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NO. 35470-5-II
Cowlitz Co. Cause NO. 06-1-00876-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JAMES BERRIER,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

On July 6th, 2006, the appellant informed his probation officer, Eric Morgan, with the State Department of Corrections (DOC) of his intent to rape and kill Kathryn Grey. Ms. Grey is also employed by DOC, and previously supervised the appellant when he was imprisoned at the Monroe Correctional Complex. Mr. Morgan was alarmed by this threat, and took the appellant into custody for a probation violation. Mr. Morgan subsequently alerted the police, and the appellant was charged on July 11th, 2006 with felony harassment. CP 1-2. The State also filed a notice of intent to seek an exceptional sentence listing five aggravating factors enumerated in RCW 9.94A.535(3). CP 3.

On August 15th, 2006, the appellant entered a plea of guilty to felony harassment. The State then moved to empanel a jury to decide whether the aggravating factors existed. The defendant resisted this effort. CP 17-43. At a motion hearing on August 31, 2006, the trial court ruled that a jury could be empaneled to decide the aggravating factors and that these factors need not be alleged in the information.¹ RP 42-44.

Subsequently, the appellant agreed to a bench trial on stipulated exhibits. The case proceeded to trial on October 11, 2006, and the

¹ In State v. Pillatos, 159 Wn.2d 459, 479, 150 P.3d 1130 (2007); the Supreme Court held that a jury may be empaneled to seek an exceptional sentence when the defendant has pleaded guilty. Pillatos did not decide the proper manner to allege the aggravating factors to support such a sentence.

Honorable Judge James Warne found that three of the aggravating factors had been proved beyond a reasonable doubt. Specifically, the court found that: (1) the appellant's conduct during the current offense had manifested deliberate cruelty to Ms. Grey; (2) that the appellant displayed an egregious lack of remorse; and (3) that the appellant committed the offense against a public official in retaliation for that person's exercise of their duty to the criminal justice system. RP 125-130; CP 62. The court then imposed an exceptional sentence of thirty months.

II. STATEMENT OF THE CASE

The State agrees with the factual and procedural history as set forth by the appellant. The facts relied upon by the trial court are contained in the exhibits designated as supplemental clerk's papers. When appropriate, this brief cites to particular facts in these exhibits.

III. ISSUES PRESENTED

- 1. IS THE STATE REQUIRED TO ALLEGE THE AGGRAVATING FACTORS THAT JUSTIFY AN EXCEPTIONAL SENTENCE IN THE INFORMATION?**
- 2. DID THE TRIAL COURT ERR WHEN IT FOUND THE AGGRAVATING FACTORS HAD BEEN PROVEN AND IMPOSED A THIRTY-MONTH SENTENCE?**

IV. **SHORT ANSWERS**

1. No.
2. No.

V. **ARGUMENT**

I. The Aggravating Factors That Support an Exceptional Sentence Need Not be Alleged in the Information

The appellant argues that under State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980), and the State and Federal constitutions, notice of intent to seek an exceptional sentence must be alleged in the information. However, the appellant misconstrues the relevant case law, and the applicable statute does not require the notice be alleged in the information. Given this, the appellant's claim must fail.

The State agrees with the defense that various mandatory sentence enhancements such as those for firearms, deadly weapons, and protected zones must be alleged in the information. See Theroff, 95 Wn.2d 385. However, this rule does not require that notice of an exceptional sentence be included in the information. The reason is clear, the enhancements discussed in Theroff and the other cases cited by the appellant are *mandatory* while the decision to impose an exceptional sentence is entrusted to the sole discretion of the trial court. The relevant portions of RCW 9.94A.533 state that "the following additional time *shall* be added."

(Emphasis added.) In contrast, the exceptional sentence statute, RCW 9.94A.537, states that if the jury finds that aggravating factors were present, the court “*may* sentence the offender” to a term not to exceed the statutory maximum. (Emphasis added.) This distinction is key, as very different consequences flow from a jury’s finding of an enhancement when compared to a finding of an aggravating factor.

The appellant’s argument becomes particularly tenuous when the relevant case law regarding notice of the death penalty is considered. In State v. Clark, 129 Wn.2d 805, 920 P.2d 187 (1996), the court rejected the argument that notice of intent to seek the death penalty should be included in the information. The Washington Supreme Court held that:

Clark argues this right includes the right to notice of the prosecutor’s intent to seek the death penalty. Indeed, Clark argues the death penalty notice adds an additional element to the underlying crime of aggravated murder, citing *State v. Campbell*, 103 Wash.2d 1, 25, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). Clark misreads *Campbell*. The statutory death notice here is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime. While we require formal notice to the accused by information of the criminal charges to satisfy the Sixth Amendment and art. I, § 22, *State v. Vangerpen*, 125 Wash.2d 782, 787, 888 P.2d 1177 (1995), we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime. *State v. Lei*, 59 Wash.2d 1, 3, 365 P.2d 609 (1961) (no constitutional requirement of notice regarding habitual criminal offender

penalties). Due process in sentencing requires only adequate notice of the possibility of the death penalty. *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991).

Clark, 129 Wn.2d at 811. When viewed in the context of the death penalty case law, it becomes clear that the aggravating factors for an exceptional sentence are not elements of the crime charged and need not be included in the information. Instead, the factors may be alleged separately, as was done in the case at hand.

Furthermore, prior to the enactment of RCW 9.94A.537, Washington courts had ruled that a defendant had *no* right to notice of an exceptional sentence. In State v. Moro, 117 Wn.App. 913, 920, 73 P.3d 1029 (2003), the court noted that “due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a possibility in all sentencings.” *See also* State v. Falling, 50 Wn.App. 47, 49-50, 747 P.2d 1119 (1987); State v. Wood, 57 Wn.App. 792, 798, 790 P.2d 220 (1990); State v. Holyoak, 49 Wn.App. 691, 697, 745 P.2d 515 (1987); State v. Dennis, 45 Wn.App. 893, 898, 728 P.2d 1075 (1986). Considering this, RCW 9.94A.537 should not be construed as requiring the aggravating factors to be alleged in the information, especially given the notable absence of any such language in the text of the statute.

Instead, the actual language of RCW 9.94A.537 states that “[a]t any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.” The plain language of this statute does not require the aggravating factors be alleged in the information. Notably, RCW 9.94A.537 does not even require the State to give notice of its intent to seek an exception sentence. Rather, the statute indicates the State “may give notice.” Given that the statute does not require *any* notice, it is difficult to understand why this optional notice must be alleged in the information as urged by the appellant.

Finally, the State would note that the aggravating factors to support an exceptional sentence are never essential elements of the crime charged. Thus, under CrR 2.1(b) these factors could be stricken as surplusage if alleged in the information. The defense’s suggestion that these factors could be alleged in the information is illusory. Instead, the factors are properly alleged in a separate notice. This Court should uphold the trial court’s ruling that the aggravating factors need not be alleged in the information.

II. The Trial Court's Finding of Three Aggravating Factors Is Supported by the Facts and the Law, and the Exceptional Sentence Was Justified.

a. The Trial Court Did Not Err by Finding the Appellant's Conduct Manifested Deliberate Cruelty Towards the Victim.

The appellant argues there was insufficient evidence to support the trial court's finding regarding deliberate cruelty. However, the nature of the threat that the appellant issued against Ms. Grey went beyond the necessary elements of felony harassment, and was a gratuitous attempt to inflict grave psychological and emotional pain on her. Specifically, the appellant told his probation officer, Eric Morgan, that he intended to take the Greyhound to King County and locate Ms. Grey. Having found Ms. Grey, the appellant further stated that he would rape her for several days and would then eventually kill her. Exhibit 1 at 77.²

Under RCW 9A.46.020, a person commits the crime of harassment by knowingly threatening to cause bodily injury immediately or in the future, and the person threatened is placed in reasonable fear the threat will be carried out. Harassment is a felony if the threat issued is a threat to kill. RCW 9A.46.020(2)(b). Thus, a person could commit the crime of felony harassment simply by saying "I will kill you." The appellant's specific threat to travel to King County and sexually violate the victim for

² The citations for the exhibits uses the number written by hand in the bottom right hand margin of these document.

several days before killing her went above and beyond the elements of the crime. The threats issued by the appellant were gratuitously cruel and could serve only to terrorize and disturb Ms. Grey as an end in itself. See State v. Talley, 83 Wn.App. 750, 760, 923 P.2d 721 (1996).

Prior decisions have upheld a finding of deliberate cruelty where the defendant slashed the victim's tires at her home, and made repeated, anonymous threatening phone calls to the victim. State v. Ratliff, 46 Wn.App. 466, 731 P.2d 1114 (1987). The court noted the defendant "inflicted excessive mental anguish upon the victim, much more than usually would be necessary to achieve this criminal purpose." Ratliff, 46 Wn.App. at 469. The court based this finding on the fact that: "the victim is a single woman living alone, Ratliff's actions greatly upset her life. She became afraid to answer her telephone or drive her car. The victim's work as an attorney was disrupted, and she was afraid to go anywhere or do anything by herself." Id. at 467.

Here, the appellant similarly chose to inflict excessive mental anguish upon Ms. Grey. Upon the appellant's release from prison for his attempted first-degree assault conviction, Ms. Grey met with her local police department and alerted her neighbors to the situation. She also obtained a cell phone and began to vary her schedule and travel routes. Ms. Grey describes herself as being in a state of "hyper-vigilance." Upon

learning of the appellant's latest macabre plans for her, Ms. Grey's fear and anxiety increased "exponentially." Exhibit 4 at 84-86; see also Exhibits 5, 6, and 7.

Finally, the simple fact that the appellant threatened to rape Ms. Grey for several days prior to killing her supports a finding of deliberate cruelty. Courts have recognized the uniquely devastating effect a rape has on victims, holding that "rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure." Farmer v. Brennan, 511 U.S. 825, 853, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Courts in Minnesota have upheld an exceptional sentence for deliberate cruelty where the defendant threatened to rape and kill the victim's child. State v. Southard, 360 N.W.2d 376, 383 (Minn.Ct.App. 1985). Due to the similarity in their respective sentencing schemes, Minnesota sentencing caselaw is persuasive authority in Washington. In re King, 54 Wn.App. 50, 53, 772 P.2d 521 (1989). Thus, when the appellant gratuitously added the threat to rape Ms. Grey for several days to his threat to kill her, he engaged in flagrantly deliberate cruelty. This Court should uphold the trial court's finding on this aggravating factor, as the facts and the law provide an ample basis for this finding.

b. The Trial Court Did Not Err by Finding the Appellant Demonstrated or Displayed an Egregious Lack of Remorse.

A defendant's lack of remorse may be an aggravating factor that justifies an exceptional sentence, if the lack of remorse is "egregious." RCW 9.9A.535(3)(q). Whether the lack of remorse is egregious depends on the facts and circumstances of the particular case. State v. Wood, 57 Wn.App. 792, 800, 790 P.2d 220 (1990). Lack of remorse has been found to be egregious where the defendant blames the criminal justice system for the crime, rather than taking responsibility for his own conduct. State v. Ross, 71 Wn.App. 556, 563, 861 P.2d 473 (1993) (defendant claimed that if he had not been imprisoned for robbery, he would have joined the army and would not have killed the victim).

In this case, the appellant made various statements to the police while incarcerated for a probation violation. Specifically, the appellant stated "[y]ou can't arrest people for the things they say." Exhibit 1 at 78. The appellant then engaged in the following exchange with the police:

BERRIER was quite adamant that he could not get in trouble for saying what he thought. BERRIER said, "BIG DEAL, SO I SAID SOME THINGS," but said he knew he could not go to prison just for saying things. BERRIER said he has been saying things for years and he had never been charged with anything before. BERRIER said he did not understand why he would be charged now. BERRIER continually said that all he ever wanted was to be in a good place to live and to get the help he needs, and that essentially it is not his fault for being in this position. BERRIER

also said repeatedly that he needs help, not punishment, and that he wanted to get to Western State Hospital. BERRIER said, "I'M SUPPOSED TO BE UP HERE ON A 30 DAY PROBATION VIOLATION AND NOW YOU GUYS WANT TO GET TOGETHER AND MAKE IT THE REST OF MY LIFE IN PRISON BECAUSE I MADE SOME STATEMENTS THAT I SHOULDN'T HAVE WHEN I WASN'T IN MY RIGHT FRAME OF MIND."

Id. at 79. The appellant also expressed displeasure with his charges to his competency examiner Dr. Finch, stating he had seen other inmates get away with saying things and that he had "said it but did not mean it" in reference to the threats against Ms. Grey. Exhibit 12 at 165. These statements demonstrate vividly the appellant's lack of remorse and understanding about the effect his threats had on Ms. Grey. Sarcastically referring to his threats to repeatedly rape and then kill the victim as a "big deal" displays the egregiousness of his lack of remorse.

The appellant's lack of remorse becomes even more apparent when his history of making threats is considered. As revealed by Dr. Bruce Olson's psychological evaluation, the appellant has a long history of making threats to prison staff and women in particular. Exhibit 11 at 112. The appellant has also previously claimed to be a serial killer and vacillates between confessing to various murders of women to then recanting these confessions. Id. at 114. Despite this long history of threatening behavior, the appellant displayed absolutely no remorse for the

vile threats he issued against Ms. Grey. Instead, the appellant “said he has been saying things for years and he had never been charged with anything before.” Exhibit 1 at 78. The only remorse the appellant displayed was for himself and for being caught, not for the victim. Given the facts of the case, the lack of remorse displayed by the appellant is blatant and egregious, and the trial court’s finding on this factor should be upheld.

c. The Trial Court Did Not Err by Finding the Appellant Committed the Offense to Retaliate Against a Public Official.

Finally, the appellant argues that his threats were not retaliation against a public official. The courts have recognized that an “attack on an official for performing his duties not only threatens the victim but also jeopardizes the functioning of the criminal justice system itself,” and that such conduct justifies an exception sentence. State v. Chance, 105 Wn.App. 291, 298, 19 P.3d 490 (2001). Post Blakely, this aggravating factor has been codified as RCW 9.94A.535(3)(x).

The evidence in this case clearly establishes that the appellant held a grudge against Ms. Grey due to actions she took in her job as a unit supervisor at the Monroe Correctional Complex. The appellant became fixated on Ms. Grey and was furious at her for having him transferred to another, less desirable, unit. See Exhibits 3-6. The appellant’s instant threats are born of this same animosity towards Ms. Grey for carrying out

her duties to the criminal justice system. As a correctional officer, Ms. Grey was charged with administering and executing the appellant's court decreed sentence for attempted assault in the first degree. The appellant's actions in this case are strikingly similar to those in Chance, 105 Wn.App. 291. There, the defendant held a grudge against a former deputy prosecutor who had convicted him of various crimes. Years later, the defendant chased and assaulted his former prosecutor outside the Thurston County Courthouse. Id. at 294. The Chance court found this assault, years later, was in retaliation for the prosecutor having carried out his official duties. Id. at 297. Here, the appellant continued to retaliate against Ms. Grey after his release from prison by issuing his threats to rape and kill her. These threats were clearly motivated, *inter alia*, by the appellant's continued displeasure with Ms. Grey's official actions. As such, the trial court's finding was supported by the evidence and should be upheld.

d. The Thirty-Month Exceptional Sentence Was Not Excessive.

The final claim advanced by the appellant is that his exceptional sentence was excessive. However, an appellate court has broad discretion to affirm the length of an exceptional sentence. State v. Burkins, 94 Wn.App. 677, 701, 973 P.2d 15 (1999). Indeed, an exceptional sentence will only be overturned as excessive where its length "shocks the

conscience”. Burkins, 94 Wn.App. at 701; State v. Vaughn, 83 Wn.App. 669, 681, 924 P.2d 27 (1996). A sentence of 100 years, which was three times longer the top end of the standard range, has been held to not sufficiently shock the conscience to require reversal. State v. Smith, 82 Wn.App. 153, 167, 916 P.2d 960 (1996).

Here the trial court imposed an exceptional sentence of thirty months, where the standard range for the offense was four to twelve months. This sentence is less than three times greater than the top of the standard range, which was the sentence upheld in Smith. In addition, the record amply demonstrates the grave danger the appellant posed to Ms. Grey and the community at large. The psychological evaluation, in particular, shows the appellant to be a deeply disturbed individual with a history of violence and dark sexual fantasies towards women. Exhibit 11. When the totality of the circumstances is taken into account, the thirty-month sentence does not “shock the conscience” and is instead wholly appropriate given the appellant’s history and the aggravating factors.

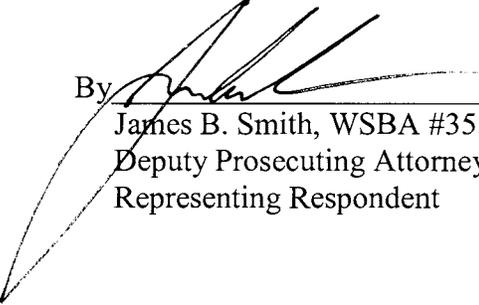
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the appellant’s appeal. There is no basis to require the aggravating factors be alleged in the information, and the evidence and

law support these factors. The State asks this Court to uphold the exceptional sentence imposed by the trial court.

Respectfully submitted this 23rd day of August, 2007.

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By 

James B. Smith, WSBA #35537
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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

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 vs.)
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 TIMOTHY J. BERRIER,)
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 Respondent.)
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NO. 35470-5-II
Cowlitz County No.
06-1-00876-3

CERTIFICATE OF
MAILING

I, Audrey J. Gilliam, certify and declare:

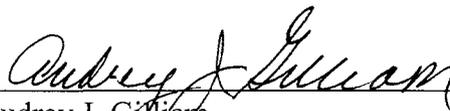
That on the 24 day of August, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Lisa E. Tabbut
Attorney at Law
P. O. Box 1396
Longview, WA 98632

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

Dated this 24 day of August, 2007.


Audrey J. Gilliam