

FILED
MAR 22 2012
COURT OF APPEALS
DIVISION III
SPokane, Washington

30126-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK P. MANN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED
MAY 22 2012
COURT OF APPEALS
DIVISION III
SPokane, Washington

30126-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK P. MANN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....3

ARGUMENT.....3

 A. THE DEFENDANT CANNOT CONTEST THE
 JURY INSTRUCTIONS.....3

 B. THE DEFENDANT CANNOT ATTACK THE
 JURY INSTRUCTIONS AS HE DID NOT OBJECT
 TO ANY OF THE INSTRUCTIONS AT TRIAL.....6

 C. THE TRIAL COURT’S FINDING THAT THE
 DEFENDANT’S CURRENT SCORE OF 12
 RESULTED IN TOO LENIENT A SENTENCE
 BECAUSE OF THE RESULTS OF THE MULTIPLE
 CURRENT OFFENSE RULES WAS NOT IN
 ERROR7

 D. THE ELEMENTS OF THE SRA REQUIRING A
 FINDING OF SUBSTANTIAL AND COMPELLING
 REASONS IS NOT “VAGUE”8

 E. RCW 9.94A.535 IS NOT UNCONSTITUTIONALLY
 VAGUE.....9

 F. THE DEFENDANT’S ABILITY TO PAY WILL BE
 DETERMINED AT A FUTURE POINT13

CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BERTRAND, 165 Wn. App. 393, 267 P.3d 511 (2011).....	13, 14
STATE V. BLANK, 131 Wn.2d 230, 930 P.2d 1213 (1997).....	13
STATE V. GORDON, 172 Wn.2d 671, 260 P.3d 884 (2011).....	4
STATE V. JACOBSON, 92 Wn. App. 958, 965 P.2d 1140 (1998), <i>review denied</i> , 137 Wn.2d 1033, 980 P.2d 1282 (1999).....	12
STATE V. LAW, 154 Wn.2d 85, 110 P.3d 717 (2005).....	10
STATE V. MUTCH, 171 Wn.2d 646, 254 P.3d 803 (2011).....	8
STATE V. O'HARA, 167 Wn.2d 91, 217 P.3d 756 (2009).....	4
STATE V. SCOTT, 110 Wn.2d 682, 757 P.2d 492 (1988).....	6
STATE V. TEUBER, 109 Wn. App. 640, 36 P.3d 1089 (2001).....	12
STATE V. WILSON, 96 Wn. App. 382, 980 P.2d 244 (1999).....	12
STATE V. ZIEGENFUSS, 118 Wn. App. 110, 74 P.3d 1205 (2003), <i>review denied</i> , 151 Wn.2d 1016 (2004).....	13

SUPREME COURT CASES

BLAKELY V. WASHINGTON, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	9
--	---

STATUTES

RCW 9.94A.010..... 10
RCW 9.94A.505..... 10
RCW 9.94A.535..... 9
RCW 9.94A.535(c)..... 7, 8
RCW 9.94A.585..... 12
RCW 9.94A.585(2)..... 12
RCW 9.94A.585(4)..... 12

COURT RULES

CrR 6.15(c) 2, 6
RAP 2.5..... 3
RAP 2.5(a)(3)..... 3, 6

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding No. 3 at CP 146:
 3. On April 14th, 2011, the jury found the defendant abused his position of trust in the commission of these crimes.
2. To the extent it is a finding of fact, the court erred in entering Conclusion of Law No. 4 at CP 146:
 4. [sic] The defendant used his position of trust to facilitate multiple sexual assaults of the victim over a considerable amount of time.
3. To the extent it is a finding of fact, the court erred in entering Conclusion of Law No. 5 at CP 146:
 5. [sic] The defendant is a real danger to the community and a standard range sentence is too lenient under the fact and circumstances of this case.
4. To the extent it is a finding of fact, the court erred in entering Conclusion of Law No. 9 at CP 147:
 9. [sic] Either one of the bases found here alone would justify the exceptional sentence imposed. This Court would impose the same sentence based upon any one of the factors stated above standing alone.
5. The trial court erred in imposing an exceptional sentence.

6. The absence of a standard guiding the determination of whether “substantial and compelling reasons” support an exceptional sentence violates the Fourteenth Amendment Due Process Clause.
7. The record does not support the finding that Mr. Mann has the current or future ability to pay legal financial obligations.

II.

ISSUES PRESENTED

- A. Can the defendant raise, for the first time on appeal, issues regarding the jury’s finding of an abuse of a position of trust when the defendant raised no objections at trial?
- B. In light of the defendant’s express approval of the jury instructions is the defendant prohibited from raising any issues related to the instructions by action of CrR 6.15(c)?
- C. Did the trial court properly find the exceptional sentencing factor of a “too lenient sentence” due to the action of the multiple current offense rules?

- D. Is the language in the SRA requiring the trial court to find “substantial and compelling reasons” to impose an exceptional sentence, unconstitutionally vague?
- E. Does the current process for sentencing the defendant under the SRA deprive the defendant of due process and meaningful review?
- F. Is the defendant’s issue regarding payment of LFOs ripe for review?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant’s version of the Statement of the Case.

IV.

ARGUMENT

- A. THE DEFENDANT CANNOT CONTEST THE JURY INSTRUCTIONS.

Generally, RAP 2.5(a)(3) prohibits a party from raising an issue for the first time on appeal unless the issue shows a “manifest error affecting a constitutional right.” RAP 2.5. The defendant in this case has the burden

of showing that (1) the claimed error is “truly of constitutional dimension” and (2) the error was “manifest.” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). It is not enough to simply claim that an error is of constitutional magnitude. *Id.*

Jury instruction errors are not automatically constitutional in magnitude. *See O'Hara*, 167 Wn.2d at 106. The error being claimed by the defendant is that the jury was not instructed to find an aggravating circumstance (abuse of trust) for each of the previously returned rape convictions. The defendant calls this a violation of his constitutional right to a unanimous jury verdict. The State counters that such is an erroneous claim. The jury was absolutely unanimous on the question of “abuse of a position of trust.” The defendant misstates the claim. The jury was unanimous, but it is unknown exactly whether the jury’s decision applied to Count II, III or IV.

If the error is found to be constitutional, then this court must determine whether the claimed error is manifest. *O'Hara*, 167 Wn.2d at 99. To show an error is “manifest,” an appellant must show that the asserted error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). This is the point at which the defendant’s issue is clearly shown not to be “manifest” and that all the defendant’s arguments along these lines must fail.

The jury was asked to return a special verdict and it answered “yes” to the question of whether the defendant abused a position of trust in committing the crime. Even if the defendant is correct that the jury should have been instructed as to which counts were being addressed, there was *no prejudice* to the defendant. Each count was very similar, involving rape of the same victim on different dates.

An examination of the Judgment and Sentence shows that 160 months were added to each of the counts II through IV as an exceptional sentence. Therefore, at least one count was found by the jury to constitute an abuse of discretion. That being the case, it does not matter what happens after that. If all three child rape counts were committed by an abuse of discretion, or only one was committed by an abuse of discretion, the outcome is the same. All counts ran concurrently, as did all of the exceptional sentences. Thus, the defendant’s amount of incarceration was set at 478 months. If it had been one count or three addressed by the jury, the final amount of incarceration would remain 478 months.

Because there was no change in the outcome of the sentencing, the defendant cannot legitimately claim to have suffered any prejudice as a result of the way the jury was instructed. Thus, the claimed error is *not* manifest and the defendant can not raise this issue for the first time on appeal.

The requirements for an exception to the general rule prohibiting raising an issue for the first time on appeal have not been met. This issue cannot be raised. RAP 2.5(a)(3).

B. THE DEFENDANT CANNOT ATTACK THE JURY INSTRUCTIONS AS HE DID NOT OBJECT TO ANY OF THE INSTRUCTIONS AT TRIAL.

In addition to the reasons outlined in the previous section, the defendant cannot contest the jury instructions because he did not contest the jury instructions at trial. CrR 6.15(c). CrR 6.15(c) requires timely and well-stated objections to jury instructions “in order that the trial court may have the opportunity to correct any error.” *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The defense was asked if they had any exceptions or objections to the jury instructions prior to the giving of the instructions. Defense counsel stated: “Your Honor, after consulting with Mr. Mann and having him leaf through a copy of these instruction, I make no exceptions or objections.” RP 389. This was not a passive acceptance of the instructions. The defendant went through the instructions and raised no objections.

C. THE TRIAL COURT'S FINDING THAT THE DEFENDANT'S CURRENT SCORE OF 12 RESULTED IN TOO LENIENT A SENTENCE BECAUSE OF THE RESULTS OF THE MULTIPLE CURRENT OFFENSE RULES WAS NOT IN ERROR.

The defendant assigns error to the trial court's finding that the defendant imposed an exceptional sentence based on the fact that the defendant's criminal history score was "12." CP 145. The trial court held that under RCW 9.94A.535(c) the defendant's high offender score resulted in some of the current offenses going unpunished. RCW 9.94A.535(c).

Although this finding and use of RCW 9.94A.535(c) would seem straightforward, the defendant attempts to discount the court's holding because the finding contains the words "is a real danger" and "is too lenient." The State asks at what point can a trial court produce a document without a defense counsel parsing the language *ad infinitum*. The defendant goes so far as to claim that since those words are not part of the factors which the trial court can find on its own, the entire finding and conclusion is defective. The defendant cites no authority for such a claim.

The defendant's rationale is difficult to understand. After outlining the defendant's offender score of "12" as a result of multiple current offenses, the defendant then notes that RCW 9.94A.535(c) allows the trial court to impose an exceptional sentence if the defendant's multiple current

offenses result in a “free crime.” *See State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). In a puzzling argument, the defendant then claims that the finding of facts does not establish “...any reason it fits within the parameter outlined in subsection (c).” Brf. of App. 19.

It makes little common sense to point out that the court’s findings note that the defendant’s score is “12,” that the trial court has the authority to order an exceptional sentence under the facts of this case, but then claim the trial court was in error because it did not meet the requirements of RCW 9.94A.535(c). It would take a determined effort on the part of a reader *not* to see that the requirements of RCW 9.94A.535(c) were fulfilled.

The State submits that in light of the jury’s finding of an “abuse of trust”, the “too lenient” factor is of lesser importance of the two factors.

D. THE ELEMENTS OF THE SRA REQUIRING A FINDING OF SUBSTANTIAL AND COMPELLING REASONS IS NOT “VAGUE.”

The defendant’s assignment of error No. 4 is simply a conclusion and reprise of his previous arguments and will be addressed in the following section of this brief.

E. RCW 9.94A.535 IS NOT UNCONSTITUTIONALLY VAGUE.

The defendant claims RCW 9.94A.535, which contains the requirement that the sentencing court find “substantial and compelling reasons” to impose an exceptional sentence, is unconstitutional because the statute does not provide objective limitations.

Before directly addressing the issue, the State submits that the defendant is not presenting correct interpretations. For example, the defendant takes the position that post-*Blakely*¹, the trial court is essentially rendered helpless in sentencing decisions. The defendant arrives at that conclusion by way of interpreting *Blakely* as removing the trial courts sentencing authority over anything to do with facts. Extending this reasoning, the defendant concludes that even though the statutes list the post-*Blakely* issues upon which the trial court has authority to operate, the defendant here argues that because the defendant’s criminal score is a “fact” and that the criminal score provides for a “free” crime is a “fact,” the defendant argues that the trial court cannot put those “facts” together to find the exceptional sentence factor. In simpler terms, the defendant argues for a “potted plant” function for sentencing courts. Presumably, if the defendant wishes to parse terms to the level shown in his brief, a trial

¹ *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

court could not function at all. The conviction(s) a defendant might have accrued and their sentencing range in the SRA are as much manipulations of “facts” as the defendant argues for the exceptional factor found by the trial court.

The net result of the defendant’s arguments on this point is a complete negation of the authority of the trial court to impose an exceptional sentence.

The defendant’s argument that “substantial and compelling reasons” is not defined ignores the language of the SRA. It is true that there has not been a concise definition of the phrase “substantial and compelling reasons”, but the claim of the defendant that the trial court’s decisions on this point are incomprehensible. *State v. Law*, 154 Wn.2d 85, 116, 110 P.3d 717 (2005) (commentators have noted the lack of a definition for the phrase “substantial and compelling reasons). Trial courts are specifically instructed to follow the SRA when sentencing to a felony. RCW 9.94A.505. RCW 9.94A.010 provides the purpose of the SRA. Trial courts are to sentence with the purpose of the SRA in mind. This provides the guidance and accountability the defendant appears to believe are absent from the SRA.

Appellate courts review lower court opinions on all manner of things. There is nothing in the defendant’s logic that would prevent an

appellate court from deciding whether the court used a “substantial and compelling reason.”

In another misconception, the defendant supports his arguments with the idea that the appellate court is banned from examining the trial court’s sentencing decisions. The defendant’s rationale is less than logical. He first argues that this court is limited to determining whether the judge’s stated reasons support the imposition of an exceptional sentence, but “it [appellate court] is left with no record to review, as the court has no insight into the jury’s deliberations.” Brf. of App. 28. This is an ironic argument in that it was a defense-bar promoted case, *Blakely*, that set up the jury determination of the sentencing facts doctrine. On one hand, *Blakely* prohibits the trial court making factual findings, yet the defendant faults that self-same trial court for not providing reasons for the imposition of an exceptional sentence. Brf. of App. 28. The defendant does not explain how the record on an exceptional sentence/special verdict trial is in any way different than the sorts of records that appellate courts read everyday. An appellate court is no more entitled to know the jury’s reasoning in a sentencing factor trial than in a standard jury trial.

It would appear that the defendant is attempting to make the process more difficult than it typically is. RCW 9.94A.585 states in part:

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the Supreme Court.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(2)&(4).

Division I of the Court of Appeals has addressed the defendant's "substantial and compelling reasons" vagueness arguments in several cases and has rejected the defense arguments each time. *State v. Teuber*, 109 Wn. App. 640, 36 P.3d 1089 (2001); *State v. Wilson*, 96 Wn. App. 382, 980 P.2d 244 (1999); *State v. Jacobson*, 92 Wn. App. 958, 968, 965 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1033, 980 P.2d 1282 (1999).

The result of the defendant's arguments is to make the statutorily based sentencing system unworkable. Despite the defendant's contentions, the exceptional sentencing provisions of the SRA are not locked into an immovable mass by *Blakely*.

F. THE DEFENDANT'S ABILITY TO PAY WILL BE DETERMINED AT A FUTURE POINT.

The defendant claims that because the record does not support the finding that the defendant has the current or future ability to pay legal financial obligations, this ability to pay must be stricken from the judgment and sentence. This is incorrect. This question was answered some time ago.

The Washington State Supreme Court has held that no inquiry into ability to pay at the time of sentencing is required. *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) "Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 242.

The defendant's challenge to his ability to pay is not ripe because it is being raised before collection efforts are made. The defendant's due process rights have not been impacted as he has not received notice that he must pay or be subject to punishment nor has any other action been taken by the State in regards to the LFOs addressed in the Judgment and Sentence. *See State v. Ziegenfuss*, 118 Wn. App. 110, 74 P.3d 1205 (2003), *review denied*, 151 Wn.2d 1016 (2004).

The defendant supports his arguments on this topic through a misreading of *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011).

The defendant cites only part of *Bertrand* and skips over the *Bertrand* court's resolution of the case. The *Bertrand* court held that since it reversed the trial court on the issue of ability to pay, the DOC could not begin collecting money without a future hearing on the ability to pay. *Bertrand, supra* at 516-17. The *Bertrand* court followed the same argument being made by the State in this case. The defendant has not presented any claim that the DOC or any other government agency is attempting to collect LFOs.

If it is desired by this court to bring this case fully into line with the holding of *Bertrand*, the finding of ability to pay of which the defendant now complains, would have to be temporarily removed until some future date when a hearing could be requested by the State.

However, a read of the sentencing transcript in this case shows that the LFO amounts and payments were set by a previous court in the defendant's prior sentencing. Sent. RP 445-46. This trial court was charged with submitting the fact of "abuse of a position of trust" to a jury, which it did. This court only noted the previous sentencing court's imposition of LFOs and monthly payment amounts. The State submits that this previous ruling was not part of this case and it is not proper for the defendant to attempt to roll a previous ruling into this current decision on a factual issue. The State argues that if the defendant wishes to contest

the imposition of LFOs and the ability to pay those amounts, the defendant must file a Personal Restraint Petition asking to address the previous ruling. The defendant should not be allowed to simply slip a prior ruling into the current case and thereby reap the advantage of a direct appeal on what should be a collateral attack.

If, at some future time the State pursues the defendant for payment of his outstanding legal financial obligations, the defendant will be entirely free to raise this issue before the Superior Court. Presumably, the Superior Court will then be in possession of the information needed to decide the issue.

V.

CONCLUSION

For the reasons stated, the exceptional sentences imposed by the trial court should be affirmed.

Dated this 22nd day of March, 2012.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent