IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ELGEN EUGENE BOWSER-MCCOY,

Appellant.

No. 46650-3-II

UNPUBLISHED OPINION

MELNICK, J.—Elgen Bowser-McCoy appeals from his conviction for residential burglary, arguing that the trial court erred by imposing an exceptional sentence above the standard range based on an aggravating factor not found by the jury and by failing to enter written findings of fact and conclusions of law in support of the exceptional sentence. He also raises three issues in a Statement of Additional Grounds (SAG). The State concedes that Bowser-McCoy's sentence must be remanded to the trial court for entry of such findings and conclusions. We accept the State's concession, remand Bowser-McCoy's sentence for entry of written findings of fact and conclusions of law in support of the exceptional sentence, and reject Bowser-McCoy's SAG issues.

FACTS

At about 4 A.M. on May 1, 2014, Angela Bish discovered a man, later identified as Bowser-McCoy, crouching in her kitchen and moving toward her living room. She screamed and the man fled out kitchen door. Neither she nor her boyfriend noticed any items missing from the house.

The State charged Bowser-McCoy with residential burglary and alleged an aggravating sentence circumstance because Bish was in the house when the crime was committed.[1] The jury convicted Bowser-McCoy as charged and entered a special verdict finding the aggravating factor beyond a reasonable doubt. The State sought an exceptional sentence above the range of 102 months, noting the jury's special verdict and Bowser-McCoy's criminal history. The trial court imposed the sentence that the State sought, discussing both Bowser-McCoy's eight prior felony convictions and the special verdict form. It did not enter written findings of fact and conclusions of law in support of the exceptional sentence because the State informed it that such findings and conclusions were not required when a special verdict had been entered.

ANALYSIS

Bowser-McCoy appeals from his exceptional sentence on two grounds. First, he argues that given its comments regarding his criminal history during sentencing, the trial court may have based his exceptional sentence at least in part on the "rapid recidivism" aggravating factor contained in RCW 9.94A.535(3)(t), which was neither alleged by the State nor found by the jury.

Second, he argues that the trial court erred by not entering written findings of fact and conclusions of law in support of its exceptional sentence. The State concedes that Bowser-McCoy's sentence must be remanded to the trial court for entry of such findings of fact and conclusions of law. *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015). We accept the State's concession.

[1] RCW 9.94A.535(3)(u) ("The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.)."

In his SAG, Bowser-McCoy raises three issues. First, he contends that the State did not prove the element of "forceable [sic] entry & or to commit a crime." SAG at 1. But there is no such element for residential burglary. The State needed only prove that Bowser-McCoy unlawfully entered Bish's residence with intent to commit a crime against a person or property therein. RCW 9A.52.025(1). The circumstances of Bowser-McCoy's discovery in Bish's residence were sufficient for the jury to infer that he entered with the intent to commit a crime against a person or property once inside. RCW 9A.52.040; *State v. Deal*, 128 Wn.2d 693, 700-01, 911 P.2d 996 (1996).

Second, Bowser-McCoy contends that the State's request for an exceptional sentence was vindictiveness based on his failing to accept a plea agreement in which the State offered to recommend a 66-month standard range sentence. But his contention is based on information outside the record and must be raised in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 338 n.5, 899 P.2d 1251 (1995).

Last, he contends that he was held in "misdemeanor court (bind-over court) for 28 days" before being arraigned. SAG at 2. But this contention is also based on information outside the record and must be raised in a personal restraint petition. *McFarland*, 127 Wn.2d at 338 n.5.

We affirm Bowser-McCoy's conviction but remand his sentence to the trial court for entry of written findings of fact and conclusions of law in support of its exceptional sentence. Upon entry of those findings and conclusions, Bowser-McCoy will have the right to appeal from them. *See Friedlund*, 182 Wn.2d 396.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, C.J.

Johanson, C.J.

Sutton, J.

Sutton, J.