

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,  
Respondent,

v.

ANTHONY JAMES GOBLE,  
Appellant.

No. 39927-0-II

UNPUBLISHED OPINION

Van Deren, J. — Anthony Goble appeals the sentence imposed for his Clark County convictions of one count of possession of depictions of a minor engaged in sexually explicit conduct and two counts of sexual exploitation of a minor. He contends that the court improperly imposed an exceptional sentence because (1) the court did not hold an evidentiary hearing when he did not stipulate to the aggravating factor and (2) the State alleged the aggravating factor only as to the exploitation crimes, but the court imposed the exceptional sentence on the possession crime. Goble has also filed a statement of additional grounds for review (SAG), in which he disputes the accuracy of some of the information in the presentence investigation report (PSI). We affirm.

## FACTS

Goble's conduct came to light in January 2009, when his stepdaughter, KT, found sexually explicit photographs of her younger stepsister, 8 year old AMG,<sup>1</sup> on her mother's camera. She told both of her parents and they both reported the matter to the Clark County Sheriff's Office. Sheriff's deputies seized the camera and confirmed the presence and nature of the photographs. Goble subsequently admitted to a deputy sheriff that he took the photographs.

AMG is Goble's biological daughter. She began living with Goble and his wife<sup>2</sup> in 2007. Children's Justice Center Detective Cynthia Bull talked with AMG in March 2009. AMG told Detective Bull that her father started taking pictures of her when she was five years old and continued until sometime before her eighth birthday. She said he also penetrated her vagina digitally on multiple occasions.

The State charged Goble with three counts of first degree rape of a child and two counts of sexual exploitation of a minor. Each count included a notification that the State would seek an exceptional sentence based on the aggravating circumstance of abuse of a position of trust.

Goble provided a written statement to the Department of Corrections on September 9, 2009. He asserted that he began taking the photographs of AMG in October 2008. He said that he engaged in this activity on various occasions while he was putting the child to bed. He erased

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<sup>1</sup> We refer to the juvenile victim and the juvenile witness by their initials to protect their anonymity.

<sup>2</sup> Goble's wife is KT's mother, but she is not AMG's mother. She and Goble were married in a religious ceremony, but they did not file the required legal documents.

many of the photographs. He denied touching AMG inappropriately and asked to take a polygraph test.

AMG later recanted the statements about Goble's touching her, and Goble passed a polygraph exam regarding those allegations. Thereafter, the State and Goble reached a plea agreement and the State dropped the rape charges. The second amended information charged one count of possession of depictions of a minor engaged in sexually explicit conduct and two counts of exploitation of a minor. The exploitation charges each included the exceptional sentence notification from the previous information. The parties agreed that the State was free to recommend an exceptional sentence up to 240 months and defendant was free to argue for a sentence totaling 120 months.

Goble pleaded guilty on August 25, 2009, and sentencing was set over to October 21, 2009, to allow time for a PSI. Goble had an offender score of 9, making his standard range sentence for the exploitation convictions 129-171 months.<sup>3</sup> His standard range sentence for the possession crime was 77 to 102 months. The statutory maximum for the exploitation convictions was 10 years and the State argued that, because Goble had abused a position of trust, the court should order consecutive sentences for those 2 crimes, resulting in a term of incarceration of 20 years. Defense counsel pointed out that Goble had taken responsibility for his crimes from the beginning and had sought treatment on his own, and argued that 10 years would provide adequate time for him to complete treatment.

The court found that Goble had abused his position of trust as AMG's father and further noted that these crimes had followed his completion of a sex offender special sentencing

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<sup>3</sup> See RCW 9.94A.510.

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alternative (SSOSA) sentence for a prior sex crime. However, it declined to impose 240 months incarceration, finding that it was more appropriate to run the two exploitation sentences concurrent with each other—but consecutive to the possession sentence—for a total of 197 months' incarceration. This appeal followed.

#### ANALYSIS

Goble first contends that the trial court could not order the sentence on the exploitation convictions to run consecutive to the possession sentence because it did not find, and could not properly find, that an exceptional sentence was appropriate for the possession crime. As provided by RCW 9.94A.589(1)(a), with certain exceptions not relevant here, consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. Under RCW 9.94A.535, the trial court may impose an exceptional sentence if substantial and compelling reasons justify it.

Where a greater sentence is supported by aggravating factors, an exceptional sentence for multiple current offenses may consist of either a lengthening of sentences or an imposition of consecutive sentences. *State v. Batista*, 116 Wn.2d 777, 787, 808 P.2d 1141 (1991). Nothing in the sentencing reform act of 1981, ch. 9.94A RCW, precludes increasing the term of an aggravated sentence by making it consecutive to a standard range sentence.

In *State v. Flake*, 76 Wn. App. 174, 883 P.2d 341 (1994), Division One of this court upheld a sentence similar to this one. The defendant in that case was convicted of vehicular assault and hit and run. The trial court found no basis for an exceptional sentence as to the hit and run, but identified several aggravating factors pertaining to the vehicular assault. It imposed a sentence above the standard range for the vehicular assault and ordered that the sentence on the

vehicular assault run consecutive to the hit and run. *Flake*, 76 Wn. App. at 178, 182-83.

Contrary to Goble's argument, there was no violation of his right to notice here. First, he had notice of the State's intent to ask for an exceptional sentence on the charges relating to sexual exploitation of a minor and of the aggravating factor upon which it would rely. Second, the imposition of consecutive sentences did not make the sentence on the conviction of possession of depictions of a minor engaged in sexually explicit conduct an exceptional sentence. *State v. Pharris*, 120 Wn. App. 661, 667, 86 P.3d 815 (2004) ("When an otherwise presumptively concurrent sentence is ordered to run consecutive to another current, standard-range sentence, only one exceptional sentence is imposed.").

Goble also contends that the exceptional sentence was improper because the court did not hold an evidentiary hearing as required by RCW 9.94A.537. Under that statute, if the defendant waives a jury determination, the facts supporting aggravating circumstances must be proved to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts. RCW 9.94A.537(3).

The State asserts that Goble stipulated to the necessary facts. Goble claims that he only agreed to let the court determine whether such facts existed. The record is somewhat confusing, but taken as a whole, supports the State's position.

At the plea hearing, the court asked if Goble was agreeing to an aggravated circumstance. Defense counsel replied, "We are not stipulating to an exceptional sentence. We're free to argue." Report of Proceedings (RP) at 4. The court attempted to further clarify Goble's position, resulting in the following colloquy:

THE COURT: Is he agreeing, though, that there's an aggravating circumstance?

DEFENSE [COUNSEL]: He's agreeing the State can argue that.

STATE: Well, my understanding is that he's agreeing that there was a position of trust or confidence used to facilitate the commission of the crime. He's simply, however, going to ask for a standard range.

DEFENSE [COUNSEL]: That's correct. That's correct.

RP at 4. The court then read the portion of Goble's statement on plea of guilty that explained the circumstances in which the judge could impose an exceptional sentence. The fourth paragraph of that subsection stated that the court could impose an exceptional sentence if the facts supporting the exceptional sentence were proven beyond a reasonable doubt to a unanimous jury, or to a judge if the defendant waived a jury, or by stipulated facts. The colloquy continued:

DEFENSE [COUNSEL]: And it's four that we're going with.

THE COURT: Okay. So what facts are being stipulated to?

DEFENSE [COUNSEL]: Well, we're not sentencing today, but --

STATE: My understanding of the facts that will be stipulated to is, we have a position of trust or confidence, and it's his daughter who trusted in him, and those would be the facts --

DEFENSE [COUNSEL]: That's correct.

THE COURT: All right. Is that your understanding, Mr. Goble, that you're stipulating that there are facts that you used your position of trust or confidence to facilitate the commission of the current offense? And that with regard to Count II --

DEFENSE [COUNSEL]: -- And III.

THE COURT: And III, that the State does not need to prove that beyond a reasonable doubt to a unanimous jury or to me, that you agree those facts exist?

. . . GOBLE: Yes.

THE COURT: All right. And do you understand that normally I wouldn't be able to do an exceptional sentence or consider those facts unless they were proven beyond a reasonable doubt to a unanimous jury?

. . . GOBLE: Yes.

THE COURT: And you're willing to waive or give up that right?

. . . GOBLE: Yes.

RP at 5-6. The court ordered a PSI. After it was filed, Goble filed a memorandum in support of his objection to the trial court relying on the finding of an aggravating circumstance for sentencing

purposes, arguing that AMG had not lived with him long enough to establish a trusting relationship. He did not indicate how long AMG had lived with him.

At the sentencing hearing, the prosecutor acknowledged Goble's memorandum and said that he did not believe Goble wanted to withdraw his plea. The trial court said that it took Goble's objection "to mean that while they were agreeing that factual circumstances existed, that I shouldn't impose an exceptional sentence." RP at 22. Defense counsel responded that the court's interpretation was correct.

But defense counsel argued that Goble's relationship with his daughter did not establish a trusting relationship, asserting that Goble had had no contact at all with AMG while he was serving his SSOSA sentence and that she "went back and forth" between his and her mother's residences while she was living with him in 2007. RP at 27. Thus, counsel argued, "[T]he facts of this case don't add up to abuse of trust." RP at 29.

Here, it is clear that at the entry of his plea, Goble waived any dispute of the facts as they related to the aggravating factor of abuse of trust and that no one anticipated an evidentiary hearing about those facts before sentencing.<sup>4</sup> At sentencing, counsel's arguments were essentially aimed at the compelling nature of the facts, a question for the court. It cannot be seriously disputed that the court properly found these circumstances to be a substantial and compelling reason for an exceptional sentence. *See State v. Jennings*, 106 Wn. App. 532, 550, 24 P.3d 430 (2001); *State v. Bedker*, 74 Wn. App. 87, 95-96, 871 P.2d 673 (1994) (A family member is

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<sup>4</sup> Defense counsel objected to the statement in the PSI that Goble had primary custody, giving the explanation noted above. He also objected to the reference to Goble's partner as his wife. And he disputed the statement that Goble began to reoffend almost immediately after he was discharged from his SSOSA sentence. Goble raises similar objections in his SAG. None of these matters directly affect the finding of abuse of trust.

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someone the victim should be able to trust.); *State v. Grewe*, 117 Wn.2d 211, 219, 813 P.2d 1238 (1991) (four months is enough time to establish a trusting relationship); and *State v. Garnica*, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001) (intermittent nature of the victim's presence in the defendant's home is not determinative). See RCW 9.94.537(6); *State v. Hale*, 146 Wn. App. 299, 304-05, 189 P.3d 829 (2008).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Van Deren, J.

We concur:

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Penoyar, C.J.

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Worswick, J.