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NO. 69102-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR BUZZELLE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock, Judge  
Superior Court Cause No. 12-1-00012-4

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BRIEF OF RESPONDENT

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**I. STATEMENT OF THE ISSUES**

- A. Whether the trial court properly imposed an exceptional sentence after the appellant knowingly, voluntarily, and intelligently waived jury determination of aggravating factors.
- B. Whether the trial court properly imposed an exceptional sentence when the appellant was provided adequate notice of the State's intention to argue multiple aggravating factors.

**II. STATEMENT OF THE CASE**

**A. Substantive Facts**

On January 1, 2012, the Island County Sheriff's Office received an initial allegation of child sexual assault of A.M.B. by the appellant, starting in approximately 2005 and continuing until the middle of December, 2011. CP 26. At the time of reporting, A.M.B. was fifteen years old; however, the alleged abuse began at age nine. Id. Although the appellant initially denied the allegations, he presented himself to the Sheriff's office on January 2, 2012 and confessed to sexually assaulting his daughter, A.M.B. Id.

The appellant stated A.M.B. slept with him because she was afraid of the dark, and he began rubbing her body, including her breasts and her vagina under her underwear. Id. He further described fondling, oral sex, having A.M.B. rub his penis, and placing her mouth on his penis. CP 27.

He stated the last act occurred two weeks prior to his confession, and involved rubbing A.M.B.'s vagina and pubic area. Id.

Detective Laura Price interviewed A.M.B. on January 3, 2012. Id. A.M.B. stated that she began sleeping with the appellant, her father, at age eight because of her fear of the dark. Id. When she was approximately nine years old, the appellant began rubbing her body, including putting his fingers inside her vagina and moving them, "in and out." Id. She would give the appellant body massages and he would direct her to touch his genitals. Id. This progressed to the appellant using his mouth and tongue on her vagina and having her use her mouth on his penis. Id. The appellant took showers with A.M.B. to wash her body and shave her pubic hair. Id. He had A.M.B. sit in his lap, both naked, while he rubbed his penis on her vagina until he ejaculated. Id. He would have A.M.B. watch pornography and asked her to masturbate herself. Id.

A.M.B. stated the appellant was very controlling of her, not allowing her to have friends. Id. She described the appellant as manipulative, causing her to continue to be afraid of the dark so she would come to his bedroom. Id. She described her relationship with the appellant, her father, as, "he kinda treated me almost like a wife." Id.

## **B. Statement of Procedural History**

The appellant was charged in Island County Superior Court with one count of Rape of a Child in the First Degree and one count of Child Molestation in the Third Degree. CP 120-22. Based on the appellant's relationship with A.M.B., both counts were charged as Domestic Violence offenses. Id.

The appellant pled guilty on May 29, 2012. CP 97-107. Prior to that hearing, the State had filed a Motion to Amend the Information. CP 108-15. While that motion did not change the filed charges, it did include specific allegations of seven aggravating factors for each charge. CP 110-15. Based on the appellant's plea of guilty, the State struck the motion to amend. 1RP 4.<sup>1</sup> However, the appellant's trial counsel confirmed that, "the State has given us notice that they will seek to prove the aggravators and to seek an exceptional sentence based on those at sentencing." 1RP 5. The trial court specifically confirmed with the appellant that he understood the issue of aggravating circumstances could be considered at the time of sentencing, and the appellant affirmed his understanding. 1RP 7. The trial court then accepted the appellant's change of plea, and a sentencing hearing was set for July 5, 2012. 1RP 8-11.

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<sup>1</sup> For ease of reference, citations to the Verbatim Report of Proceedings for the plea of guilty entered on May 29, 2012 and the sentencing hearing held on July 5, 2012 will be referred to here in the same format as used in the Appellant's Opening Brief (1RP for the guilty plea and 2RP for the sentencing hearing).

At the beginning of the sentencing hearing, the parties provided the trial court with a written Waiver of Jury Trial and an agreed Stipulation to Facts for Purposes of Sentencing. CP 21-96. The Waiver of Jury Trial, signed by the appellant, noted that he understood that, despite his plea of guilty, he retained a right to jury determination of the aggravating factors and that he was waiving that right after consultation with counsel. CP 21. Similarly, the Stipulation to Facts reiterated the appellant's right to jury trial and affirmed the appellant's waiver was made knowingly, freely and voluntarily without threats or promises. CP 23-24. The trial court engaged in a colloquy with the appellant regarding the waiver and stipulation, and the appellant orally confirmed that he had reviewed the documents and understood their contents. 2RP 7. After reviewing the agreed documentary evidence, the trial court held a second colloquy with the appellant and again confirmed the appellant's knowing, free, and voluntary waiver of his right to jury determination of the aggravating factors. 2RP 8-11.

The trial court then considered the agreed documentary evidence and arguments by the State and the appellant. 2RP 36-53. The trial court first found a sentence under the Special Sex Offender Sentencing Alternative, as proposed by the appellant, was not appropriate in this case. 2RP 39-45. The court then considered seven aggravating factors alleged by the State, finding each alleged factor had been proven. 2RP 45-49.

Based on those factors, the court imposed an exceptional sentence of a minimum of 240 months in custody. 2RP 52. The court also found that each individual aggravating factor, on its own, was sufficient to support the exceptional sentence. 2RP 49-50. The court then entered a judgment and sentence reflecting its order and Findings of Fact and Conclusions of Law for the exceptional sentence. CP 3-20. The appellant now timely appeals. CP 1-2.

### **III. ARGUMENT**

#### **A. The sentencing court appropriately imposed an exceptional sentence.**

*1. The sentencing court properly found substantial and compelling reasons justifying an exceptional sentence.*

The sentencing court followed proper proceedings and found substantial and compelling reasons justifying an exceptional sentence. A Washington court may impose a sentence outside the standard range if it finds “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The Sentencing Reform Act lists the factors that justify an exceptional sentence above the standard range. *State v. Poston*, 138 Wn.App. 898, 904, 158 P.3d 1286 (Div. 1, 2007). In this case, the State alleged seven aggravating factors: deliberate cruelty to the victim, a particularly vulnerable victim, an ongoing pattern of sexual abuse of a victim under eighteen years, domestic violence, a high degree

of sophistication or planning, abuse of a position of trust, and a destructive impact on persons other than the direct victim. CP 108-15. Following the appellant's waiver of jury determination of those factors and consideration of stipulated evidence, the sentencing court found all seven factors and imposed an exceptional sentence. CP 19-20.

Significantly, the appellant is not challenging the court's findings, conclusions, or sentence. Instead, the appellant's challenge is limited to the procedure followed in imposing his sentence. See Appellant's Brief at 1 (assigning error only to the procedure in finding aggravating circumstances and in not arraigning the appellant on an amended information). However, the sentencing court properly acted as a finder of fact after the appellant knowingly, intelligently, and voluntarily waived his right to a jury. Also, the court properly considered the alleged aggravating factors at the sentencing hearing after the appellant's valid waiver. The sentencing court, therefore, followed an appropriate procedure, and the appellant's sentence should be upheld.

2. *The sentencing court appropriately acted as the finder of fact for the aggravating factors when the appellant knowingly, intelligently, and voluntarily waived his right to jury determination.*

The sentencing court appropriately acted as a finder of fact following the appellant's knowing, intelligent, and voluntary waiver of his

right to jury determination of aggravating factors. Because the facts supporting aggravating factors may increase the applicable punishment by justifying an exceptional sentence, a defendant has a right to have a jury determine those facts. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2363, 147 L.Ed.2d 435 (2000)). However, the right to a jury trial may be waived by a knowing, intelligent, and voluntary act. See RCW 10.01.060; *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994); *State v. Lane*, 40 Wn.2d 734, 737, 246 P.2d 474 (1952). That freedom includes the opportunity to waive *Apprendi/Blakeley* rights. *State v. Dillon*, 142 Wn.App. 269, 275, 174 P.3d 1201 (Div. 1, 2007). The sentencing court in this case appropriately acted as a finder of fact because the appellant knowingly, intelligently, and voluntarily waived his right to a jury for purposes of the aggravating factors.

The appellant pled guilty to the original charges, effectively waiving a jury determination of his guilt. CP 97-107. At sentencing, the appellant submitted a written Waiver of Jury Trial on the State's allegations of aggravating circumstances. CP 21-22. The parties also entered a signed Stipulation to Facts for Purposes of Sentencing, which confirmed the parties' agreement that, "[t]here will be a bench trial where

a judge (instead of a jury) will function as the sole trier of fact and decide State's allegations of aggravating circumstances in this case." CP 24. The appellant signed both the waiver and stipulation. CP 21, 24. The court confirmed the appellant had read both documents, discussed them with his attorney, and understood his signed waivers. 2 RP 6-7 (Waiver of Jury Trial), 8-11 (Stipulation to Facts). The appellant had no questions about either document, and no threats or promises were made to induce his waiver or stipulation. 2 RP 7, 11.

The appellant knowingly, intelligently, and voluntarily waived his right to jury determination of the alleged aggravating circumstances. The waiver was knowingly made after the appellant was repeatedly informed of his rights, both orally and in writing. The appellant's decision was intelligently made following review of the written waivers and discussion with his counsel. And, the decision was voluntary, without inducement by promises or threats. Therefore, the appellant's waiver of jury determination was valid, and the sentencing court properly acted as a finder of fact.

3. *The sentencing court properly considered the aggravating factors at the sentencing hearing following the appellant's valid waiver.*

The sentencing court did not improperly bifurcate any trial. Because the appellant entered a plea of guilty, there was no initial trial

from which to divide the aggravating factors. Because no jury was impaneled for either the determination of guilt or of the aggravating factors, the appellant's reliance on RCW 9.94A.537 is inapplicable. Most significantly, the appellant's attempt to impose the jury-specific provisions of RCW 9.94A.537 when no jury was used runs contrary to procedures consistently approved in recent, similar cases.

Despite the appellant's best efforts, RCW 9.94A.537 cannot be grafted onto a case where jury was not impaneled. In response to *Blakeley*, the legislature enacted RCW 9.94A.537 and "created a special category of sentencing hearing, which involves jury fact finding (*unless a jury is waived*)". *State v. Griffin*, 173 Wn.2d 467, 475, 268 P.3d 924, 928 (2012) (emphasis added). In fact, that statute specifically allows for waiver of jury determination of aggravating circumstances. See RCW 9.94A.537(3) The remaining provisions in the statute presume a jury. See RCW 9.94A.537(4) ('evidence ... shall be presented to the jury'), (5) ("If any person who served on the jury is unable to continue ..."), (6) ("If the jury finds ..."). When, as in this case, jury is waived pursuant to RCW 9.94A.537(3), the remaining provisions, therefore, become moot.

Moreover, the appellant's strained reliance on RCW 9.94A.537 would cause an absurd result. Appellant courts will avoid literal readings of statutes that would result in unlikely, absurd, or strained interpretations.

*State v. Castillo*, 144 Wn.App. 584, 591, 183 P.3d 355 (2008). Requiring a jury when one is validly waived is certainly absurd. Using procedures specifically designed for jury fact-finding without impaneling a jury is equally absurd. Yet, that would be the result of imposing the jury requirements of RCW 9.94A.537 after the appellant validly waived his right to jury determination of aggravating factors.

Further, appellant courts have not hesitated to approve sentences using similar proceedings. For example, in *State v. Cham*, the trial judge accepted the defendant's waiver of jury for aggravating circumstances after he was found guilty of the underlying crime. *State v. Cham* 165 Wn.App. 438, 267 P.3d 528 (Div. 1, 2011). While the Court of Appeals carefully reviewed the validity of the defendant's waiver, the process was noted factually, but not otherwise questioned. *Id.* Similarly, the trial court and Court of Appeals had no apparent procedural concerns when the defendant pled guilty to the underlying charge, then waived his right to a jury trial on aggravating factors and agreed to a bench trial with stipulated exhibits and no witness testimony. *State v. Berrier*, 143 Wn.App. 547, 178 P.3d 1064 (Div. 2, 2008). Again, the reviewing court noted the process, but the appeal's focus on was on the defendant's notice of the aggravating factors. *Id.*

Most similarly to this case, the defendant in *In re Beito* entered a plea of guilty and waived jury determination of aggravating factors. *In re Beito*, 167 Wn.2d 497, 500-01, 220 P.3d 489 (2009). Although the plea was entered more than a year before the findings and conclusions for the sentence, the courts had no issue with the procedure. See *Id.* at 500-01.<sup>2</sup> Instead, the Supreme Court's consideration of the case was limited to the court's imposition of the exceptional sentence based on unstipulated facts. *Id.* at 503. Procedurally, this case is not distinguishable from the cases listed above. Like those cases, the appellant entered a plea of guilty and waived jury determination of the aggravating factors, resulting in a separate bench trial on the presence of aggravating factors. Because the procedure was the same, and because the appellant here is not contesting the facts, conclusions, or sentence reached in the sentencing hearing, the court should, treat the procedure in this case as it has the prior cases.

4. *The appropriate remedy for procedural error in sentencing is remanding for full resentencing.*

If court does require compliance with the jury procedures in RCW 9.94A.537, the appropriate remedy is to remand the case for full resentencing, including introduction of evidence and argument for an exceptional sentence. In the aftermath of *Blakely* and the enactment of

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<sup>2</sup> The defendant's plea was entered October 8, 2000 and written findings of fact and conclusions of law regarding the exceptional sentence were entered April 2, 2002.

RCW 9.94A.537, courts have routinely remanded cases where exceptional sentences were imposed with procedural flaws for full resentencing. *See State v. Griffin*, 173 Wn.2d 467, 476, 268 P.3d 924 (2012); *State v. McNeal*, 142 Wn.App. 777, 795-96, 175 P.3d 1139 (2008); *State v. Murawski*, 142 Wn.App. 278, 290-91, 173 P.3d 994 (2007). In fact, the courts have remanded for resentencing within the standard range only when no procedure existed at the time of the original sentencing for a required jury determination of the aggravating factors. *See In re Beito*, 167 Wn.2d 497, 506-08, 220 P.3d 489 (2009). Unlike the defendant in *Beito*, who was originally sentenced before enactment of RCW 9.94A.537 and did not waive jury fact-finding, the appellant here had a process for jury fact-finding available and waived that right. Therefore, if the court finds a procedural error in the appellant's sentence, the appropriate remedy, if the court finds error, is remanding for full resentencing.

**B. The appellant received adequate notice of the State's intention to request an exceptional sentence based on seven aggravating factors.**

The appellant received adequate notice of the State's intention to request an exceptional sentence when the State filed a Motion to Amend the Information and he acknowledged notice more than a month prior to his sentencing hearing. The State may give notice that it is seeking a sentence above the standard sentencing range at any time prior to trial or

entry of the guilty plea. RCW 9.94A.537(1). While a defendant is entitled to adequate notice of aggravating circumstances, that notice need not be included in the formal charging instrument. *State v. Siers*, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). In this case, the appellant was provided with notice in the form of a Motion for Order for Amended Information. CP 108-115. Prior to entering his plea of guilty, the appellant, through his counsel and orally to the court, confirmed his receipt and understanding of that notice. 1RP 4, 6-8. Given the appellant's formal notice of the State's intentions and his confirmation of receipt and understanding, the appellant received adequate notice, and court should uphold his sentence.

The Washington Supreme Court recently considered the precise question the appellant has raised and held that adequate notice of alleged aggravating factors does not require inclusion of those factors in a charging document. *Siers*, 174 Wn.2d at 277. The majority in *Siers* reviewed the decision in *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009), as well as the state and federal constitutional implications of notice requirements. *Id.* at 276-81. In particular, the Court noted the lead opinion in *Powell* considered aggravating circumstances not to be elements of an offense, and; therefore, not within the rule that all elements of a crime must be set forth in a charging instrument. *Siers*, 174 Wn.2d at 278 (citing *Powell*, 167 Wn.2d at 682). Additionally, the Court noted the requirement

from *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), of a jury trial on aggravating factors, “does not necessarily mean that aggravating factors must be pleaded in the information.” *Siers*, 174 Wn.2d at 277-78. Instead, neither the United States nor Washington Constitutions require states to allege aggravating circumstances in an information. *Id.* at 281. “[S]o long as a defendant receives constitutionally adequate notice of the essential elements of a charge, ‘the absence of an allegation of aggravating circumstances in the information [does] not violate [the defendant’s] rights.’” *Id.* at 267 (citing *Powell*, 167 Wn.2d at 687).

The appellant received constitutionally adequate notice of the essential elements of the crime and of the aggravating circumstances. The Information contained all essential elements of the crimes of Rape of a Child in the First Degree and Child Molestation in the Third Degree. CP 120-22. The appellant has made no claims to the contrary. The appellant received notice of the State’s allegation of aggravating circumstances prior to his change of plea and confirmed that notice at his hearing for change of plea. 1RP 4-8. The appellant then had more than an additional month prior to the bench trial on aggravating circumstances. That notice was more than sufficient to allow him to prepare a defense in response to the aggravating circumstances.

#### IV. CONCLUSION

The appellant's sentence should be upheld because it was properly imposed following adequate notice and his valid waiver of jury determination of aggravating circumstances. The appellant received constitutionally adequate notice of State's allegation of aggravating factors. The sentencing court properly acted as a finder of fact following the appellant's knowing, intelligent, and voluntary waiver of jury determination of the facts supporting an exceptional sentence. The appellant's waiver removed any requirement that the sentencing court comply with the jury procedures contained in RCW 9.94A.537. Therefore, the sentencing court did not err in imposing an exceptional sentence, and this court should uphold the appellant's sentence.

Respectfully submitted this 22nd day of March, 2013.

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