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Supreme Court No. 97970-7
Court of Appeals No. 78510-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN WAYLAND,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

 1. Brian Wayland served his country with honor and returned home suffering from the extreme mental and physical trauma of war. 2

 2. In 2015, Mr. Wayland committed unarmed bank robberies and everyone recognized he desperately needed help. 5

 3. After Mr. Wayland’s treatment lapsed and he reoffended, the trial court denied his request for an exceptional sentence on the second set of charges..... 6

D. ARGUMENT IN FAVOR OF GRANTING REVIEW 10

This Court should grant review because the trial court applied the wrong standard of proof and failed to consider the mitigating factor relied upon by the defense when it denied Mr. Wayland’s request for an exceptional sentence. 10

- a. Mr. Wayland requested an exceptional sentence based upon a mitigating factor the legislature has determined is “substantial and compelling” as a matter of law, and he was required to prove this circumstance existed by a preponderance of the evidence. 10
- b. This Court should accept review because the trial court applied the wrong burden of proof. 13
- c. This Court should accept review because the trial court did not consider the mitigating factor presented by Mr. Wayland..... 14
- i. Mr. Wayland presented substantial expert evidence about the mental trauma he suffered and why it led him to commit robbery 15
- ii. The trial court conflated two mitigating factors and failed to consider the factor supported by the evidence presented. 17

E. CONCLUSION	20
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TABLE OF AUTHORITIES

Washington Supreme Court

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002)..... 17

In Re Pers. Restraint of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012) .. 12

Nguyen v. Dep't of Health, Med. Qual. Assur. Comm'n, 144 Wn.2d 516, 29 P.3d 689 (2001)..... 11

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)..... 10, 11

State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017) 12

State v. Rogers, 112 Wn.2d 180, 770 P.2d 180 (1989)..... 15

Washington Court of Appeals

State v. Corona, 14 Wn. App. 76, 261 P.3d 680 (2011)..... 12

State v. Garcia, 162 Wn. App. 678, 256 P.3d 379, 381 (2011)..... 10, 11

State v. Kozey, 183 Wn. App. 692, 334 P.3d 1170 (2014) 17

State v. Moore, 73 Wn. App. 789, 871 P.2d 642 (1994)..... 10

Washington Statutes

RCW 9.94A.535..... 10, 11, 12, 14, 15, 17

Washington Rules

RAP 13.4..... 1

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Brian Wayland requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Brian Wayland*, No. 78510-9, filed November 12, 2019. A copy of the opinion is attached in an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court has the authority to impose an exceptional sentence when it finds the defendant has established mitigating circumstances by a preponderance of the evidence. When the court applies the wrong legal standard, it abuses its discretion. Should this Court grant review where the trial court applied a higher burden of proof than required by law and found it had no choice but to impose a “harsh” standard range sentence because Mr. Wayland failed to satisfy this higher burden of proof?

2. As the basis for his request for an exceptional sentence, Mr. Wayland presented evidence that his ability to conform his conduct to the requirements of the law was significantly impaired as a result of the untreated mental trauma he suffered in war. Pursuant to RCW 9.94A.535(1)(e), this is a substantial and compelling reason to grant an exceptional sentence as a matter of law. Should this Court grant review

because the trial court denied Mr. Wayland's request for an exceptional sentence without considering this mitigating circumstance?

C. STATEMENT OF THE CASE

1. Brian Wayland served his country with honor and returned home suffering from the extreme mental and physical trauma of war.

Brian Wayland joined the army when he was only 17 years old. RP 53. He became an exceptional soldier who served in five combat deployments between 2001 and 2012. CP 108-110. During his first deployment to Afghanistan, he worked as part of a raiding force seeking out the Taliban. CP 108. A few years later, Mr. Wayland deployed to Kuwait, where he provided officials traveling back and forth to Iraq with protective cover from regular rocket and mortar fire. CP 108.

Mr. Wayland met his wife, Aubrie Agbalog, during his deployment to Kuwait. CP 109. A fellow soldier, Ms. Agbalog was impressed by Mr. Wayland's strong moral compass and his adherence to his ethical principles while at war. RP 54. The two became friends and later married. RP 54; CP 109.

During Mr. Wayland's third deployment, which was to Iraq, Mr. Wayland began suffering from insomnia and having nightmares. CP 109. He worked with the Federal Bureau of Investigation and the Central Criminal Court of Iraq, and much was asked of him. CP 109. Mr. Wayland

was tasked with guarding and transporting prisoners, and providing extra manpower to the mortar and machine gun sections. CP 109.

Ms. Agbalog gave birth to their daughter during Mr. Wayland's fourth combat deployment, which was to Afghanistan. RP 54, 120. During that deployment, Mr. Wayland oversaw two sniper teams and engaged in approximately 30 gun fights. CP 109.

Mr. Wayland flew home to meet his daughter for the first time, but upon re-deploying was shot and medically evacuated. RP 54, 120-21; CP 109. Mr. Wayland's doctors did not expect him to walk again, but he proved them wrong within a year and deployed again, this time with Special Forces. RP 54; CP 110.

Things were different during Mr. Wayland's fifth deployment. RP 54. The mission was more intense and Mr. Wayland was rarely able to contact his family. RP 54. Twice within a two week period, Mr. Wayland was struck by an improvised explosive device (IED) and suffered a traumatic brain injury (TBI). RP 121; CP 110. The second time the IED hit Mr. Wayland's armored vehicle directly and he had to be medically evacuated home. CP 110, n.4.

Mr. Wayland earned multiple awards and medals for his service, including two Purple Hearts and a Bronze Star. CP 109; RP 55-56. The recommendation submitted for Mr. Wayland's Bronze Star reveals Mr.

Wayland was given responsibilities “far beyond his pay grade” in Afghanistan and that the actions he took were “exemplary” and saved the lives of his fellow soldiers. CP 165. The recommendation describes Mr. Wayland’s “leadership under fire” as “remarkable.” CP 165.

The recommendation also describes Mr. Wayland as a “consummate professional” who “constantly thought two steps ahead” for his commander and volunteered to mentor other soldiers. CP 165. Mr. Wayland’s army evaluations rate him “among the best” and describe Mr. Wayland as “reliable, trustworthy, focused” and emphasized he “performed well in stressful situations and remained positive despite a high stress combat environment.” CP 115.

Despite his love for his work and for serving his country, Mr. Wayland was forced to retire from the army after suffering the second TBI. CP 109. When Mr. Wayland returned home, Ms. Agbalog realized things were “not right.” RP 55.

Mr. Agbalog noticed Mr. Wayland’s text messages contained spelling errors and his memory was poor. RP 55. He was suddenly color blind. CP 113. He engaged in the same actions over and over, like going outside to smoke a cigarette, because he could not remember he had done the same thing just moments before. RP 55. He got lost in the parking lot

in the Boston airport, even though he had grown up in Boston. CP 108, 113.

Mr. Wayland began to have trouble leaving his home and started having nightmares. RP 55. He patrolled the home, checking the porch, the doors to the house, and their car. RP 55. He stopped sleeping for days and began hallucinating, seeing people he had killed and having conversations with them. CP 113.

2. In 2015, Mr. Wayland committed unarmed bank robberies and everyone recognized he desperately needed help.

It was under these circumstances that Mr. Wayland began robbing banks. RP 97, 122. Mr. Wayland entered financial institutions unarmed and, without suggesting he had a weapon, demanded cash from tellers, which he then carried away in his arms with the bills pressed to his chest. *See, e.g.*, CP 6.

When Mr. Wayland was arrested, he told the detective he had committed more robberies than he actually had, and the detective spent the majority of his work on Mr. Wayland's case proving Mr. Wayland had not committed all of the crimes to which Mr. Wayland confessed. RP 97. Ultimately, Mr. Wayland pleaded guilty to two counts of first- degree robbery. RP 97.

Everyone agreed Mr. Wayland needed help. RP 98. His case was transferred to Veterans Court, where he was temporarily assigned to a homeless domiciliary even though he was not homeless. CP 111; CP 76. Mr. Wayland was supposed to begin intensive mental health outpatient treatment but no openings were available and his treatment lapsed. CP 111.

While at the homeless domiciliary Mr. Wayland met a young veteran who wanted to know how to rob a bank. CP 113. Mr. Wayland obliged and then joined him, returning to this pattern of behavior shortly after resolving his first case but before receiving treatment for his significant mental trauma. CP 111; CP 76.

3. After Mr. Wayland's treatment lapsed and he reoffended, the trial court denied his request for an exceptional sentence on the second set of charges.

The State charged Mr. Wayland with 11 counts of first degree robbery for the crimes he committed shortly after his release to the domiciliary. CP 9-11. The King County prosecutor worked to consolidate all of the charges under a single cause number in King County, despite some of the crimes occurring in Pierce and Thurston Counties, and recommended the low end of the standard range, which was 129 months. CP 18, 76-77. However, the State refused to agree to an exceptional

sentence, arguing the first time Mr. Wayland was released from custody it was a “complete and utter failure.” CP 77.

April Gerlock, Ph.D., evaluated Mr. Wayland and prepared a report for the court. CP 105. Dr. Gerlock is a board certified psychiatric nurse practitioner and clinical professor at the University of Washington who also works as a consultant for the United States Department of Veterans Affairs (VA). CP 123; RP 57. She has performed research on veterans with post-traumatic stress disorder (PTSD) and provides direct patient care to veterans. RP 59. While she was retained by Mr. Wayland, she has testified for the prosecution in the past. RP 60.

Dr. Gerlock diagnosed Mr. Wayland with PTSD and depression and explained the symptoms of both interact and overlap with symptoms from Mr. Wayland’s traumatic brain injury. CP 115-19. Dr. Gerlock also explained Mr. Wayland suffered from a type of mental trauma called “moral injury,” which is the psychological trauma that results when an individual is forced to act in opposition to his own ethical or moral beliefs. CP 119. Researchers are just beginning to investigate this type of injury in soldiers who are required to seriously injure and kill others. CP 119.

In her written report and in her testimony at Mr. Wayland’s sentencing hearing, Dr. Gerlock explained why Mr. Wayland’s mental trauma eventually led him to rob banks. She described the particular

trauma that results from having to kill another individual in war, and that individuals suffering from this trauma exhibit classic PTSD symptoms but also engage in self-destructive and risk-taking behavior. RP 74-75.

Referring to Mr. Wayland's condition, Dr. Gerlock explained:

People who are in that level of confusion and distress will do almost anything sometimes just to get some relief from that experience, and that's where you see those self-injurious behaviors. That's where you see the substance issues. And it's not just like an isolated event. The distress spans time. So they're in this state of psychological distress and will engage in these self-injurious behaviors to get some relief from that.

RP 76.

Dr. Gerlock explained Mr. Wayland was supposed to receive assistance for his mental trauma through the Veterans Court disposition.

RP 78. Mr. Wayland had been placed on the PTSD track at the domiciliary, which meant he was housed with veterans whose primary issue was substance abuse or homelessness, and he received only "very basic" PTSD intervention designed to build foundational skills. RP 78.

Mr. Wayland did not receive trauma-focused intervention and the intensive outpatient program that was supposed to provide continuing treatment never materialized. RP 78, 84.

Dr. Gerlock believed that, without treatment, Mr. Wayland was unable to conform his conduct to the requirements of the law. RP 81. She

believed he needed a longer inpatient program designed by the VA to address the symptoms of PTSD, moral injury, and the TBI. RP 79-81. Mr. Wayland asked the court impose an exceptional sentence of time served, and release him on community custody when a bed became available at an inpatient facility. CP 97; RP 118.

After listening to argument from the parties, the court acknowledged the standard sentencing range was “harsh,” but the “substantial and compelling reason standard is a high bar” and without finding the existence of a mitigating factor, the court had no tools at its disposal to impose anything below the standard range. RP 129. The court denied Mr. Wayland’s request for an exceptional sentence and imposed 129 months, or almost 11 years, in prison. RP 129; CP 68. The Court of Appeals affirmed. Slip Op. at 8.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

This Court should grant review because the trial court applied the wrong standard of proof and failed to consider the mitigating factor relied upon by the defense when it denied Mr. Wayland’s request for an exceptional sentence.

- a. Mr. Wayland requested an exceptional sentence based upon a mitigating factor the legislature has determined is “substantial and compelling” as a matter of law, and he was required to prove this circumstance existed by a preponderance of the evidence.

The legislature empowered trial courts to impose a sentence below the standard range where such a sentence is justified by a “substantial and compelling” reason. RCW 9.94A.535. Whether a reason is substantial and compelling is a matter of law. *State v. Garcia*, 162 Wn. App. 678, 683, 256 P.3d 379 (2011) (citing *State v. Moore*, 73 Wn. App. 789, 795, 871 P.2d 642 (1994)). To satisfy this legal standard, it must be shown that the mitigating factor was not considered by the legislature when establishing the sentencing range and the mitigating factor is sufficiently substantial and compelling to distinguish the instant crime from others in the same category. *State v. O’Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015).

In RCW 9.94A.535(1), the legislature provided specific mitigating factors that satisfy the substantial and compelling standard. This list is intended to be illustrative, rather than exhaustive. RCW 9.94A.535(1). Thus, where a mitigating factor is not listed in the statute, the trial court

must apply the test reiterated in *O'Dell* to determine whether the factor relied upon by the defense is “substantial and compelling” as a matter of law. 183 Wn.2d at 690; *see also Garcia*, 162 Wn. App. at 683-87 (applying test and finding most of the mitigating factors considered by the trial court supported the imposition of an exceptional sentence below the standard range).

Such an analysis was not necessary here because at sentencing Mr. Wayland explicitly relied upon one of the factors provided in RCW 9.94A.535(1)(e), which states:

The defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.
Voluntary use of drugs or alcohol is excluded.

Dr. Gerlock testified Mr. Wayland’s ability to conform to the requirements of the law was significantly impaired as a result of PTSD and TBI. RP 81.

The burden of proof, which instructs the judge on the degree of confidence he should have in the correctness of his factual conclusions, is also dictated by statute. *Nguyen v. Dep’t of Health, Med. Qual. Assur. Comm’n*, 144 Wn.2d 516, 524, 29 P.3d 689 (2001); RCW 9.94A.535(1). Under RCW 9.94A.535(1), the court may impose an exceptional sentence where it determines “the mitigating circumstances are established by a

preponderance of the evidence.” *See also State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017).

The preponderance of the evidence standard is a relatively low standard, where the opposing parties “share the risk of error in roughly equal fashion.” *Nguyen*, 144 Wn.2d at 524. The court must find only that it is more likely than not that the mitigating circumstance exists. *See In Re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (preponderance of the evidence standard requires proof that “was more likely than not”). At the sentencing hearing the burden was on Mr. Wayland to demonstrate, by a preponderance of the evidence, that his ability to conform his conduct to the requirements of the law was significantly impaired. RCW 9.94A.535(1). If the court found Mr. Wayland satisfied this burden, the court had the authority to impose an exceptional sentence. RCW 9.94A.535(1) (“The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.”)

On appeal, a sentencing court’s decision may be reversed where it abuses its discretion or misapplies the law. *State v. Corona*, 14 Wn. App. 76, 78, 261 P.3d 680 (2011). Even where a trial court makes a reasonable decision, it abuses its discretion when it “applies the wrong legal standard or bases its ruling on an erroneous view of the law.” *Id.* at 79. On appeal,

this Court reviews de novo the trial court's choice of law and application of the law to the facts of the case. *Id.*

- b. This Court should accept review because the trial court applied the wrong burden of proof.

The trial court did not recognize the burden of proof was preponderance of the evidence. Instead, the court denied Mr. Wayland's request after finding the "substantial and compelling reason standard" had not been satisfied. Specifically, the court found:

The substantial and compelling reason standard is a high bar. I don't find that it's been met, but I also know that the sentencing range here is harsh.

RP 129.

The Court of Appeals determined this statement by the trial court "was simply a recognition that it is difficult to prove the existence of a substantial and compelling reason to impose an exceptional sentence." Slip Op. at 6. It concluded Mr. Wayland's assertion that the sentencing court believed "the burden of proof was greater than by a preponderance of the evidence" was therefore "plainly wrong." Slip Op. at 6. But the Court of Appeals' analysis is unsupported by the record. The trial court unequivocally identified the standard as "[t]he substantial and compelling reason standard" and did not address the preponderance of the evidence standard. RP 129. Because the trial court found the "high bar" set by the

“substantial and compelling reason standard” had not been met, it wrongly concluded it was left with no option other than to impose a harsh standard range sentence. RP 129.

The trial court’s conclusion was error because the mitigating factor presented by the defense was “substantial and compelling” as a matter of law. RCW 9.94A.535(1). The trial court’s task was to determine whether the mitigating circumstance had been proven, by a preponderance of the evidence, as a matter of fact in Mr. Wayland’s case. If the court determined it had been proven by a preponderance of the evidence, the trial court had the authority to impose an exceptional sentence under the statute.¹ The trial court’s failure to recognize this was error. Because the court failed to apply the correct burden of proof at Mr. Wayland’s sentencing hearing, this Court should accept review.

- c. This Court should accept review because the trial court did not consider the mitigating factor presented by Mr. Wayland.

The court also failed to consider the relevant legal standard when it did not evaluate whether Mr. Wayland proved the mitigating factor put forth by the defense, which was that Mr. Wayland’s capacity to conform

¹ In a footnote, the Court of Appeals claims Mr. Wayland asserted the trial court was *required* to impose an exceptional sentence as a matter of law if Mr. Wayland satisfied his burden by a preponderance of the evidence. Slip Op. at 6, n. 3. Mr. Wayland did not make this argument. Discretion remains with the trial court under RCW 9.94A.535(1) as to whether to impose an exceptional sentence. However, the trial court must apply the correct standard in reaching its decision, which the trial court failed to do here.

his conduct to the requirements of the law was significantly impaired by his mental trauma. RCW 9.94A.535(1)(e); RP 81.

- i. Mr. Wayland presented substantial expert evidence about the mental trauma he suffered and why it led him to commit robbery.*

The State relied on *State v. Rogers* to argue against the imposition of an exceptional sentence. 112 Wn.2d 180, 770 P.2d 180 (1989). CP 79. In *Rogers*, the defendant got divorced, left his job as a school principal, and robbed a bank with two loaded guns. 112 Wn.2d at 180. This Court reversed the trial court's imposition of an exceptional sentence, holding the defendant's mental state was no different than most individuals who commit armed robbery. *Id.* at 185.

At Mr. Wayland's sentencing the State claimed the evidence upon which Mr. Wayland relied mirrored the deficient evidence presented in *Rogers*. CP 79. But the vague assertion of "severe emotional and psychological stress" put forth in *Rogers* is not equivalent to the evidence presented by Mr. Wayland. *Rogers*, 112 Wn.2d at 184. In her written report and testimony, Dr. Gerlock provided extensive information as to how she had diagnosed Mr. Wayland with PTSD, why the moral injury he suffered during his combat deployments made him more likely to engage in self-harming behaviors, and why he needed more intensive, trauma-

focused, treatment than the Veterans Court disposition had offered in order to begin to heal. CP 105-121; RP 61-84.

Specifically, Dr. Gerlock explained Mr. Wayland had described one of his worst experiences in the military as being put in a position where he had to kill others and described the feelings of shame that resulted from these experiences. CP 120. She noted Mr. Wayland did not discuss his work as an interrogator, but Dr. Gerlock knew from her clinical experience with other veterans that this job “brings a unique set of ethical challenges and moral dilemmas.” CP 120.

Dr. Gerlock pointed out that the way Mr. Wayland operated during the robberies – with the cash pressed against his chest and a trail of cash behind him – was in stark contrast to the documented focus and attention to detail he exhibited in combat. CP 120. She described how taking risks or engaging in self-harming behavior had been found to be specifically linked to moral injury, or “killing trauma,” in combat veterans and that Mr. Wayland had explained the robberies relieved the intensity of his symptoms. CP 120; RP 75. Dr. Gerlock referred to new research that is just beginning to explore the significance and consequences of moral injury in veterans. RP 75; *see also* CP 153.

Dr. Gerlock further explained it was more difficult to treat Mr. Wayland than other veterans because he had suffered multiple traumatic

events over the course of multiple deployments. RP 82. She testified treatment was further complicated by Mr. Wayland's repeated traumatic brain injuries. RP 83. Dr. Gerlock believed Mr. Wayland was "an extreme case" who needed to be followed "very closely." RP 83. She believed that, given what she understood about Mr. Wayland's significant mental trauma, he was unable to conform his conduct to the requirements of the law. RP 81. The State offered no expert testimony to the contrary.

ii. The trial court conflated two mitigating factors and failed to consider the factor supported by the evidence presented.

In order to impose an exceptional sentence, the court needed to find only that Mr. Wayland demonstrated his ability to appreciate the wrongfulness of his conduct was significantly impaired *or* his ability to conform his conduct to the requirements of the law was significantly impaired. RCW 9.94A.535(1)(e). It was not required to find Mr. Wayland had proven both. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent"); *State v. Kozey*, 183 Wn. App. 692, 696, 334 P.3d 1170 (2014) (discussing use of "and" versus "or").

Yet the trial court conflated these two mitigating factors, stating:

And put another way, I don't find that Mr. Wayland's capacity to appreciate the wrongfulness of his conduct or conform to the requirements was significantly impaired.

The witness for the defense testified that Mr. Wayland's inability to conform was impaired as a result of post-traumatic stress disorder and traumatic brain injury, and it could very well be that Mr. Wayland engaged in this activity in part to get relief from that, *but that doesn't mean, at least in my view, that his capacity to appreciate the wrongfulness of his conduct was significantly impaired.*

On the one hand, robbing banks can seem impulsive and irrational like a lot of crimes that are committed. On the other hand, Mr. Wayland committed these crimes over a series of weeks in multiple counties, and *I don't find that to the extent Mr. Wayland suffers from post-traumatic stress disorder and traumatic brain injury that he was so impaired that he didn't have time, for example, to think about the dangers presented by these crimes.*

RP 127-28 (emphasis added).

The court acknowledged Dr. Gerlock's testimony that Mr. Wayland's ability to conform his actions to the requirements of the law was significantly impaired, but then did not consider this mitigating factor. RP 127-28. Instead, the court only examined, and rejected, a mitigating factor not alleged by the defense: that Mr. Wayland's capacity to appreciate the wrongfulness of his conduct was significantly impaired. RP 127-28.

The Court of Appeals relied on the trial court's statements to find the trial court "plainly considered Wayland's asserted mitigating factor in its entirety." Slip Op. at 7, n.5. This is simply incorrect. The trial court recited both mitigating factors when it stated, "put another way, I don't find that Mr. Wayland's capacity to appreciate the wrongfulness of his conduct or conform to the requirements was significantly impaired." RP 127. But the court only analyzed Mr. Wayland's capacity to appreciate the wrongfulness of his conduct. It never analyzed whether Mr. Wayland had the ability to conform his actions to the law.

Indeed, when the court relied upon the fact Mr. Wayland had time to appreciate the danger presented by the robberies to deny the exceptional sentence, it failed to recognize this was exactly why Dr. Gerlock believed Mr. Wayland satisfied the criteria for an exceptional sentence. In Dr. Gerlock's expert opinion, Mr. Wayland engaged in this risk-taking behavior *because* of the danger presented as it provided temporary relief from his severe symptoms of PTSD and moral injury. RP 74-74; CP 120. According to Dr. Gerlock, this is why Mr. Wayland's ability to conform his actions to the law was significantly impaired. RP 81.

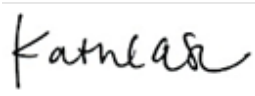
The trial court's conflation of these two separate mitigating factors, and failure to consider the mitigating circumstance presented by the defense, was error. This Court should accept review.

E. CONCLUSION

The trial court applied the wrong burden of proof and did not consider the mitigating factor presented by the defense before denying Mr. Wayland's request for an exceptional sentence. This Court should grant review.

DATED this 12th day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen A. Shea", enclosed in a thin black rectangular border.

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APPENDIX

COURT OF APPEALS, DIVISION ONE OPINION

November 12, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN JOSEPH WAYLAND,

Appellant.

DIVISION ONE

No. 78510-9-I

UNPUBLISHED OPINION

FILED: November 12, 2019

DWYER, J. — Brian Wayland pled guilty to 11 counts of robbery in the first degree and was given a standard range sentence of 129 months of incarceration. He appeals from his sentence, asserting that the sentencing court abused its discretion when it declined to impose an exceptional sentence below the standard range. Because the sentencing court properly exercised its discretion, we affirm.

I

Between March and May 2016, Brian Wayland robbed 11 banks in King, Pierce, and Thurston counties, stealing approximately \$28,000 in cash. Following his arrest in May, Wayland confessed to the robberies. He then pled guilty to 11 counts of robbery in the first degree.¹

At his sentencing, Wayland requested an exceptionally lenient sentence of time served and release to community custody so that he could receive treatment

¹ Although the robberies occurred in multiple counties, all the robbery charges against Wayland were consolidated under a single cause number in King County.

for posttraumatic stress disorder (PTSD). Wayland asked the court to find that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired and to grant an exceptional sentence downward based on RCW 9.94A.535(1)(e).² In support of his request, Wayland presented testimony from an expert, Dr. April Gerlock, who specializes in psychiatric nursing. Gerlock testified that, in her opinion, Wayland's experience as a soldier in Afghanistan and Iraq, which left him with a gunshot wound, traumatic brain injuries, and an extreme case of PTSD, resulted in an impaired ability to conform his conduct to the requirements of the law. Dr. Gerlock further opined that Wayland needed in-patient treatment to manage his PTSD.

The State requested that the sentencing court impose a sentence of 129 months, at the low end of the standard range. The State argued that Wayland's robberies had significantly traumatized the bank employees he had robbed and that his PTSD did not significantly impair his "ability to make decisions about committing [the robberies]." The State also argued that Wayland posed a significant risk of reoffending if released, as he had been given an exceptionally

² RCW 9.94A.535(1)(e) states:

(1) Mitigating Circumstances – Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

.....

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

lenient sentence for prior robbery convictions and had resumed robbing banks shortly after his release.

The sentencing court denied Wayland's request for an exceptional sentence, noting that "[t]he substantial and compelling reason standard is a high bar. I don't find that it's been met," and sentenced Wayland as requested by the State. The sentencing court concluded that there were no

substantial and compelling reasons justifying an exceptional sentence below the range. The record shows that Mr. Wayland does suffer from a mental condition. I don't find a connection between that condition and a significant impairment of Mr. Wayland's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Explaining the reasons for its decision, the sentencing court further stated that

[t]he witness for the defense testified that Mr. Wayland's ability to conform was impaired as a result of post-traumatic stress disorder and traumatic brain injury, and it could very well be that Mr. Wayland engaged in this activity in part to get relief from that, but that doesn't mean, at least in my view, that his capacity to appreciate the wrongfulness of his conduct was significantly impaired. And I underscore that word "significantly."

On the one hand, robbing banks can seem impulsive and irrational like a lot of crimes that are committed. On the other hand, Mr. Wayland committed these crimes over a series of weeks in multiple counties, and I don't find that to the extent Mr. Wayland suffers from post-traumatic stress disorder and traumatic brain injury that he was so impaired that he didn't have time, for example, to think about the dangers presented by these crimes.

II

Wayland contends that the sentencing court erred when it declined to give him an exceptionally lenient sentence. This is so, Wayland asserts, because (1) the sentencing court applied the wrong standard of proof for determining whether

there was a substantial and compelling reason to grant an exceptional sentence and (2) the sentencing court did not consider whether Wayland's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired.

Our review of the record, however, leads us to conclude that the sentencing judge both applied the proper standard of proof and properly considered Wayland's arguments and evidence before deciding that no exceptional sentence was warranted herein.

A

Generally, a sentence within the standard range sentencing guidelines set forth in the Sentencing Reform Act of 1981 (SRA) may not be appealed. RCW 9.94A.585(1); State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). There is an exception, however, for when a defendant seeks to challenge the procedure through which an exceptional sentence is denied and a standard range sentence is imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). In such circumstances, review is limited to determining whether the sentencing court abused its discretion by (1) categorically refusing to impose an exceptional sentence downward under any circumstances, (2) relying on an impermissible basis for refusing to impose an exceptional sentence below the standard range, or (3) failing to recognize that it has discretion to impose an exceptional sentence downward. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); accord State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007).

“Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence.” Garcia-Martinez, 88 Wn. App. at 330.

RCW 9.94A.535, which sets forth the circumstances in which a court may deviate from the standard SRA guidelines, states that a 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.” The statute further provides that a court “may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1). The statute then sets forth a non-exhaustive list of mitigating circumstances which could justify the imposition of an exceptional sentence below the standard sentence range for an offense, one of which is that “[t]he defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.” RCW 9.94A.535(1)(e).

B

Wayland contends that the sentencing court applied the wrong standard of proof and failed to consider the mitigating factor he urged justified the imposition of an exceptionally lenient sentence. Upon this premise, Wayland asserts that the sentencing court declined to give him an exceptional sentence because of an improper reason, application of the wrong legal standard, and its failure to recognize that it had discretion to impose an exceptional sentence. We disagree.

First, Wayland asserts that the sentencing court applied the wrong burden of proof when considering Wayland's chosen mitigating factor because, when announcing its decision, it stated that "[t]he substantial and compelling reason standard is a high bar. I don't find that it's been met." According to Wayland, this statement indicates that the sentencing court believed that the burden of proof was greater than by a preponderance of the evidence. This is plainly wrong. The sentencing court's statement says nothing about Wayland's burden of proof; it was simply a recognition that it is difficult to prove the existence of a substantial and compelling reason to impose an exceptional sentence.³ Wayland does not identify any support in the record for his assertion that the trial court did not apply the proper burden of proof.

Second, Wayland asserts that the sentencing court did not consider the mitigating factor that his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired.⁴

This, again, is plainly incorrect. The sentencing court stated that there were no substantial and compelling reasons justifying an exceptional sentence below the range. The record shows that Mr. Wayland does suffer from a mental condition. I don't find a connection between that condition and a significant impairment of Mr. Wayland's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

³ Indeed, if it were otherwise, and exceptional sentences became the rule rather than the exception, the standard range sentencing guidelines could hardly be considered standard.

⁴ Wayland also contends that because he successfully proved, by a preponderance of the evidence, that his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, the sentencing court was required to give him an exceptional sentence as a matter of law. Wayland is wrong. RCW 9.94A.535(1) is clear that a sentencing court *may* impose an exceptional sentence when a mitigating factor is proved by a preponderance of the evidence. It does not require the sentencing court to impose such a sentence but, rather, leaves it to the discretion of the sentencing court.

The sentencing court further explicitly acknowledged the testimony of Wayland's expert and explained why it considered it insufficient to prove the existence of a mitigating factor justifying an exceptional sentence:

[t]he witness for the defense testified that Mr. Wayland's ability to conform was impaired as a result of post-traumatic stress disorder and traumatic brain injury, and it could very well be that Mr. Wayland engaged in this activity in part to get relief from that, but that doesn't mean, at least in my view, that his capacity to appreciate the wrongfulness of his conduct was significantly impaired. And I underscore that word "significantly."^[5]

On the one hand, robbing banks can seem impulsive and irrational like a lot of crimes that are committed. On the other hand, Mr. Wayland committed these crimes over a series of weeks in multiple counties, and I don't find that to the extent Mr. Wayland suffers from post-traumatic stress disorder and traumatic brain injury that he was so impaired that he didn't have time, for example, to think about the dangers presented by these crimes.

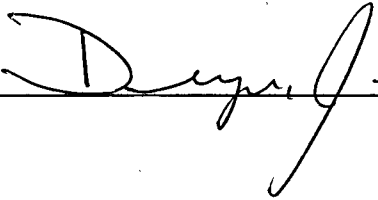
In short, the record establishes that the sentencing court fully considered Wayland's argument and the evidence presented by Wayland's expert witness and concluded that Wayland's ability to appreciate the wrongfulness of his conduct or to conform his actions to the requirements of the law was not proved to be significantly impaired.

The record establishes that the sentencing court exercised its discretionary authority to consider whether to grant Wayland an exceptional sentence and concluded that Wayland had failed to prove the existence of a mitigating factor that could permit the court to impose such

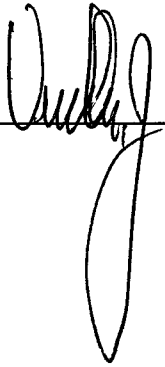
⁵ Wayland contends that this statement shows that the sentencing court considered only whether Wayland's ability to appreciate the wrongfulness of his conduct was significantly impaired and did not consider whether Wayland's ability to conform his conduct to the requirements of the law was significantly impaired. The record rebuts this contention. The sentencing court explicitly stated that it did not find a connection between Wayland's mental health conditions and his "ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." It plainly considered Wayland's asserted mitigating factor in its entirety.

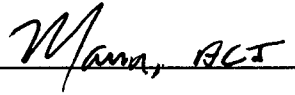
a sentence. Wayland's disagreement with the sentencing court's conclusion regarding his ability to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law is not ground for reversal.

Affirmed.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78510-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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