective [sic]. I want you to know that I started with the Court of Appeals decision, the Court of Appeals appropriately, as a way of objectively citing to the record without hyperbole.

2RP 47-48.

Then the resentencing court read a portion of the Court of Appeals opinion into the record, reciting the facts of Bell’s history of abuse against J.F. and the facts of the crimes charged. 2RP 47-49. When Bell told the court that this was the “state’s version” of events, the court responded that it had also reviewed Bell’s testimony, and noted that he has several misdemeanors, including escape and assaults that were not included in his standard range.⁵ 2RP 51.

Then Judge Bradshaw began to impose his sentence. He agreed with Bell’s attorney that the Rape in the Third Degree charged in Count XIV should carry the high end of the range, at 54 months because he

⁵ Bell incorrectly states that the court never mentioned this during the resentencing hearing. Brief of App., 12.

found the rape “even more repugnant than the Assault 2.” 2RP 52. The court ordered that this count, “by way of the aggravator” in Count I, run consecutively to Count I. 2RP 52. In his analysis of his sentence for Count I, Judge Bradshaw reasoned as follows:

One could look at this fact pattern and say, if not this fact pattern, what fact pattern would deserve the top of the statutory sentence. Um, that would be hyperbole... so it's difficult and the effort I make is to try to anchor this a little more than throwing a book ...or the.. top end of the sentence, so I will not be applying the top end of the, uh, statutory sentence here.

...

So that takes us back to something that can help in this regard and that of course is the standard range... to recognize the repugnant aspect of Count I and double within the standard range. That standard range is 43 - 57. So, in looking about what should be doubled within 43 - 57, I came back to the uh, facts. I come back to what Mr. Bell, I sincerely heard what you had to say, but was still disturbed that after four years you could not speak about this fact pattern, this crime, this trial, without still taking a shot at the victim. You still had to say she instigated what, to a part, what had happened. I appreciate you went on to say, “I take full responsibility,” but it does not seem, um ... well, we'll leave it at that. So, this is, uh, a matter of, uh, discretion and nothing, uh, more. So, my view of the facts would be, um, that this pattern of an aggravated crime of what was done to, um... a diminutive formable person is, um... in my view, repugnant. Therefore, the Court will be doubling the top of that standard range, the, the 57, in other words, uh, 114.

2RP 53.

Bell's lawyer asked for clarification, saying, “it's my understanding that the court is imposing 114 months on Count I and, is

the court running that consecutively to the remaining counts ... ?” Judge Bradshaw clarified that he was running Count I consecutive to the 54 months in Count XIV. 2RP 55.

The Judgment and Sentence, signed by all parties, indicates that Counts V, VI, VII and VIII were vacated. CP 124. Section 2.5 of the Judgment and Sentence is check-marked “Exceptional Sentence” and reads as follows: “Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Counts I.” CP 125.

The court also entered written Findings of Fact and Conclusions of Law, attached here as Appendix A (App. A). The first paragraph lists the various materials the court considered in its sentence, including the new letter from J.F., and Bell’s latest allocution. App. A, 1. There are eleven Findings of Fact. Findings 1 through 6 relate to the past incidents of domestic violence Bell committed against J.F., some of which were charged in Counts XII-XIV, and others which were presented to prove the aggravator. App. A, 2. Findings 7 through 9 summarize Counts I-III. App. A, 2-3. Finding 10 summarizes the facts that were the original basis for Counts IV-VIII, Witness Tampering, but reduced to one count after appeal. App. A, 3.

Finding 11 repeats the factual basis for the aggravating factor found by the jury:

In count I, the first Assault 2, Domestic Violence charge, the jury found that the defendant's crime of domestic violence was part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time, supporting an exceptional sentence under RCW 9.94A.535(h)(i). This was upheld by the Court of Appeals.

App. A, 3. This is the only Finding of Fact that contains the phrase "exceptional sentence."

There are 11 Conclusions of Law. Conclusion 5 refers to the jury finding a "pattern of abuse," and holds that this finding provided the basis for an exceptional sentence:

The facts found by the jury, and captured in the Appellate opinion, the trial transcripts, and the jail phone calls reveal a pattern of abuse of a diminutive and vulnerable victim that is exceptionally repugnant. This conduct clearly provide [sic] substantial and compelling reasons justifying an exceptional sentence.

App. A, 4.

Conclusion 9 also invokes the jury's finding, and finds that it provided a substantial and compelling reason for an exceptional sentence:

[p]attern of abuse against Jaimi Freitas, found beyond a reasonable doubt by the jury, warrants an exceptional sentence upward, and the court in its discretion, finds that doubling the high end of the standard range and running it consecutively to Count XIV, one of the most heinous of the defendant's crimes against [J.F.], is an appropriate sanction in this case. The jury's special verdict provides a

substantial and compelling reason to grant this exceptional sentence on Count I, consecutive to Count XIV.

App. A, 4-5.

The court ended with Findings 10 and 11, ruling that the pattern of abuse was “psychological, physical and sexual,” and that the sentence ensured “punishment that is proportionate to the egregiousness of the offenses.” App. A, 5.

C. ARGUMENT

Under a variety of legal theories, Bell argues that he could not, and should not, have received a longer sentence on remand after appeal. His arguments must be rejected. Judge Bradshaw was entitled to exercise his discretion to impose a sentence he thought appropriate for Bell’s multiple crimes against J.F., even though the initial sentence imposed by a different judge was 24 months shorter.

1. BELL FUNDAMENTALLY MISPERCEIVES THE COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Bell argues that the court erroneously relied on facts other than the aggravator found by the jury in granting its exceptional sentence. But his argument is built on a fundamentally false premise. He erroneously characterizes each of the court’s Findings of Fact and Conclusions of Law as independent bases for granting an exceptional sentence and he spins

numerous ancillary arguments from that false premise. Brief of App., 9-17.

Correctly understood, the court's ruling is unremarkable; it presupposes a factual finding by the jury on the aggravating factor. The court's findings and conclusions then go on to explain the reasons the court exercised its discretion to impose the sentence, and the reasons for the length of the sentence. Each finding and conclusion is not, itself, a basis to depart from the range.

Finding of Fact 11 and Conclusions of Law 5 and 9 make clear that the court rooted its sentence on the jury finding. Judge Bradshaw relied on only the jury's verdict as the basis to impose an exceptional sentence. Finding of Fact 11 states the factual support for the exceptional sentence. App. A, 3. The only conclusions of law that refer to the actual basis for the exceptional sentence are Conclusions 5 and 9. App. A, 4-5. Conclusion 5 states that the facts "found by the jury, captured in the Appellate opinion, the trial transcripts and the jail phone calls reveal a *pattern of abuse* of a diminutive and vulnerable victim that is especially repugnant," clearly providing "substantial and compelling reasons justifying an exceptional sentence." App. A, 4-5 (emphasis added). Conclusion 9 establishes that the pattern of abuse warranted an "exceptional sentence upward." App. A, 4-5. While there are many

findings and conclusions, the court stated explicitly which ones provided the initial basis for its exceptional sentence: Finding 11 and Conclusions 5 and 9. Each of these is rooted in the jury's finding of the aggravator.

Given the particular circumstances of this case – a lengthy trial with multiple counts, a previous exceptional sentence and a new judge at resentencing – Judge Bradshaw's detailed findings and conclusions that extend beyond the jury finding are appropriate to explain the length and structure of his sentence, and permit a detailed review of the appropriateness of his sentence. In order to reach this legal conclusion and to determine the appropriate length of the sentence, the court must consider all the facts, and Judge Bradshaw's Findings and Conclusions capture his reasoning for the entirety of the sentence, not merely the initial basis for the exceptional.

a. Blakely Is Inapposite.

Bell cites Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), to argue that Judge Bradshaw's Factual Findings 1 through 10 are all improper because they were not found by the jury. Brief of App., 10-12. This argument is wholly built on Bell's erroneous first premise. Blakely is simply inapposite because Judge Bradshaw relied on an aggravator found by the jury to impose the exceptional sentence.

In Blakely, the Supreme Court held that, with the exception of prior convictions, any fact that increases the penalty of a crime beyond the standard range must be proven beyond a reasonable doubt to a jury. The decision in Blakely changed the fact-finder on aggravating factors from judge to jury, but the sentencing judge still must decide whether to impose a sentence based on that jury finding. State v. Rowland, 160 Wn. App. 316, 329, 249 P.3d 635 (2011).

RCW 9.94A.535 lists the aggravating factors and provides that

[t]he *court* may impose a sentence outside the standard sentence range for an offense if it finds... that there are substantial and compelling reasons justifying an exceptional sentence.

(emphasis added).

The imposition of an exceptional sentence following Blakely, therefore, involves two steps. First, a jury must find statutory aggravating facts, and second, the court may then exercise its “discretion to determine, given the aggravating facts, whether an exceptional sentence is warranted and, if so, its length.” Rowland, 160 Wn. App. at 330.

The jury here found that that for Count I, there was “evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim,” an aggravating factor under RCW 9.94A.535(h)(i). CP 344-45. The resentencing court relied on the jury’s finding as a basis for granting an

exceptional sentence. See CP 125, Judgment and Sentence, Section 2.5, imposing an “Exceptional Sentence” because of the “finding of fact” that “[t]he jury found ...aggravating circumstances as to Count I.” Further, Judge Bradshaw’s Findings of Fact and Conclusions of Law restate the jury’s finding as support for the exceptional sentence. App. A, 3-5 (FOF 11; COL 5, 9).

Because the jury found that the aggravator was committed beyond a reasonable doubt, and it was the jury’s finding that was the basis for granting the exceptional sentence, Blakely is inapposite.

b. The Findings And Conclusions Are Proper.

Much of Bell’s brief attacks individual findings and conclusions made by Judge Bradshaw on grounds besides the Blakely analysis discussed above. Brief of App., 12-18. Bell argues that the findings and conclusions are not rooted in the record, that some are legally irrelevant, and that the court erroneously relied upon many in granting an exceptional sentence. But Judge Bradshaw acted in accordance with case law by memorializing not merely the initial basis for the exceptional sentence, which was the jury’s aggravated finding, but also the factual and legal justification for the length and structure of the sentence. This principal is illustrated in State v. Hyder, 159 Wn. App. 234, 266, 244 P.3d 454 (2011). In Hyder, the defendant was convicted of first degree child molestation

and incest against his biological children. Id. at 244. The jury also found Hyder guilty of aggravating factors on two of the counts and he was given an exceptional sentence. On remand after his appeal, the court again granted an exceptional sentence, and entered written findings of fact and conclusions of law. Id. at 262.

In reviewing whether the sentencing court in Hyder had substantial and compelling reasons for imposing its exceptional sentence, the appellate court looked at the aggravating facts and found that those facts, in and of themselves, presented “substantial and compelling reasons justifying an exceptional sentence.” Id. at 263. Hyder, like Bell, argued that the sentencing court relied on facts beyond those found by the jury, because its written findings and conclusions incorporated oral findings where the court addressed other facts, like the length of the molestation, the breach of the natural paternal relationship, the present danger posed by the defendant, and the atypical nature of his crime. Id. at 257-60. The Court of Appeals held, however, that the findings and conclusions, over and above the jury’s finding, did not eliminate the basis for an exceptional sentence, because in actuality “imposing the exceptional sentence, the court applied only the jury’s findings.” Id. at 264.

Judge Bradshaw, like the judge in Hyder, properly set forth the details of Bell’s history against J.F. in the court’s findings. This approach

in no way upsets the judge's ultimate reliance on the jury's factual determination to impose an exceptional in the first place.

Bell assigns error to Finding 12, where Judge Bradshaw noted that Bell's offender score did not take into account his adult misdemeanor history. Brief of App., 12-13. He is correct in noting that, absent a jury finding that the presumptive sentence is "clearly too lenient," a sentencing court should not consider adult misdemeanors as a basis for an exceptional sentence. State v. Alvarado, 164 Wn.2d 556, 564-69, 192 P.3d 345 (2008). He is incorrect, however, in arguing that Judge Bradshaw based the exceptional sentence on this fact. While the court made a factual finding that Bell had seven misdemeanors not accounted for in his offender score, he made no conclusion of law based on this, nor did he cite it as the basis for the exceptional sentence. Because a sentencing court can consider a defendant's criminal history in determining the length of a sentence, there is nothing improper about this factual finding.

Bell also targets Conclusion of Law 5, where Judge Bradshaw invokes the "pattern of abuse" found by the jury, adding that it was against a "diminutive and vulnerable victim," making the offenses "particularly repugnant." Brief of App., 14-15; App. A, 4. Bell argues that there was no factual finding that J.F. was "diminutive and vulnerable" nor is the subjective "repugnance" of a crime, when not framed as a jury finding of

an aggravating fact, grounds for an exceptional sentence. Brief of App., 14. While J.F.'s size and vulnerability compared with Bell is perhaps more appropriately a finding of fact than legal conclusion, there is certainly a basis in the record for the court's finding, given J.F.'s testimony regarding her age and the size and weight disparity between the two. CP 439-40. Again, the court did not use this fact as a reason to depart from the range, it recited this fact as a reason to give a long exceptional sentence. Because the sentencing court, as in Hyder, is permitted to consider all of the facts in a case in determining its sentence, the victim's size and vulnerability is an appropriate consideration.

Bell also takes issue with Finding 10 and Conclusion 7, which relate to each other. Brief of App., 15. In Finding 10, the court found that "Bell repeatedly attempted to contact [J.F.] as well as friends and family members, to try to convince her to tell the prosecutor nothing happened or not to testify." App. A, 2. In Conclusion 7, Judge Bradshaw said that those attempts to "recruit others to assault the victim so she would not testify at trial," strike at "a central tenet of the criminal justice system." App. A, 4. Bell argues that the allegations involving the recruitment of others were the basis for the now-vacated witness tampering charges, and therefore should not be considered by the court. Brief of App., 16.

While Bell is correct that four of the five Witness Tampering counts were vacated, there was never a finding that Bell's efforts to recruit others did not occur, only that those efforts were encompassed under the same unit of prosecution as Count IV, where Bell tampered directly with J.F. During cross-examination, Bell admitted calling his friends to have them intimidate J.F. during cross-examination. CP 68-70. Judge Bradshaw indicated that he had reviewed Bell's testimony prior to imposing his sentence, so this fact would have been known by him as well. Bell's efforts to recruit others then, were an appropriate consideration in the court's overall sentence.

Bell also challenged Conclusion 10: "The pattern of abuse was psychological, physical *and* sexual." Brief of App., 16. After all, Bell says, "the court's conjunctive 'and' exceeds the jury's disjunctive finding" where the jury found "psychological, physical, *or* sexual" abuse. *Id.* This argument wrongly suggests that the court may consider *only* the jury's finding when setting the length of an exceptional sentence. Clearly, the court must determine sentence length based on facts. The fact that Bell's crimes were sexual *and* cruel is relevant.

Moreover, a sentencing court's conclusion of law will be upheld if it is supported by findings. State v. Gaines, 122 Wn.2d 503, 508, 859 P.2d 36 (1993). Here, the jury found Bell guilty of raping J.F. This Court's

own factual recitation of Bell's violence against J.F. included psychological abuse, like his "flinching at her to scare her," and "forcing her to take shots of rum and threatening to beat her with a bottle if she did not." CP 66. In J.F.'s letter to the resentencing court, she also described the emotional manipulation that accompanied his abuse. 2RP 26-31. Thus, the sentencing court's observation that Bell's abuse consisted of physical, psychological and sexual abuse, is consistent with the jury findings and the record.

Contrary to Bell's implied assertion, each finding and conclusion need not re-articulate the jury's finding, nor be limited to that finding. Findings and conclusions can also, like those here, justify the length and structure of the exceptional sentence.

c. The Court Did Not Rely On Facts That Inhered In The Offense To Justify Its Exceptional Sentence.

Bell further argues that because the sentencing court's findings of fact mirror in many ways the facts of the case itself, the court simply relied on the elements of the charges as a basis for an exceptional sentence, thereby improperly relying on facts that already "inhere in the charged offense." Brief of App., 17.

This argument is based on the same flawed reasoning as Bell's major contentions – that the court's findings of fact and conclusions of law

enumerated individual basis for an exceptional sentence, and each individual finding should be analyzed as if it were an aggravating finding supporting the exceptional sentence. For the reasons argued above, the court's factual summary and comments on the severity of the crime were not the basis for triggering an exceptional sentence – that rested on the jury's finding alone. There is no elementary overlap between the aggravator and the Assault in the Second Degree charge; Bell's argument fails.

2. THE COURT'S SENTENCE WAS PROPER.

Bell argues that the exceptional sentence was improper, excessive and vindictive. His arguments are contrary to binding precedent. The resentencing court had the discretion to impose a higher sentence even with fewer charges.

a. The Exceptional Sentence Of 168 Months Was Not Excessive.

Bell argues that, because he had fewer charges at resentencing, any sentence above what was originally imposed is excessive. Brief of App., 24-25. His argument must be rejected. A resentencing judge has wide discretion, and the facts before Judge Bradshaw here justified the length of the sentence.

RCW 9.94A.535 allows a trial court to impose an exceptional sentence if the court finds substantial and compelling reasons to depart from the standard range. State v. Kolesnik, 146 Wn. App. 790, 805, 192 P.3d 937 (2008). The facts justifying a departure from the range must be found by a jury. Blakely, 542 U.S. 296. Once the court has properly decided that an upward or downward departure is warranted based on a jury's findings of fact, the court may consider other facts in the record to determine the length of the sentence. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2004). The sentence is excessive only if it shocks the conscience. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1992).

Once a jury's finding provides the basis for an exceptional sentence, the "available sentence length choices and thus, the limits of permissible judicial discretion are expanded." State v. Mail, 65 Wn. App. 295, 299, 828 P.2d 70 (1992). A sentencing court has "all but unbridled discretion in setting the length of the sentence," even for exceptional sentences. State v. Knutz, 161 Wn. App. 395, 411, 253 P.3d 437 (2011).

Judge Bradshaw properly found that the jury's finding of a pattern of domestic violence against J.F. provided a substantial and compelling reason to impose an exceptional sentence. The court, using its review of the record, the new letter from the victim presented at sentencing, Bell's own allocution, and all of the other considerations the court mentions on

the record, appropriately exercised its discretion in granting a 168 month exceptional sentence, a sentence justified by his Findings and Conclusions.

In State v. Ritchie, the Washington Supreme Court addressed the lengths of exceptional sentences imposed upon three defendants where the trial court did not explain its reasons for setting the length of the sentence. Ritchie, 126 Wn.2d 388. First, the court held that a sentencing court need not craft explicit findings justifying the length of an exceptional sentence. Id. at 396. Next, the court reviewed the sentences for any indicators that the court relied on an impermissible reason, or that the length of the sentence shocked the conscience. As to all of the defendants in Ritchie, the court found aggravating factors.⁶ Therefore, the first part of the clearly excessive test, that the exceptional sentence be rooted in a permissible reason, was met. The same is obviously true in Bell's case.

In determining whether or not the sentences shocked the conscience, the court looked at the facts of each crime. One defendant, Scott, murdered an elderly victim in her home. Id. at 398. He broke over 20 bones in her body, tried to rape her, and strangled her with a telephone cord. Id. at 398. Another defendant, Ritchie, raped a six-and-one-half week old infant in his care. Id. at 399-400. The final defendant, Hamrick,

⁶ In this pre-Blakely decision, the court's finding of the aggravating factors was sufficient to meet the first test.

brutally beat a 20-month-old toddler in his care and tortured another 18-month-old. Id. at 401-03. Each defendant was given a lengthy exceptional sentence.

In reviewing the length of time of each sentence, the court carefully listed the harrowing facts of the crimes themselves, down to some of the most disturbing details. With respect to Scott, the court held as follows:

Recitation of these facts and reflection upon the four horrid aggravating factors demonstrate that it was not an abuse of discretion to impose a 900 month exceptional sentence.

Id. at 400. With respect to Ritchie, the court affirmed the lengthy exceptional sentence, because the “enormity of the vile act of Defendant upon a 6 ½ week old child is apparent.” Id. at 401. As for Hamrick, the court merely recited the facts in detail and concluded that his sentence was “not clearly... excessive.” Id. at 404. Thus, in determining whether a sentence is excessive, a detailed consideration of the facts of the crimes is warranted.

Like the court in Ritchie, Judge Bradshaw was well within his discretion when he considered specific, particularly egregious facts about the case and about Bell himself, including the repeated and vicious nature of his attacks and the tremendous size disparity between Bell and his victim, Bell’s lack of remorse and victim-blaming during allocution, his

attempts to recruit others to intimidate and rape the victim to prevent her from testifying, and his misdemeanor history.⁷

Bell's crimes, like those of the defendants in Ritchie and Hyder, were disturbing. In two years, Bell broke J.F.'s hip and lacerated her liver by dropping her off of a 15-foot balcony, he dislocated her shoulder, he strangled her and blackened her eyes, he raped her twice, he cut her face for the perceived slight of wiping ketchup on him, and he asked his friend to rape her to prevent her from testifying. CP 62-69; RP 17. In one jail phone call, Bell attempted to win back J.F.'s good graces, asking her if she missed him. J.F. responded:

What would I miss? The getting' my ass kicked, being bruised every day, having to makeup a different fucking lie to, for the bruises on my arms and the bruises on my face? Or do I miss you sitting on me, or do I miss you kicking me, or do I miss my shoulder dislocating every time I fucking try to wash my hair and shit cause you fucking threw me by my arm? Do I, is that what I miss, is that what you're talking about?"

2RP 13.

It can hardly be argued that a sentence of 168 months was clearly excessive given what Bell did to J.F., given what he tried to have done to her even after his arrest, given his equivocation and blame-shifting at his

⁷ Bell argues that the record is not clear with respect to how Judge Bradshaw knew Bell's misdemeanor history. His criminal history was part of the initial bail summary, filed with the court. CP 5.

resentencing hearing, and given his efforts to undermine the justice system as a whole by his tampering with J.F. Judge Bradshaw was well within his discretion to independently assess the facts and the circumstances, some of which were not available at the first sentencing, and impose a 168 month sentence.

b. The Harsher Sentence Is Constitutional.

Bell contends that the resentencing court unconstitutionally punished Bell for exercising his right to appeal. Bell argues that by permitting the resentencing court to impose a higher sentence, the defendant's right to appeal is compromised. Brief of App., 28, 29. He asks this Court to create its own constitutional remedy to avoid a perceived "chilling effect" on a defendant's right to appeal, and proposes a new rule of law: "Whenever an appeal results in vacated convictions and resentencing is required, the resentencing court cannot impose a harsher sentence on remand." Brief of App., 32. Bell's proposed new rule is foreclosed by Washington law.

The Washington Constitution guarantees the right to appeal in criminal cases. Const. art. I, § 22. But the right does not come without some risks. By appealing, a defendant challenges the entire sentence and, at his own behest, wipes the slate clean; the trial court is free to impose any valid sentence under local law, limited only by the statutory

maximum. State v. Larson, 56 Wn. App. 323, 329, 783 P.2d 1093 (1989); North Carolina v. Pearce, 395 U.S. 711, 720-21, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Chaffin v. Stynchcombe addressed the possibility of a chilling effect when defendants risk higher sentences by appealing. 412 U.S. 17, 25, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973). There, the Court compared the decision to appeal with the decision to plead guilty; every time a defendant exercises his right to a trial and rejects an offer by the State, the potential negative result of that exercise may indeed “have a discouraging effect upon the defendant’s assertion of those rights.” Id. at 28. The Court found that that was merely an “inevitable attribute” of any legitimate system. Id. Like the right to trial, the right to appeal may “require the accused to choose whether to accept the risk of a higher sentence or to waive his rights.” Id. There is no reason that the right to appeal should suddenly be elevated above the right to a jury trial, protecting the defendant at all costs from the potentially negative results of his decision. Id. at 29.

Bell cites examples of other jurisdictions where higher sentences after appeal have been limited. Brief of App., 32-24. But Washington courts, the legislature and the U.S. Supreme Court have not elected to adopt these narrower rules.

Bell cites State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011), in support of his proposed remedy. In Sims, the defendant pled guilty to one count of child molestation and the sentencing court imposed a Special Sex Offender Sentencing Alternative (SSOSA), contingent on his banishment from the county where the victim and her family lived. Sims, at 440. On appeal, Sims challenged only the banishment condition, but the State, while conceding the illegality of the banishment clause, challenged the SSOSA in its reply brief. Id. at 441. The Court of Appeals accepted the concession, but permitted the sentencing court to retain discretion to not impose the SSOSA on remand. Id.

The Washington Supreme Court reversed the Court of Appeals on this point, holding that because the defendant's assignment of error on appeal was limited to his banishment, the trial court retained discretion upon remand over only that particular portion of the judgment and sentence. Id. It was only in this narrow respect that the court discussed a "chilling effect."

Sims is distinguishable. Bell's first appeal after trial assigned error to facets of the entire case, including the entire sentence. CP 61-62. By appealing the case itself, and not merely a narrow aspect of his sentence, Bell wiped the proverbial slate clean at his "own behest," and the

resentencing court had the opportunity to resentence him at his own discretion. State v. Larson, 56 Wn. App. 323, 329; Pearce, at 720-21.

The most practical rebuttal to Bell's "chilling effect" argument is the status quo. Under well-established law discussed above, resentencing judges have long been able to increase a defendant's sentence after an appeal as long as the harsher sentence is not vindictive. New judges have always been free to exercise their discretion separately from the first judge. Despite these precedents, Washington courts routinely see many criminal appeals from defendants seeking to revisit their judgments and sentences. In short, the potential for a harsher sentence has not created a chilling effect in the past, and it will not do so in the future.

c. The Presumption Of Vindictiveness Does Not Apply.

Bell argues that because he was resented on fewer charges than his original sentence, the court's imposition of a higher exceptional sentence is necessarily vindictive. Brief of App., 39-48. Bell quotes North Carolina v. Pearce to support his position that this court should attach a presumption of vindictiveness to the new sentence:

Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his or her doing so must affirmatively appear. Those reasons must be based upon objective information concerning the defendant's identifiable conduct occurring after the original sentencing proceeding. And the factual basis upon which the

increased sentence is based must be made part of the record.

395 U.S. 723, 726. But as Bell also points out, Pearce's presumption of vindictiveness has been severely curtailed in subsequent cases;⁸ and the above quote ignores a critical distinction. Where the same sentencing court, with no additional information, imposes a harsher sentence after appeal, the new sentence is presumed vindictive and the sentencing court needs to explain the higher sentence. North Carolina v. Pearce, 396 U.S. at 726. But where resentencing is before a *different* judge, no presumption applies, and the court need not explain its sentence. State v. Parmelee, 121 Wn. App. 707, 711, 90 P.3d 1092 (2004).

State v. Parmelee, 121 Wn. App. 707, is precisely on point.

Parmelee was originally found guilty and sentenced to a 48 month prison term. Id. at 708. On appeal, the court held that two of his crimes merged, significantly reducing his standard range, and the case was remanded for resentencing. Id. at 708. The resentencing judge, a different judge than the original trial and sentencing judge, found four aggravating factors not found by the first sentence and imposed an exceptional sentence of 60 months. In his appeal of the resentencing, Parmelee alleged vindictiveness

⁸ But Pearce has not been overruled, and the presumption of vindictiveness, when there is a reason for it, still survives, as in State v. Ameline. There, the same judge presided over the case three times, granted the same sentence twice, but then granted a harsher sentence after remand. 118 Wn. App. 128, 75 P.3d 589, 592 (2003).

against the sentencing court and asked for remand to a different sentencing judge.

Parmelee held that the presumption of vindictiveness applies only where there is a “reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.” Id. at 711. A concern about judicial vindictiveness only arises where the judge fully considers a sentence, renders a decision and then, after a successful appeal, that very judge changes the sentence without explanation. Id. at 711. This is because the sentencing judge, with all other things being equal, should be expected to “operate in the context of roughly the same sentencing considerations” after remand as he did before. Id. But in cases where a harsher sentence is imposed by an altogether different judge, the situation is antithetic. Parmelee holds that there is no presumption of vindictiveness when “a different judge imposes the more severe sentence.” Id. at 712.

Parmelee is also consistent with cases decided after Pearce. In Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), the defendant originally pled guilty, received a 30-year concurrent sentence for three crimes, and successfully appealed. On remand, Smith took the case to trial and lost. At sentencing after trial, the same judge imposed two concurrent life terms, plus another 150 consecutive years.

The Court's opinion in Smith limited the Pearce presumption to only cases where there was a reasonable likelihood of actual vindictiveness.⁹

In Texas v. McCullough, 475 U.S. 134, 106 S. Ct. 976 (1986), the trial court at resentencing after a second trial imposed a sentence 30 years longer than the initial sentencing authority. As Bell points out, the court based the increase on the testimony of new witnesses not present at the initial trial, and on the just-discovered fact that McCullough had been released from jail shortly before committing the murder. Brief of App., 41. But the sentencing court made another finding omitted by Bell in his summary. "The judge candidly stated that, had she fixed the first sentence, she would have imposed more than 20 years." McCullough, at 136.

On appeal, McCullough argued that Pearce precluded the court from imposing a higher sentence, because the increase was not rooted in

⁹ Justice Rehnquist wrote:

The Pearce presumption was not designed to prevent the imposition of an increased sentence on retrial for some valid reason associated with the need for flexibility and discretion in the sentencing process, but was premised on the apparent need to guard against vindictiveness in the resentencing process. Because the Pearce presumption may operate in the absence of any proof of an improper motive and thus... block a legitimate response to criminal conduct, we have limited its application,... to circumstances where its objectives are thought most efficaciously served. Such circumstances are those where there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.

Smith, 799-800 (internal quotations omitted).

McCullough's identifiable conduct after the original sentencing proceeding, and the presumption of vindictiveness therefore attached. Id. at 138. The Court, however, held that there was no basis for finding vindictiveness where the sentencing authority at resentencing was different than the authority at the original sentence.¹⁰ Id. at 138 (citing Chaffin v. Stynchcombe, 412 U.S. 17, 25, "unlike the judge who has been reversed," a second sentencer "had no motivation to engage in self-vindication"). Pearce's presumption of vindictiveness does not extend to cases where there is no motive for vindictiveness.

Bell is controlled by Parmelee. 121 Wn. App. 707. Judge Bradshaw was not the original sentencing judge, so he is not presumed vindictive just because he ordered a longer sentence. Still, he did explain his reasons for the sentence and those reasons are legitimate.

Bell acknowledges that Parmelee is directly contrary to his position and asks this court to overrule it as "harmful and wrongly decided." Brief of App., 45. He contends that the case violates equal protection because defendants resentenced before the same judge are given the presumption of vindictiveness while defendants facing a new

¹⁰ While Bell is correct in pointing out that the resentencing court's willingness to grant the new trial for McCullough in the first place helped diminish any apprehension of vindictiveness, this was not the dispositive factor in McCullough. Like in Chaffin, the Court explicitly held that where a separate sentencing authority imposes the harsher verdict, no presumption of vindictiveness is triggered. Brief of App., 45; McCullough, at 139.

judge at resentencing are not granted the same presumption. *Id.* This argument should be rejected.

The first step in an equal protection analysis is determining whether the persons compared are “similarly situated.” USCA Const. Amend. XIV. Defendants presenting before the same judge for resentencing are not similarly situated when compared to defendants facing a second judge for resentencing. A presumption of vindictiveness arises when the same judge imposed a longer sentence after remand because nothing – except the appeal – has changed to justify the longer sentence. In contrast, a defendant being resentenced before a different judge faces a whole new decision-maker who is entitled to exercise independent judgment. Thus, that defendant is not similarly situated to a defendant facing the same decision-maker for resentencing, and an equal protection analysis is inapposite.

Failing to establish a basis to apply a traditional “presumption” of prejudice, Bell endeavors to create a new rationale for implied bias. Bell suggests that the judge should be presumed vindictive because he was formerly a prosecutor¹¹. Brief of App., 43, 46. This novel proposition is unwarranted and should be rejected for two reasons: (1) each judge should

¹¹ Bell suggests the possible motives: Bell’s new sentence was more punitive for one of three reasons: “(1) the state overcharged him, he properly won his appeal...; (2) Judge Mertel retired; or (3) a career King County prosecutor had been elected to preside in Judge Mertel’s department.” Brief of App., 46.

have discretion to impose sentence without being maligned based on the judge's prior work, and (2) there is no presumption in law that prosecutors are vindictive.

Judges have wide discretion to impose a sentence based on their beliefs and their judgments. A judge, even a resentencing judge giving a harsher exceptional sentence, is "to be accorded very wide discretion in determining an appropriate sentence." Wasman v. United States, 468 U.S. 559, 563, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984). Bell cites to no authority that establishes that a judge's prior status as a litigator/lawyer should be presumed to carry over into his judicial career.

There is no basis in law for the charge that having been a former prosecutor makes a judge vindictive. In State v. Swenson, the court found that even where the judge on a case had formerly prosecuted the very same defendant, recusal by the court was not required. 158 Wn. App. 812, 820, 244 P.3d 959 (2010). Swenson did not use the term "vindictiveness" because judicial vindictiveness is a term of art with a very particular meaning, referring to a court punishing a defendant's exercise of his constitutional right to appeal. Smith, at 798. Being a former prosecutor does not, as a matter of law, create a presumption of vindictiveness.

Applying Bell's theory to any parallel hypothetical illustrates its weakness. Should judges who were former defense attorneys be presumed

“clearly too lenient” when imposing their sentence? Should judges who formerly worked on women’s issues be presumed bias in cases dealing with the same? Should a former plaintiff’s counsel be presumed biased against insurance companies? The answer, clearly, is no. Bell’s argument should be summarily rejected.

Finally, Bell cannot contend actual bias because, contrary to his assertions, Judge Bradshaw actually had additional information Judge Mertel did not.¹² A sentencing court is entitled to consider any and all information that reasonably might bear on the proper sentence. Wasman v. United States, 468 U.S. 559, 563.

The resentencing court had the advantage of Bell’s latest allocution. At the initial sentencing, Bell spent his allocution attacking the State and J.F. for positing “lies” against him. 1RP 22-25. Prior to the resentencing, Bell had several years in prison to consider his crimes, to prepare a way to voice his remorse and regret to the court, and to indicate some empathy for J.F. This was particularly opportune after J.F.’s

¹² Bell argues that the only “new” facts relevant to the resentencing were “(1) Bell had appealed and his offender score ... was four points lower and (2) Judge Mertel had been replaced by Judge Bradshaw,” then concludes, without explanation that “because there was a realistic motive for vindictive sentencing in Bell’s case, the Pearce presumption should apply.” Brief of App., 43.

compelling letter was read into the record and after Bell's own father told the court that Bell was "very remorseful." 2RP 39. Even with this familial prompting and ample opportunity to prepare, Bell began by immediately blaming J.F. for the crimes. This failure to atone for his wrongs was striking and appropriately influenced Judge Bradshaw's sentence. 2RP 43; App. A, 5 (COL 8). Bell's failure to show remorse when given another opportunity threw "new light" upon Bell's "life, habits, conduct, and mental and moral propensities," arguably allowing for even the same sentencing judge to impose a harsher sentence under Pearce. Pearce, at 723. Given the additional aggravating information before a new judge, it can hardly be argued that there was any actual bias because the new judge imposed 24 additional months.

Judge Bradshaw was free to exercise his discretion to the new and old facts before him. Judge Mertel's original sentence did not bind Judge Bradshaw; as both parties agreed at the resentencing, and the court itself articulated on the record. 2RP 47-48. As the resentencing court, Judge Bradshaw appropriately imposed his own reasonable sentence, based on the jury's finding, and free of any presumed or actual vindictiveness.

3. THE SENTENCING REFORM ACT AUTHORIZES IMPOSITION OF AN EXCEPTIONAL SENTENCE CONSISTING OF A SENTENCE OUTSIDE THE STANDARD RANGE AND CONSECUTIVE SENTENCES WHEN THERE IS A SUBSTANTIAL AND COMPELLING REASON TO DEPART FROM THE STANDARD RANGE.

Bell argues that a defendant may not receive an exceptional sentence consisting of a sentence both outside the standard range and a consecutive sentence unless the court finds more than one aggravating circumstance. Brief of App., 21. This argument is contrary to the language of the Sentencing Reform Act and logic. The Division III cases cited by Bell in support of his position are not persuasive and should not be followed.

RCW 9.94A.535 provides that “The court may impose a sentence outside the standard sentence range if it finds... that there are substantial and compelling reasons justifying an exceptional sentence.” The statute additionally provides “A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.” Thus, a sentence may be exceptional in two ways: it may be outside the standard range or it may be consecutive to another sentence. But, there is nothing in this statutory scheme that requires an independent basis for either type of departure.

The claim that a trial court is limited to imposing either a sentence above the standard range or a consecutive sentence, is similar to the discredited “doubling rule.” When the S.R.A. was first enacted, defendants argued that an exceptional sentence should be limited to no more than twice the standard range. State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986). The state supreme court rejected that limitation, finding there was no statutory authority for imposing an arbitrary limit on exceptional sentences. Id. The court reasoned that once a basis for an exceptional sentence is established, “the court is permitted to use its discretion to determine the precise length of the exceptional sentence.” Id. at 530.

If an exceptional sentence has a valid basis and is not clearly excessive, it should be affirmed. As in Oxborrow, this court should reject Bell’s invitation to impose an arbitrary limit on the trial court’s discretion that has no basis in statutory language. The sentences imposed by the trial court in this case are consistent with the purposes of the S.R.A., and should be affirmed.

In State v. Batista, 116 Wn.2d 777, 780, 808 P.2d 1141 (1991), the state supreme court clarified the standards for imposing consecutive sentences as an exceptional sentence. The court stated, “Where multiple current offenses are concerned, in addition to lengthening of sentences, an

exceptional sentence may also consist of imposition of consecutive sentences.” Id. at 784. The court stated, “If a presumptive sentence is clearly too lenient, this problem could be remedied *either* by lengthening concurrent sentences, *or* by imposing consecutive sentences.” Id. at 786 (emphasis in original). In Batista, two other aggravating circumstances had been found by the trial court, and thus, the supreme court was not addressing the question of whether a sentence outside the standard range and consecutive to other counts could be imposed based on one aggravating circumstance. Id. at 791. Because that question was not presented, Batista cannot be read to stand for the proposition that more than one aggravating circumstance must be found to impose an exceptional sentence that is both outside the standard range and consecutive to other counts.

The cases from Division Three that rely on Batista for that proposition are mistaken. In State v. McClure, 64 Wn. App. 528, 827 P.2d 290 (1992), the court relied on the above-quoted sentence from Batista, in concluding that “this language *suggests* the court must choose between the two forms of exceptional sentences” when only one aggravating circumstance is present. Id. (emphasis added). No other analysis is presented and the language of the statute is never addressed.

In In re Pers. Restraint of Holmes, 69 Wn. App. 282, 848 P.3d 754 (1993), the question presented was quite different. In that case, the court curiously imposed a sentence *below* the standard range to run consecutively to other counts. Id. at 293. Citing Batista without further analysis, the court held that the sentence imposed by the court on the basis of a single aggravating factor was improper. Id.

Finally, in State v. Quigg, 72 Wn. App. 828, 845, 866 P.2d 655 (1994), the court affirmed multiple aggravating circumstances on appeal. Thus, Quigg is inapposite.

4. BELL'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS BASELESS.

Bell contends that if this Court affirms Judge Bradshaw's sentence, it should find that the appellate counsel was ineffective and appoint new counsel to argue the current claim. To prevail on an ineffective assistance of appellate counsel claim, the appellant must demonstrate deficient performance and prejudice arising from that failing. In re Pers. Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). Here, Bell made many arguments on appeal, and succeeded in vacating four felony charges.

Because Bell prevailed on appeal, it is difficult to see how his lawyer failed. After appeal, Bell had the opportunity to be resentenced, and some judges may have given him a lower sentence. However, in part

because of Bell's own victim-blaming at the hearing, Bell's potential for a lower sentence did not become a reality. But there is no way that an appellate lawyer could divine what Bell or J.F. would say at sentencing, or what a new judge would impose. This is not in appellate counsel's control, so the ineffective assistance of counsel doctrine is inapposite.

D. CONCLUSION

For the forgoing reasons, the State asks this Court to affirm Judge Bradshaw's exceptional sentence.

DATED this 17 day of December, 2012.

Respectfully submitted,

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APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
KING COUNTY, WASHINGTON

FEB 01 2012

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CLIFTON KELLY BELL,

Defendant.

No. 07 1067261 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE
EXCEPTIONAL SENTENCE

Pursuant to RCW 9.94A.120(2),(3), and having reviewed all the evidence, records and other information in this matter, to wit:

The Court of appeals opinion; the State's and Defense's briefing; the transcriptions of the trial testimonies of the defendant, the victim, and witness Ryan Anderson; the original judgment and sentence; transcripts of phone calls made by the defendant from King County Dept. of Correction; a transcript of the original sentencing hearing; letters from the defendant's mother, brother, father, and friend; photographs of some of the victim's injuries; documents submitted by defense showing the classes the defendant has taken while in custody; recordings of calls made by the defendant while in custody; oral statement of the defendant's father; a current (new) statement from Ms. Freitas read into the record; the defendant's allocution; and having considered the arguments of counsel, the court imposed an exceptional sentence of 114 months on Count I consecutive to 54 months on Count XI for a total of 168 months¹. This sentence is based on the above, the specific reasons articulated at the sentencing hearing, and the following facts and law²:

A. FINDINGS OF FACT

The Court relied in large part on the facts proven at trial and emphasized in the Court of

¹ The State recommended a sentence of 177 months.

² The State submitted proposed FOF/COL subsequent to the hearing; the defense elected to not do so.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

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ORIGINAL

1 Appeals opinion, including the following:

- 2 1. During one early incident, the defendant grabbed Jaimi Freitas' neck. The defendant's
3 violence proceeded to escalate.
- 4 2. On February 17, 2006, another conflict occurred. Bell grabbed the victim's arm and
5 threw her, dislocating her shoulder.
- 6 3. On July 26, 2006, Jaimi Freitas stood outside the front door of the apartment and
7 asked him to toss her the key. Bell told her to come and get the key. When she reached
8 for the key, Bell pulled her into the apartment and began punching Jaimi Freitas. When
9 she ran for the front door, he closed and bolted it so she could not escape. Hoping to
10 signal someone, she ran towards the balcony. She grabbed the balcony rail to prevent
11 Bell from pulling her by the waist back into the apartment. Bell let go, and Jaimi
12 Freitas flipped over the rail and onto her back, hitting the ground fifteen feet below, a
13 fracturing her hip pelvis and causing internal bleeding.
- 14 4. Around September 30, 2006, Jaimi Freitas and Bell were dating on and off and not
15 getting along very well. While visiting a friend's house, Jaimi Freitas and Bell were
16 eating together when Jaimi Freitas placed her hand on Bell's leg. Bell angrily accused
17 Jaimi Freitas of wiping ketchup on his pants. When she denied it, Bell stood up and
18 threw a glass plate, hitting her in the forehead. Blood immediately flowed from the
19 triangle gash in Jaimi Freitas's head. Bell apologized and assisted Jaimi Freitas in
20 stopping the flow of blood.
- 21 5. That same evening, Jaimi Freitas and Bell went to his mother's house to get her
22 assistance in tending to the wound. That night they slept in his sister's bed at his
23 mother's house. After apologizing, Bell wanted to have sex. Jaimi Freitas, nursing this
24 recent suffered injury, told Bell, "No. I don't want to do this." Bell forcibly removed
her pants and underwear despite her protests. He pinned her down and began having
sexual intercourse, telling Jaimi Freitas, "It will be okay" while she continued to say
no.
6. Jaimi Freitas testified that during yet another incident, she and Bell were having sex
when he suggested anal intercourse. When she refused, Bell penetrated her anus while
she cried.
7. On September 23, 2007, Jaimi Freitas lived in a small studio apartment in Lake City,
located in King County. Bell lived with her on and off, but they did not live
together full-time due to the conflict in their relationship. That day, Jaimi let Bell in
when he knocked on the door at about 3:00 a.m. At first things were fine, but then
Jaimi Freitas became angry that Bell was mistreating her dog. When she told Bell to
stop, they began to argue. Jaimi Freitas testified that she could tell Bell had been
drinking. Jaimi Freitas walked out the front door of the apartment and tried to call the
dog to come outside. Bell restrained the dog so it could not leave. He then threw Jaimi
Freitas's cell phone, breaking it. He coaxed Jaimi Freitas back inside and shut the door
behind her. Bell then punched Jaimi Freitas in the eye, and Jaimi Freitas began to cry.
He then grabbed her and pulled her to the ground. He laid her on her back and sat on

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

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1 her chest with his legs on each side of her, pinning her arms. Jaimi Freitas testified that
2 Bell swore at her and asked her, " 'Do you want to see stars?' " He placed his hands
3 around her neck and squeezed so that she could not breathe for between two and 30
4 seconds.

5 8. Jaimi Freitas testified that after this strangling, Bell stood and "got nice" and that
6 he put his arm around Jaimi Freitas and asked her, " '[W]hy do you have to act like
7 that?' " She said he unlocked the front door, saying " 'I'll even keep the door
8 unlocked.' " She testified that he calmed down but then "he went right back into what
9 he was before." She explained that by this she meant that "his demeanor" told her that
10 "he wanted to hurt me."

11 9. Jaimi Freitas testified that Bell grabbed her hair and pulled her towards the floor,
12 tearing the hair out of her scalp. He then locked the front door and removed the key to
13 the deadbolt. Because the deadbolt could not be opened from the inside without
14 having a key, Jaimi was trapped. Jaimi Freitas testified that every time she tried to
15 walk towards the door of the (very small) apartment, he would get between her
16 and the door and tell her that she was not going anywhere. She testified that when she
17 tried to go to the bathroom to see her face he kept "flinch[ing]" at her to scare her.
18 Bell then located some ice for her swelling eye. He also poured her a shot of rum and
19 forced her to drink it, despite her protests, threatening to hit her with the bottle if
20 she did not.

21 10. From jail, Bell repeatedly attempted to contact Jaimi Frietas as well as friends
22 and family members, to try to convince her to tell the prosecutor nothing happened or
23 not to testify.

24 11. In count I, the first Assault 2, Domestic Violence charge, the jury found that the
defendant's crime of domestic violence was part of an ongoing pattern of
psychological, physical or sexual abuse of the victim manifested by multiple
incidents over a prolonged period of time, supporting an exceptional sentence under
RCW 9.94A.535(h)(i). This was upheld by the Court of Appeals.

12. The defendant has seven prior adult misdemeanor convictions that are not accounted
for in the standard range sentences.

20 B. CONCLUSIONS OF LAW -- SUBSTANTIAL AND COMPELLING REASONS FOR
21 IMPOSING EXCEPTIONAL SENTENCE

22 1. The Court of Appeals affirmed the underlying convictions on all counts, including the
23 aggravated factor found by the jury in Count 1 but vacated Counts V, VI and VII under a
24 Unit of Prosecution analysis.

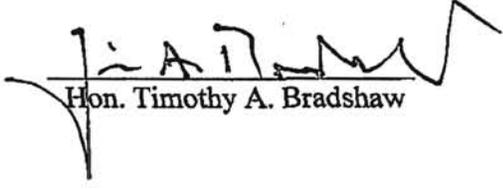
- 1 2. This Court succeeded the original sentencing judge, the Hon. Charles Mertel (ret.),
2 and has exercised independent discretion in this sentencing matter.
- 3 3. The Court has considered independently the appropriate sentence given all of the
4 information presented and specific objective facts identified above.
- 5 4. The Court reviewed the facts from all sides and considered all of the information
6 noted above. It also relied on the Court of Appeals citing to the record at trial.
- 7 5. The facts found by the jury, and captured in the Appellate opinion, the trial transcripts,
8 and the jail phone calls reveal a pattern of abuse of a diminutive and vulnerable victim
9 that is exceptionally repugnant. This conduct clearly provide substantial and compelling
10 reasons justifying an exceptional sentence.
- 11 6. The court has based its sentence on the data legitimately before the court and not on
12 the fact of or because of the original appeal which is of course a matter of right. The
13 court's sentence represents the lawful consequence of the defendant's criminal conduct
14 that is both quantitatively and qualitatively remarkable.
- 15 7. The defendant's stated attempts to recruit others to assault the victim so she would
16 not testify at trial is the type of behavior that strikes at a central tenet of the criminal
17 justice system.
- 18 8. The defendant showed no genuine remorse throughout his relationship with Jaimi
19 Freitas, or during his trial and, disconcertingly, could not, despite his best efforts, refrain
20 from blaming the victim even during his current (new) allocution at the resentencing
21 hearing.
- 22 9. The defendant's pattern of abuse against Jaimi Freitas, found beyond a reasonable
23 doubt by the jury, warrants an exceptional sentence upward, and the Court, in its
24

1 discretion, finds that doubling the high end of the standard range and running it
2 consecutively to Count XIV, one of the most heinous of the defendant's crimes against
3 Jaimi Freitas, is an appropriate sanction in this case. The jury's special verdict provides a
4 substantial and compelling reason to grant this exceptional sentence on Count I
5 consecutive to Count XIV.

6 10. The pattern of abuse was psychological, physical, and sexual.

7 11. This sentence ensures punishment that is proportionate to the egregiousness of the
8 offenses.

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10 Done this 31st of January, 2012

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Hon. Timothy A. Bradshaw

APPENDIX B

SENTENCING CHART

BELL'S SENTENCING GRID

COUNT	CRIME	DATE	STATE'S REC. (1 st Sent.)	SENT. IMPOSED	RE-SENT. IMPOSED
I	Assault 2 Aggravator: Ongoing Pattern of Abuse	9/23/07	72 months <i>consec.</i> to all counts	72 months <i>consec.</i> to all counts	114 months <i>consec.</i> to <i>count XIV</i>
II	Unlawful Imprisonment	9/23/07	60 months	60 months	29 months
III	Assault 3	9/23/07	60 months	60 months	29 months
IV- VIII	Witness Tampering	9/23/07- 12/3/07	60 months	60 months	IV: 29 months (V-VIII vacated)
IX - XI	Violation of No Contact Order	10/12/07 10/14/07 11/11/07	12 months each, <i>consec.</i>	12 months each, concurrent	12 months each, concurrent
XII	Assault 2	2/17/06	72 months	72 months	54 months concurrent
XIII	Assault 3	2/06-9/06	60 months	60 months	29 months concurrent
XIV	Rape 3	2/06-9/06	60 months	60 months	54 months <i>consec.</i> to <i>count XIV</i>
TOTAL EXCEPTIONAL SENTENCE:			180 months	144 months	168 months

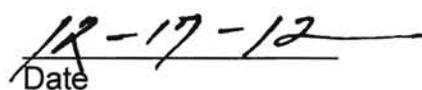
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. CLIFTON BELL, Cause No. 67910-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date