

NO. 46741-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

FERNANDO PAUL HODGSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02199-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The exceptional sentence was properly based on a jury found aggravator because the “abuse of trust” aggravator does not inhere in the crime of child molestation in the first degree.**
- II. **The post-conviction sexual assault protection order was improperly issued when it was based on the crime of indecent exposure because indecent exposure is not a sex offense.**
- III. **The community custody condition that Mr. Hodgson have no contact with any minors without approval of DOC and a sexual deviancy treatment provider was an appropriate crime-related prohibition.**
- IV. **The community custody condition that Mr. Hodgson have no position of trust or authority over minor children without approval of DOC and a sexual deviancy treatment provider was an appropriate crime-related prohibition.**
- V. **Though the trial court did not enter findings pursuant CrR 3.5 for the second CrR 3.5 hearing that occurred at trial, there is no need for the entry of findings since no error is alleged related to defendant’s statements admitted as a result of that hearing.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Fernando Hodgson was charged by third amended information with Child Molestation in the First Degree for an incident occurring on or

about November 15, 2013 with victim M.L.G., a second count of Child Molestation for an incident occurring on or about and between September 1, 2012 and November 14, 2013 with victim M.L.G., and one count of Indecent Exposure to Victim Under 14 for an incident on or about and between September 1, 2012 and November 15, 2013 with victim W.M.G. CP 1-2. Each count of Child Molestation alleged as an aggravating circumstance that “[t]he defendant used his or her position of trust and/or confidence to facilitate the commission of the current offense. RCW 9.94A.535(3)(n).” CP 1-2.

The case proceeded to a jury trial before The Honorable Scott Collier, which commenced on August 26, 2014 and concluded with a jury verdict on September 2, 2014. CP 3-7; RP 406-1566. The jury convicted Mr. Hodgson of the first count of Child Molestation, answered yes on the aggravating factor, and convicted him of Indecent Exposure, but acquitted him of the second count of Child Molestation. CP 3-7; RP 1560-66. The trial court sentenced Hodgson to an exceptional sentence of 87 months to life and imposed a sexual assault protection order and no-contact provisions to which Hodgson assigns error and which are discussed below. CP 8-33; RP 167. Hodgson filed a timely notice of appeal. CP 34.

B. FACTUAL HISTORY

The State adopts Hodgson's Statement of the Case as set forth in his brief at section C. Br. of App. at 3-10. Hodgson's Statement of the Case is a fair summary of a relatively voluminous trial record. The State augments the adopted factual summary with additional facts below and additional facts, as necessary, in the argument section.

Hodgson had a piercing in his penis that was ring-like. RP 581-83, 588, 930-31, 1201-02, 1226. This information was never shared with Ms. Grennell's children, M.L.G. and W.M.G. RP 931. In order to notice the piercing, one would have to be looking Hodgson's penis up close. RP 1201-02, 1226. M.L.G. described his penis as having a piercing and that the piercing was like an earring. RP 581-83, 588. W.M.G. described Hogson's penis as "kind of a [sic] upside down mushroom," but did not mention a piercing. RP 1085-87.

Both child victims explained that Hodgson would give them sleeping pills at night and said that the pills were either orange or pink in color. RP 463, 514, 682, 971-72, 1088. The sleeping pills were generic Benadryl, a bottle of which was found in Hodgson's property. RP 972, 1219. Hodgson admitted to giving that drug to the girls but claimed it only

happened one time and that he ceased doing it after being confronted by Ms. Grennell. RP 1219.

Additionally, M.L.G. reported a series of events in which Hodgson would appear naked in her bedroom at night when she was supposed to be sleeping. RP 569-75, 682, 963-64. In these instances, he would stand in M.L.G.'s room and rub his penis. RP 571-75, 963-64.

After Ms. Grennell called the police and Hodgson fled the scene, he stayed the night thru morning in a nearby vacant field and did not return to the house even when he knew the police had left. RP 943-46, 1112-13, 1203-05. That morning, however, he did send a text message to Ms. Grennell stating: "I don't know what was said to you but I would not hurt your girls or you in any way. . . ." RP 951. Nonetheless, during his interview with the police he claimed to not have any idea why they would want to talk to him. RP 1099-1100, 1115-17.

ARGUMENT

- I. **The exceptional sentence was properly based on a jury found aggravator because the "abuse of trust" aggravator does not inhere in the crime of child molestation in the first degree.**

RCW 9.94A.535, a portion of the 1981 Sentencing Reform Act (SRA), permits a trial court to sentence one convicted of a crime above the

standard range imposed under sentencing guidelines—an exceptional sentence—provided a jury finds certain aggravating circumstances. RCW 9.94A.535(3); *State v. Allen*, 182 Wn.2d 364, 382, 341 P.3d 268, 277 (2015); *State v. Manlove*, 186 Wn.App. 433, 437-438, 347 P.3d 67 (2015). “The legislative intent of the SRA's exceptional sentence provision is to authorize courts to tailor the sentence, as to both the length and the type of punishment imposed, to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid.” *Manlove*, 186 Wn.App. at 439 (citing *State v. Davis*, 146 Wn.App. 714, 719–20, 192 P.3d 29 (2008)).

An exceptional sentence, however, cannot be imposed when the aggravating circumstance found by the jury is inherent in the crime for which the defendant was convicted. *State v. Pappas*, 176 Wn.2d 188, 196-197, 289 P.3d 634 (2012). In other words, if the jury necessarily finds the aggravating circumstance when it finds the defendant guilty of the crime charged then the aggravating circumstance is inherent in the crime. *Id.*; *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

One aggravating circumstance or factor a jury can find—and the one the jury in this case in fact found—is if the defendant “used his or her position of trust, confidence, or fiduciary responsibility to facilitate the

commission of the current offense.” RCW 9.94A.535(3)(n). This is often referred to as the “abuse of trust” aggravator.

Here, Hodgson argues that the abuse of trust aggravator “inheres in the crime of first-degree child molestation.” Br. of App. at 12. Two sentences later, however, Hodgson necessarily acknowledges that the aggravator does not inhere in the crime by stating that “[i]n the *vast majority* of cases, an offender has access to a child because of a trust relationship between the child’s parent or caregiver and the offender.” Br. of App. at 12 (emphasis added). This is a straightforward conclusion because a person need not be in a position of trust to commit the crime of child molestation in the first degree, e.g., a stranger can commit the crime. Thus, the trial court did not err when it relied on the abuse of trust aggravator found by the jury to sentence Hodgson to an exceptional sentence.

II. The post-conviction sexual assault protection order was improperly issued when it was based on the crime of indecent exposure because indecent exposure is not a sex offense.

Pursuant to RCW 7.90.150(6)(a), when a condition of the defendant’s sentence restricts the defendant’s ability to have contact with the victim of his crime, a sexual assault protection order shall issue provided the defendant was found guilty of a sex offense as defined in

RCW 9.94A.030 or of a crime under RCW 9A.44.096 or RCW 9.68A.090. If, on the other hand, a defendant has not been convicted of one the enumerated crimes, then the no-contact provision of his sentence remains merely a condition of his sentence.

Here, as it pertains to W.M.G., Hodgson was convicted of indecent exposure to a victim under 14 in violation of RCW 9A.88.101(2)(b). CP 2, 8-12. Following his conviction, a sexual assault protection order was entered with W.M.G. as the listed protected party. CP 98-99. Hodgson argues that the trial court did not have authority to enter the sexual assault protection order because indecent exposure is not a sex offense as defined in RCW 9.94A.030, and that neither RCW 9A.44.096 or RCW 9.68A.090 applies to his indecent exposure conviction. Br. of App. at 14. He is correct. As a result, the sexual assault protection order at issue must be vacated, though the no-contact provision of his sentence would remain a condition of the sentence.

III. The community custody conditions that Mr. Hodgson have no contact with any minors or have no position of trust or authority over minor children without approval of DOC and a sexual deviancy treatment provider was an appropriate crime-related prohibition.

The SRA authorizes trial courts to impose crime-related prohibitions as conditions of a defendant's sentence. RCW 9.94A.505(8). “[B]ecause the imposition of crime-related prohibitions is necessarily fact-

specific and based upon the sentencing judge’s in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion.” *In re Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010).

When the conditions of a defendant’s sentence, however, “interfere with a fundamental constitutional right . . . such as the fundamental right to the care, custody, and companionship of one’s children,¹ [s]uch conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Id.* (quoting *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)). Accordingly, a trial has the authority to “restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State’s compelling interest in preventing harm and protecting children.” *State v. Corbett*, 158 Wn.App. 576, 598, 242 P.3d 52 (2010) (citing *State v. Berg*, 147 Wash.App. 923, 942, 198 P.3d 529 (2008); *State v. Ancira*, 107 Wn.App. 650, 654, 27 P.3d 1246 (2001)).

Corbett is instructive. 158 Wn.App. 576. There, the defendant was convicted of four counts of rape of a child in the first degree for acts against his wife’s then six-year-old daughter. *Id.* at 581-82. The sentencing court prohibited the defendant from having any contact with all minors, which necessarily included his biological children—two sons ages

¹ Otherwise known as the “right to parent.” *Id.* at 377.

10 and 14 who lived with their mother—as a condition of sentence. *Id.* at 597.

As is this case here, the defendant argued that his right to parent was violated by the condition of no-contact with minors based, in part, on the fact that his children were not the victims in his case and the argument that the State failed to show that the no-contact condition was necessary to protect them. 158 Wn.App. at 597; Br. of App. at 18. *Corbett*, however, rejected that argument noting that the defendant “abused his parenting role by sexually abusing a minor in his case” and concluded that the “[t]he no-contact order is reasonably necessary to protect [the defendant’s] children because of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children.” *Id.* at 599 (citing *Berg*, 147 Wn.App. at 943-44), 601. Similarly, *Corbett* rejected the defendant’s argument that the no-contact order was not “tailored to serve the State’s interest in protecting children because it applies to his sons when his victim was a girl” because the defendant’s manner of offending was not “gender specific.” *Id.* at 600.

There are no meaningful distinctions to be drawn between the defendant in *Corbett* and Hodgson, i.e., the difference in egregiousness of the conduct is one of degree and not of kind. Hodgson committed offenses against two children, abused the trust of them and their mother in order to

commit his crimes; he turned what was supposed to be bedtime into an opportunity to sexually abuse minor children. Hodgson also lived with his victims, despite not being married to their mother, as long, if not longer, as the defendant in *Corbett* did with his victim. Importantly, his no-contact conditions are also more narrowly tailored than those at issue in *Corbett*, as they allow contact with minors provided there is “prior approval of DOC and [a] sexual deviancy treatment provider.” CP 28, 30. Therefore, the trial court did not abuse its discretion when imposing as a condition of Hodgson’s sentence a prohibition on contact with all minor children, including his biological children, without prior approval.

IV. Though the trial court did not enter findings pursuant CrR 3.5 for the second CrR 3.5 hearing that occurred at trial, there is no need for the entry of findings since no error is alleged related to defendant’s statements admitted as a result of that hearing.

Pursuant to CrR 3.5(c) a trial court must enter written findings of fact and conclusions of law following a hearing on the admissibility of a defendant’s statements. A trial court's failure to comply with this requirement constitutes error, but the error is harmless if the court's oral findings are sufficient to allow appellate review. *State v. Thompson*, 73 Wn.App. 122, 130, 867 P.2d 691 (1994). Moreover, the absence of written findings are not grounds for reversal absent a showing prejudice. *Id.*

Here, the trial court's oral findings are sufficient to allow appellate review, but no error is alleged related to the admission of Mr. Hodgson's statements following the second CrR 3.5 hearing. RP 647; Br. of App. at 19-21. Nor is there an argument that Mr. Hodgson was prejudiced as a result of the failure to enter findings. Br. of App. at 19-21. Because the oral findings are sufficient and no error is alleged in the admission of the statements or prejudice alleged due to the absence of findings, there is no need to remand this case for the entry of findings.

CONCLUSION

For the reasons stated above, Mr. Hodgson's sentence should be affirmed, the sexual assault protection order should be vacated, and the no-contact provision of his sentence should remain.

DATED this 10th day of November 2015.

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