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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 28299-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant/Cross-Respondent,

vs.

MIZAEL MAGANA,

Defendant/Respondent/Cross-Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
HONORABLE JAMES C. LUST

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# SUPPLEMENTAL BRIEF OF RESPONDENT/CROSS-APPELLANT

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## A. SUPPLEMENTAL STATEMENT OF THE CASE

Mizael Magana, Respondent-Cross-Appellant herein, incorporates by reference the Statement of the Case set forth in his Brief of Respondent/Cross-Appellant at pp. 2–7.

On December 16, 2010, a Commissioner of this Court granted the parties' agreed motion to remand for entry of findings of fact and conclusions of law regarding the exceptional sentence. On file. On March 7, 2011, written findings/conclusions were entered by the trial court and forwarded to this Court. CP 178–82. The Court set a schedule for supplemental briefing, if any, by the parties. Court's letter dated March 10, 2011. The State of Washington, appellant/cross-respondent, has not filed a supplemental brief.

## B. SUPPLEMENTAL ARGUMENT

**1. The reasons for imposing the mitigated exceptional sentence set forth in written findings of fact and conclusions of law are supported by the record and justify a sentence out side the standard range for the offense.**

The trial court has now entered written findings of fact and conclusions of law regarding the mitigated sentence, as required by RCW 9.94A.535. CP 178–82. Because the court's reasons have a factual basis,

are valid mitigating factors as a matter of law and are clearly not too lenient, the mitigated sentence must be upheld.

a. Unchallenged findings are verities on appeal.

Unchallenged findings of fact are verities on appeal and an appellate court reviews only those facts to which the appellant has assigned error. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). A finding of fact is an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect, while a conclusion of law is the determination made by a process of legal reasoning from the facts. The court reviews findings of fact that are improperly called conclusions of law as findings of fact. Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wn. App. 408, 417-18, 225 P.3d 448 (2010). Herein, since the State has not assigned error to any of the trial court's findings, the unchallenged findings are verities on appeal.

b. Standards of review.

A trial 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." RCW 9.94A.535. An appellate court may reverse only if it finds, [1] using a clearly erroneous

standard, "that the reasons supplied by the sentencing court are not supported by the record which was before the judge"; [2] using a *de novo* standard, "that those reasons do not justify a sentence outside the standard sentence range for that offense"; or, [3] using an abuse of discretion standard, "that the sentence imposed was clearly excessive... ." RCW 9.94A.585(4); State v. Solberg, 122 Wn.2d 688, 705, 861 P.2d 460 (1993).

An exceptional sentence below the standard range may be imposed if the court finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). The statute's list of mitigating circumstances are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1).

Here, the written findings show that the trial court imposed the exceptional mitigated sentence on three related bases: Mizael's juvenile age at the time of the crime[1], his minimal level of participation in the crime and that the offense was principally accomplished by another person. The trial court *did not* base the mitigated sentence on disparate sentencing and this Court should disregard undersigned counsel's

[1] Although youthful age alone is not a proper mitigating factor, State v. Ha'mim, 132 Wn.2d 834, 846–47, 940 P.2d 633 (1997), it may be considered in conjunction with other mitigating factors. *See* State v. Statler, No. 28195-7-III, 2011 WL 873438, *7–8 (March 15, 2011).

argument in this regard at pp. 9–10 of Brief of Respondent/Cross-Appellant. The reasons given by the court are supported by the record and justify the exceptional sentence which is not clearly too lenient.

c. Minimal involvement. The record supports the sentencing court's findings to the effect that Mizael's involvement in the entire drive-by shooting incident was minimal. An accomplice's minimal involvement is a proper factor for the court to consider in imposing an exceptional sentence below the standard range. State v. Moore, 73 Wn. App. 789, 796–97, 871 P.2d 642 (1994). "[A]n accomplice and principal should be treated alike insofar as the determination of guilt or innocence is concerned. That does not mean, however, that minimal involvement in criminal activity may not be considered by a sentencing court in determining whether to impose a sentence below the standard range." Id. at 798–99.

During the four day bench trial, the trial court heard testimony from nine State's witnesses and three defense witnesses. RP 102–553. The court determined that Mizael was guilty as an accomplice of the counts of assault and drive-by shooting. CP 38, 180–81. For purposes of the mitigated sentence, however, the court found there was credible evidence that Mizael was present as the center rear passenger of the car

and was not firing a gun[2]. Nor was Mizael armed with a gun[3]. There was also a lack of evidence that the defendant was an instigator[4]. Furthermore, Mizael was not in control of the car, and was not directing or controlling events[5]. These findings—which have not been challenged by the State—amply support the court's conclusion that by a preponderance of the evidence the commission of the assaults/drive-by shooting was principally accomplished by a person other than Mizael and that his participation in the crimes was minimal. Conclusion of Law 9 and 11 at CP 181.

d. Excessive length of the sentence given all circumstances.

The record supports the sentencing court's finding that the presumptive length of the sentence was excessive under the circumstances. ¶ 2.6 at CP 25. Mizael was convicted solely on an accomplice theory, and although "only a rider, not a shooter" he was stuck with the two firearm enhancements. 7/6/09 RP 7, 10. The court reasonably concluded that the standard ranges for the assaults, including mandatory 60-month sentences for the firearm enhancements, of 171 to 207 months (Count I) and 153 to 183 months (Count 2) was clearly excessive. Through a mitigated sentence, the court actually imposed a sentence of 168 months. CP 26.

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[2] Finding of Fact 14 at CP 180.
[3] The court dismissed the charge of unlawfully possessing a firearm, finding that Mizael did not have a firearm in his possession or control. 5 RP 586.
[4] Conclusion of Law [sic] 10 at CP 181.

The State incorrectly contends that the sole basis the trial court gave for the downward departure was the "multiple offense police [sic] of RCW 9.94A.589." Brief of Appellant, pp. 3–4. These words were never uttered by the court and, as the State admits, defense counsel only "suggested" that the basis for an exceptional "could be" the operation of that policy. Brief of Appellant, p. 3. Therefore, the State's reliance on State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047, *rev. denied* 144 Wn.2d 1005, 29 P.3d 717 (2001) is unfounded and irrelevant as it applies to this case. Brief of Appellant, p. 5–6.

The trial court's written findings do not reference the multiple offense mitigating factor set forth in RCW 9.94A.535(1)(g). The Judgment and Sentence form at ¶ 2.6 states: "Exceptional Sentence: Substantial and compelling reasons exist which justify an exceptional sentence based on the ~~disparity~~ length (handwritten in) of the sentence, which is clearly excessive. RCW 9.94A.531(1)(q)." CP 25. It therefore appears the trial court *did not* base the mitigated sentence on the operation of the multiple offense mitigating factor.

In any event, Bridges involved the operation of the policy where there were multiple charges stemming from multiple controlled buy drug

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[5] Conclusion of Law [sic] 10 at CP 181.

transactions. Unlike Bridges, this case involves multiple charges and mandatory firearm enhancements stemming from only one incident.

This case is more akin to State v. Smith, 124 Wn. App. 417, 102 P.3d 158 (2004), *aff'd on other grounds*, 159 Wn.2d 778, 154 P.3d 873 (2007). In Smith,, a single act of shooting into a car with three occupants yielded three convictions of second degree assault and three weapon enhancements. The reviewing court concluded that the "multiple offense policy" factor was properly applied and, since the three consecutive enhancements were mandatory, the court could properly reduce the base sentences of 15 to 20 months to concurrent one-day sentences on each count. Smith, 124 Wn. App. 435–38.

Herein, there was also a single incident of shooting into a car with three occupants. Presumably the only difference in charging assaults regarding the driver and passenger and charging drive by shooting regarding the infant was that the state could not prove that the shooter intended to assault the child. As in Smith, the two consecutive enhancements were also mandatory. The trial court here did not reduce the base sentence to a negligible amount as in Smith, but instead imposed two consecutive 24 month sentences on the assaults to correspond to the maximum sentence regarding the third victim. Under Smith, the trial

court's action was reasonable and a proper application of the multiple offense policy.

e. A sentence of 14 years (168 months) is not clearly too lenient.

Once a sentencing court finds substantial and compelling reasons for imposing an exceptional sentence, it is permitted to use its discretion to determine the precise length of that sentence. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995); State v. Ross, 71 Wn. App. 556, 568, 861 P.2d 473 (1993). A sentence is clearly excessive if it is imposed on untenable grounds, for untenable reasons. Ross, 71 Wn. App. at 568-69, 861 P.2d 473. The question of whether a sentence is excessive is reviewed for an abuse of discretion. State v. Sanchez, 69 Wn. App. 195, 207, 848 P.2d 735 (1993). In determining if the length of a particular sentence is appropriate, the court should consider " 'whether the sentence imposed was one which no reasonable person would impose.' " Ross, 71 Wn. App. at 571, 861 P.2d 473. A trial court does not abuse its discretion in determining the length of an exceptional sentence unless it relies upon an impermissible reason or imposes a sentence so long [or short] that it shocks the conscience of the reviewing court. Ross, 71 Wn. App. at 571-72, 861 P.2d 473.

Here, the court sentenced Mizael to two years on each assault, to be served consecutively. When added to the two mandatory, consecutive five-year terms for the firearm enhancements, Mizael will serve 10 years in prison with no reduction for good time, plus 4 additional years, for a total of 14 years (168 months). In Smith, the defendant was sentenced to serve 9 years (108 months) in prison with no reduction for good time, plus one day.

> Finally, we must decide whether the court abused its discretion in sentencing the defendant too leniently. We cannot say that no other judge, when faced with these facts, would impose this sentence. Therefore, we hold the trial court did not abuse its discretion.

Smith, 124 Wn. App. at 437–38. Likewise, one cannot say that *no* other judge, when faced with the facts in this case, would impose the sentence thoughtfully crafted by the court. The trial court did not abuse its discretion.

**2. The terms of community custody imposed by the court exceed the terms authorized by applicable law.**

Mr. Magana incorporates by reference the argument on this issue set forth in his Brief of Respondent/Cross-Appellant at pp. 14–15. He accepts the State's concession that the term of community custody was improperly set and should be corrected. Reply Brief of Appellant at p. 23.

**3. Allowing a community corrections officer to determine without a hearing whether a treatment counseling program is necessary and crime-related violates due process and constitutes an excessive delegation of judicial authority.**

Herein, as a condition of sentence, the court ordered Mizael to:

> Attend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer.

CP 27. Mr. Magana incorporates by reference the argument on this issue set forth in his Brief of Respondent/Cross-Appellant at pp. 16-22. He accepts the State's concession that the condition is an improper delegation of the court's authority (Reply Brief of Appellant at p. 23-24), but contends the remedy is not remand but rather to strike the offending condition.

## C. CONCLUSION

For the reasons stated, the court did not err in imposing an exceptional sentence below the standard range. The judgment of the trial court should be affirmed and the matter remanded to correct the term of community custody and strike the offending condition.

Respectfully submitted June 6, 2011

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Attorney for Appellant