IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SCOTT ALLAN GUELLER, Appellant.	No. 40792-2-II UNPUBLISHED OPINION

Penoyar, J. — Scott Allan Gueller appeals his conviction and 10-year exceptional sentence following his guilty plea to one count of unlawful issuance of bank checks[1] and one count of unlawful offer, sale, or purchase of securities.[2] As part of his plea, he admitted that the securities fraud count was a major economic offense.[3] He contends that the plea hearing record fails to show a sufficient factual basis to support his conviction for the securities fraud count or the sentence enhancement.[4] He also contends that the waiver of his jury trial right contained in his plea statement was invalid and the length of his exceptional sentence was clearly excessive. We affirm.

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[1] In violation of former RCW 9A.56.060(1) (1982).

[2] In violation of RCW 21.20.010.

[3] In violation of RCW 9.94A.535(3)(d)(i-ii).

[4] Gueller does not challenge his conviction or sentence for the check fraud count.

Facts[5]

On November 28, 2007, Nels Honeycutt filed a fraud complaint with the sheriff's office stating that Gueller had paid him to build a deck with a $3,000 check. The check was returned for non-sufficient funds, and Honeycutt was never able to collect on the check. The sheriff's office obtained bank records that showed Gueller did not have sufficient funds to cover the check when he issued it. The sheriff's office contacted Gueller about the complaint on January 21, 2008. Gueller confirmed that he had hired Honeycutt to build a deck, but began to have financial difficulties after the work started.

During the check fraud investigation, Detective Matt Organ became aware of some suspicious activity in Gueller's Sterling Savings Bank account. The bank had referred Gueller's case to their fraud department. The fraud investigator found that Gueller had made a series of large deposits that matched large withdrawals from another bank customer, Yvonne Kooyman. The bank contacted Kooyman and learned that Gueller had convinced Kooyman to let him make investments on her behalf.

On March 31, 2008, Sterling Savings Bank sent the sheriff's office suspicious activity reports. Kooyman had transferred her children's Uniform Transfer to Minors (UTMA) accounts from Charles Schwab to her Sterling Savings account and then to Gueller. Kooyman transferred a total of $90,000 to Gueller, with the first transfer of $30,000 occurring on July 6, 2007. Gueller deposited $28,000 in cash and immediately wired $22,000 of this money to his personal Ameritrade account. He also wrote two checks from those funds to other parties totaling $5,000.

[5] The facts are taken from the motion and declaration for order for warrant of arrest filed in support of the original warrant in this case. CP at 20-24.

On July 23, 2007, Kooyman made a second transfer of $70,000 from her children's Charles Schwab UTMA accounts to her Sterling Savings Bank account. Kooyman wrote Gueller a $60,000 check. Gueller immediately deposited $58,000 to his Sterling Savings Bank account and wired $50,000 of that money to his personal Ameritrade account.

On April 15, 2008, Organ contacted Kooyman. Kooyman said she met Gueller when she bought a car from him at a dealership in Montesano. She also said that he stole $90,000 from her. Kooyman stated she had given Gueller checks for $30,000 and $60,000 in the summer of 2007 about two weeks apart. Kooyman said Gueller had promised to double her money in about a year and a half. Gueller told her he would invest all of the money she gave him in an Ameritrade account for her three children. Kooyman said Gueller was not going to be paid anything for helping her, and the source of her money was from her grandfather who had set up the Charles Schwab UTMA accounts for the three children as a college fund. Kooyman said she had received less than $2,000 back from Gueller and he admitted that he had lost all of her money because of a "market down turn." Clerk's Papers (CP) at 23.

Organ interviewed Kooyman's husband, William Harper, who confirmed the above described events involving Kooyman's money. Gueller said that he would cash the checks that Kooyman had given him and immediately invest the money for them. Gueller said he would come to their house and show them where he had invested the money, but he never showed up. When Kooyman and Harper demanded the money back from Gueller in November of 2007, he finally admitted that he had made bad choices and lost the money. Although Gueller set up an Ameritrade account in Kooyman's name, no deposits were ever made to that account and all funds transferred from Kooyman to Gueller were placed in Gueller's personal account.

On November 3, 2008, the State charged Gueller with felony unlawful issuance of a bank check (count I)[6] and unlawful offer, sale, or purchase of securities (count II). The State further alleged that count II was a major economic offense and gave notice that it would seek an exceptional sentence. On October 19, 2009, pursuant to a plea agreement, the State filed an amended information that reduced count I to a gross misdemeanor but preserved count II and the RCW 9.94A.535(3)(d)(i-ii) aggravating circumstance, stating, "Upon the defendant's conviction and . . . admission of the defendant of such aggravating circumstances, the State will be asking for an exceptional sentence." CP at 2.

Gueller pleaded guilty as charged to the amended information on October 19, 2009. He filed a statement of defendant on plea of guilty, which incorporated the plea agreement. In addition to the written plea agreement, the court engaged in a colloquy with Gueller on the record in which Gueller acknowledged that he read, understood, and discussed with his attorney the plea statement and plea agreement. Gueller also admitted that the count II offense was a major economic offense, and he acknowledged that the State would be asking for an exceptional sentence of 18 months, that the trial court was not bound by the State's recommendation, and that the court could sentence him to the statutory maximum of 10 years. The trial court accepted his guilty plea.

The sentencing hearing was continued to give Gueller an opportunity to work and pay towards restitution. Sentencing occurred on April 26, 2010, and, despite the delay, Gueller had

[6] Count I is not at issue in this appeal.

made no payments to his victims. The trial court sentenced Gueller to an exceptional sentence of 120 months on count II, to run consecutively to the 365 days imposed for count I. On May 28, 2010, the court entered findings and conclusions in support of the exceptional sentence. Gueller appeals.

analysis

I. Factual Basis of Guilty Plea

Gueller first contends that the record of his plea hearing does not set forth a sufficient factual basis (1) to support the count II charge of securities fraud in violation of RCW 21.20.010, or (2) to establish a major economic offense as charged under RCW 9.94A.535, which served as the basis for his exceptional sentence. We disagree.

A. Standard of Review

We review de novo the circumstances under which a guilty plea was made. *Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979). Due process requires that a guilty plea must be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Court rule also provides that:

> The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea*.

CrR 4.2(d) (emphasis added).

B. Securities Fraud

Gueller was charged with violating RCW 21.20.010,[7] which broadly prohibits "fraud or deceit upon any person" in the context of a proposed securities transaction. RCW 21.20.010(3). "Under RCW 21.20.010, the crime of securities fraud involves fraud or untruthfulness with respect to the offer or sale of any security." *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). In determining whether a factual basis exists for a plea, the trial court need not be convinced beyond a reasonable doubt that the defendant is in fact guilty. *Saas*, 118 Wn.2d at 43. Rather, a factual basis exists if there is sufficient evidence for a jury to conclude that the defendant is guilty. *Saas*, 118 Wn.2d at 43. Gueller contends that neither his plea form nor his colloquy with the trial court establish a factual basis for his plea. But, "[a]t a plea hearing, the

[7] RCW 21.20.010 provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
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> (1) To employ any device, scheme, or artifice to defraud;
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> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
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> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

trial court may consider any reliable source of information in the record for determining whether sufficient evidence exists to support the plea . . .[including] the prosecutor's factual statement." *Saas*, 118 Wn.2d at 43.[8]

Here, at the time of the plea hearing, the record also contained a previously filed prosecutor's factual statement describing the basis for the charges. The statement explained how Gueller had written a check to pay a contractor knowing that he had insufficient funds to cover the check (count I). The statement further explained that Gueller induced Kooyman to give him (for investment purposes) her children's $90,000 college fund, which Kooyman had received from her grandfather. Gueller promised that he would invest the money in an Ameritrade account for Kooyman's three children and he promised to double the money in about a year and a half.[9] Gueller set up an Ameritrade account in Kooyman's name, but he placed her money in his personal account. Gueller told Kooyman that he would go to her home and show her and her husband how he had invested the money, but he never did so. When Kooyman finally demanded that Gueller return her funds, Gueller said he lost the money on bad investments.

[8] To satisfy the CrR 4.2(d) factual basis requirement, there must be sufficient evidence for a jury to conclude that the defendant is guilty and this evidence must be developed on the record at the time the plea is taken; the factual basis may not be deferred until sentencing. *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 210, 622 P.2d 360 (1980). Such factual basis may be established from any reliable source, and not alone from the defendant's admissions, so long as the material relied upon by the trial court is made a part of the record. *Keene*, 95 Wn.2d at 210 n.2; *see also State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976).

[9] Gueller indicated that he would use the funds to purchase stock, which is clearly a "security" under RCW 21.20.005(12)(a).

Like the victim in *Sass*, Kooyman gave Gueller money under the inducement that he would invest it, but Gueller used it for his own purposes. *Saas*, 118 Wn.2d at 44. The prosecutor's declaration, as above described, provides a sufficient factual basis to support Gueller's guilty plea. The trial court did not err in finding a factual basis for Gueller's plea. *Saas*, 118 Wn.2d at 44.

C. Major Economic Offense

RCW 9.94A.535(3) provides "an exclusive list of factors that can support a sentence above the standard range." That list includes RCW 9.94A.535(3)(d)(i), which provides, "The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors: (i) The current offense involved multiple victims or multiple incidents per victim."

Here, the above discussed prosecutor's statement noted that Kooyman made more than one transfer of funds to Gueller in July 2007. Thus, the record establishes "multiple incidents per victim" as provided in RCW 9.94A.535(3)(d)(i). Moreover, the plea agreement notes that Gueller "agrees to pay restitution to the uncharged victims Mark and Sheree Dodd." CP at 35. Thus, the plea agreement acknowledges "multiple victims" as provided in RCW 9.94A.535(3)(d)(i). Accordingly, the record at the time of the plea hearing clearly provided sufficient facts to support

an exceptional sentence.[10] We hold that the trial court did not err in finding that "there is a factual basis for [Gueller's] plea on each count and for [his] plea to the aggravating circumstance." Report of Proceedings (RP) at 10.

Gueller relies on *State v. R.L.D.*, 132 Wn. App. 699, 133 P.3d 505 (2006); *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), and *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000); but those cases do not require a different result. In *R.L.D.*, we vacated a juvenile defendant's guilty plea to second degree theft regarding a car prowl because "[t]he plea agreement facts (*and other facts before the court*) insufficiently demonstrate the requisite dominion and control to support a theft conviction." *R.L.D.*, 132 Wn. App. at 706 (footnote omitted, emphasis added). *R.L.D.* acknowledged and followed the *Saas* rule, that when making such sufficiency determination, "the court may consider any reliable source of information, as long

[10] In preparation for the April 26, 2010 sentencing hearing, the prosecutor filed a report on April 22 that provided details of multiple uncharged incidents regarding the Dodds. The prosecutor's statement explained that in 2005 and 2007, Gueller induced the Dodds, a couple in their 70s, to take out three separate bank loans totaling $40,000 for Gueller's use in completing a hunting camp on his property. Gueller convinced the Dodds that he could sell the property to the government for a large profit. Gueller promised the Dodds that he would pay back the loaned money and give the Dodds a $20,000 bonus. Gueller did not do so.

Although it is not clear whether the details of Gueller's transactions with the Dodds were in the record at the time of the plea hearing, the plea agreement memorialized Gueller's agreement to pay restitution to the Dodds as uncharged victims, the plea agreement was incorporated by reference into Gueller's guilty plea statement, and this arrangement was explained to the court at the plea hearing. The State explained that the proposed amendment to the charges for purposes of the plea bargain included reducing count I to a gross misdemeanor. The State explained, "Count 2 is really the meat of the information with the major economic offense. Mr. Gueller has no felony history. He's agreed to pay restitution to a third uncharged victim and that's what the State feels is most important in this case." Report of Proceedings (RP) at 3. Defense counsel acknowledged that Gueller was prepared to plead guilty to the amended information. Accordingly, even if the multiple incidents regarding the Dodds were not yet part of the record at the time of the plea hearing, the fact that Gueller had defrauded multiple victims clearly was part of that record.

as the information is part of the record at the time of the plea." *R.L.D.*, 132 Wn. App. at 706 n.8 (citing *Saas*, 118 Wn.2d at 43). That is the rule we apply here.

A.N.J. involved a juvenile defendant who alleged ineffective assistance where defense counsel misinformed the defendant about the consequences of his plea. *A.N.J.*, 168 Wn.2d at 116-17. Counsel also did not read the plea agreement to the juvenile defendant or make the defendant read it himself; and counsel spent only about five minutes going over the plea agreement with the defendant just before the plea hearing. *A.N.J.*, 168 Wn.2d at 101 n.6, 103. Similarly in *S.M.*, a juvenile defendant alleged ineffective assistance where defense counsel in part did not review the plea form with the defendant, was not present when defendant signed the plea form, and the defendant was misinformed about a consequence of his plea. *S.M.*, 100 Wn. App. at 403-04, 407, 410-11. Given the failings of defense counsel in *A.N.J.* and *S.M.*, the reviewing courts in those cases looked with particular scrutiny at the colloquies to see if they revealed the defendants' full understanding of the nature of the charges that defendants were admitting. *A.N.J.*, 168 Wn.2d at 118-19; *S.M.*, 100 Wn. App. at 415. Those decisions, however, do not require that the colloquy in every case involve rigorous questioning of the defendant on every element of the offense. Those cases turn on the fact that *nothing* in the record showed

defendant's understanding of the charge against him.[11] *See A.N.J.*, 168 Wn.2d at 119-20; *S.M.*, 100 Wn. App. at 415. Here, there is no similar allegation of ineffective assistance and Gueller expressly acknowledged to the trial court that he had discussed the plea agreement and his plea statement with defense counsel and understood everything in each document.

II. Jury Trial Waiver

Gueller argues that his plea is invalid because it contains a waiver of his jury trial right and the record does not demonstrate that he understood his state constitutional right to a jury trial. We disagree.

This issue turns on the validity of Gueller's waiver of his jury trial right. Gueller makes the same substantive argument that we rejected in *State v. Pierce*, 134 Wn. App. 763, 142 P.3d

[11] The *A.N.J.* court opined:

> In addition to the lack of any colloquy with the court, we also conclude that neither the charging documents, the plea document, or other evidence of record shows that A.N.J. understood the meaning of sexual contact. Because the record does not affirmatively disclose that A.N.J. understood that any contact he had with T.M. had to be for sexual gratification to constitute the crime with which he was charged, the court violated his right to due process when it accepted his plea and erred when it denied his motion to withdraw his plea. *Cf. S.M.*, 100 Wn. App. at 409.

A.N.J., 168 Wn.2d at 119.

610 (2006).[12] As did the defendant in *Pierce*, Gueller relies on article I, sections 21 and 22, of the Washington constitution.[13] *See Pierce*, 134 Wn. App. at 770.

In *Pierce* we held that the defendant validly waived his jury trial right because he received advice of counsel, submitted his waiver in writing, and acknowledged in a colloquy with the court that he understood his jury trial right and was waiving it freely and voluntarily. 134 Wn. App. at 772.

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[12] We summarized Pierce's argument as follows:

> Pierce claims that his waiver of his jury trial right was invalid under Washington's state constitution. He claims that a valid waiver of the state constitutional right to a jury trial requires more than a valid waiver of the corresponding federal right. He argues that a waiver of the state constitutional right to a jury trial is valid only if the defendant is fully aware of the meaning of the state constitutional right. Without citing authority, Pierce claims that he needed to understand his right to participate in jury selection, his right to an impartial jury, his right to a 12–person jury, his right to be presumed innocent until proven guilty beyond a reasonable doubt, and his right to a unanimous verdict.

Pierce, 134 Wn. App. at 769. Gueller makes the same argument.

[13] Washington Constitution article 1, section 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Washington Constitution article 1, section 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

Here, Gueller signed a statement of defendant on plea of guilty that provided in enlarged, bold print, "I understand that I have the following important rights, and I give them all up by pleading guilty." CP at 25 (capitalization altered). The listed rights included: "The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed," and "I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty." CP at 25-26. At the plea hearing, in response to the judge's questions during colloquy, Gueller affirmatively acknowledged that he had "carefully read" the statement of defendant on plea of guilty, that he "underst[oo]d everything in the statement," and that he had "discussed it with [his] attorney." RP at 6. He also stated that he paid "close attention" to the constitutional rights listed in the statement, and that he "underst[oo]d those rights" as well as the fact that he would give up those rights when he pleaded guilty.[14] RP at 6-7.

Given Gueller's written acknowledgement that he was giving up his right to a jury trial, his affirmation to the court that he understood the rights he was giving up, and his

[14] Without citation to authority, Gueller contends that the record must show that he understood the state constitutional jury trial rights he was giving up, including (1) the right to participate in jury selection, (2) the right to an impartial jury, (3) the right to a 12–person jury, (4) the right to be presumed innocent until proven guilty beyond a reasonable doubt, and (5) the right to a unanimous verdict. As noted above, Gueller expressly waived rights (2) and (4) in the plea statement. And, as in *Pierce*, he cites no legal authority saying that the trial court had to specifically inform him of these remaining items before he could validly waive his jury trial right. *See Pierce*, 134 Wn. App. at 772-73.

acknowledgement that he had been advised by counsel, we hold, consistent with *Pierce*, that Gueller validly waived his jury trial right when he pleaded guilty.[15]

III. Exceptional Sentence

Gueller contends that the trial court's 120-month sentence is clearly excessive. We disagree.

We review whether an exceptional sentence is clearly excessive for an abuse of discretion. *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (citing *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). "A 'clearly excessive' sentence is one that is clearly unreasonable, 'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *Kolesnik*, 146 Wn. App. at 805 (quoting *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995)). When a sentencing court does not base its sentence on improper reasons, we will find a sentence excessive only if its length shocks the conscience in

[15] We also adhere to our holding in *Pierce* that an analysis pursuant to *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), is not necessary to decide the jury trial waiver issue in this context. *See Pierce*, 134 Wn. App. at 773. We reiterate that "*Gunwall* addresses the extent of a right and not how the right in question may be waived." *Pierce*, 134 Wn. App. at 773 (citing *Gunwall*, 106 Wn.2d at 58). Although presented in the context of a guilty plea, the issue here, as it was in *Pierce*, is waiver. *Pierce*, 134 Wn. App. at 773. And "[a]lthough Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived." *Pierce*, 134 Wn. App. at 773.

light of the record. *Kolesnik*, 146 Wn. App. at 805. *See also State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010), *review denied*, 170 Wn.2d 1017 (2011).[16]

Gueller does not challenge the fact that the trial court imposed an exceptional sentence. As part of his plea deal he agreed with the State's recommendation that an exceptional sentence be imposed based on the admitted aggravating circumstance that count II was a major economic offense. He also acknowledged in colloquy that the trial court was not bound by the State's recommendation of an exceptional sentence of 18 months on count II, and that, in light of the aggravating factor to which he was agreeing, the trial court could sentence him up to the statutory maximum of 10 years on count II. Nevertheless, Gueller contends that the trial court's imposition of a 10 year sentence on count II is clearly excessive, noting that the 120-month sentence is 40 times the 3-month high end of the standard range for count II.

In *State v. Ritchie*, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995), our Supreme Court explained that the sentencing court need not state reasons to justify the length of the sentence imposed. *Ritchie* also rejected the notion that the length of an exceptional sentence must be proportionate to sentences in similar cases. *Ritchie*, 126 Wn.2d at 396. *Ritchie* rejected any "mechanical approach" of comparing the sentence at issue with the average sentence for the same crime, or the average sentence for more serious crimes, or comparisons to the midpoint of the

[16] Reviewing courts have "near plenary discretion" to affirm the length of an exceptional sentence, just as the trial court has "all but unbridled discretion in setting the length of the sentence." *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007) (quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989), *abrogation on other grounds recognized by, State v. Ramos*, 124 Wn. App. 334, 341 n. 27, 101 P.3d 872 (2004)). Here, the 10-year sentence imposed is permissible because it does not exceed the statutory maximum. *State v. Hagler*, 150 Wn. App. 196, 204, 208 P.3d 32, *review denied*, 167 Wn.2d 1007 (2009) (trial court may not impose a sentence beyond the statutory maximum).

standard ranges for the crime at issue. 126 Wn.2d at 397.[17] *Ritchie* directs that the salient inquiry regarding the *length* of the exceptional sentence is whether the trial court abused its discretion in imposing that sentence.

> In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: rely on an impermissible reason (the "untenable grounds/untenable reasons" prong of the standard) or impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court (the "no reasonable person" prong of the standard).

126 Wn.2d at 395-96 (quoting with approval *State v. Ross*, 71 Wn. App. 556, 571-72, 861 P.2d 473 (1993)).

Here, though the trial court imposed the maximum sentence allowed by law, Gueller's 10-year sentence does not shock the conscience of this court. Gueller misappropriated $60,000 and $30,000 from monies set aside for Kooyman's children's college education. Gueller also misappropriated funds totaling $40,000 from the Dodds in multiple transactions over several years. Although Gueller had agreed to pay restitution to the Dodds as part of his plea deal, and his sentencing was delayed to permit him an opportunity to do so, Gueller failed to make such payments. Under these circumstances, we see no abuse of discretion in the length of the exceptional sentence that the trial court imposed.

[17] *Ritchie* also disapproved the notion that the maximum sentence is reserved for only the worst cases in which the circumstances of the crime distinguish it from other crimes of the same statutory category. *Ritchie*, 126 Wn.2d at 395.

We affirm.

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.

Penoyar, C.J.

I concur:

Hunt, J.

I concur in the result only:

Quinn-Brintnall, J.