IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW C. MEACHAM, Appellant.	No. 40892-9-II UNPUBLISHED OPINION

Van Deren, J. — Mathew C. Meacham appeals the trial court's conclusion following a bench trial that he committed two counts of residential burglary with sexual motivation and the enhanced sentence the trial court subsequently imposed. Meacham argues, and the State concedes, that the trial court sentenced him under the wrong statute. Because the trial court's findings of fact do not support the conclusion that Meacham committed his offenses with sexual motivation and because the trial court sentenced Meacham under the wrong statute, we vacate his sentence and remand for resentencing under the proper statute without sentence enhancements or conditions relating to sexual motivation.[1]

[1] A commissioner of this court initially considered Meacham's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

FACTS

The State charged Meacham with two counts of residential burglary for taking his neighbor's clothing out of a clothes dryer located in her attached garage and alleged that Meacham committed the burglaries "for the purpose of his sexual gratification contrary to [former] RCW 9.94A.535(3)(f) [(2007)]." Clerk's Papers (CP) at 5. Meacham waived his right to a jury trial and agreed to stipulate to the following pertinent facts contained in the bill of particulars:[2]

> 1. [The victim] is a 29 year old female who, during the charged time period, resided alone . . . within Grays Harbor County.
> 2. [The victim]'s residence ha[d] an attached garage where her washer and dryer were located.
> 3. The defendant lived two houses away . . . .
> 4. Between January 18 and January 20, 2008, [the victim]'s garage was unlawfully entered and clothing was stolen from her dryer[; s]pecifically, bras, panties, socks and shirts.
> 5. On January 25, 2008, the police set up a [voice activated radio alarm (VARDA)] in [the victim]'s garage to notify police of any unlawful entry and [to] record any such event.
> 6. The police also placed a "decoy" load of laundry into [the victim]'s dryer that contained a mixture of clothing, including panties that were marked with [the victim]'s initials.
> 7. On February 20, 2008, the VARDA . . . was activated and police responded to [the victim's address].
> . . . .
> 9. As they entered the fenced backyard, officers observed a suspect exiting the garage . . . .
> . . . .
> 11. The subject was identified as [Meacham].
> . . . .
> 14. The officer observed that at least [one] pair of underwear and [one] bra were missing from the "decoy" load of laundry.
> . . . .
> 19. [Meacham] was interviewed by the police and stated the following:

[2] At the June 2, 2010 bench trial, defense counsel informed the trial court that Meacham agreed to stipulate to facts contained in the bill of particulars apart from three factual statements related to the State's sexual motivation allegations, which referenced subjects that the trial court had excluded in a previous order granting Meacham's motion in limine.

> 1. [Meacham] admitted to entering the garage looking for "female" clothing.
> . . . .
> 3. [Meacham] stated that he went straight to the clothes dryer and took some items.
> . . . .
> 6. [Meacham] then went home and put the clothing items he took between his bed mattress and box spring.
> . . . .
> 12. [Meacham] admitted that he had entered the same garage the same way about a month prior to this night.
> 13. [Meacham] stated that the underwear he had taken during the previous incident was in a bottom dresser drawer in his bedroom . . . .
> 14. [Meacham] stated there were additional pairs of women's panties in the bottom drawer, but these were from previous relationships he had with [other] women.
>
> 20. [Meacham] agreed to take police to his home and show them the clothing.
>
> 21. Women's underwear, specifically two pairs of panties and a bra, was located between the mattress and box spring in [Meacham]'s bedroom.
>
> 22. This underwear was marked with the [victim]'s initials on the tag and matched what Detective Krohn observed being placed into [the victim]'s dryer on January 25.
>
> . . . .
>
> 24. [Meacham] pointed out the dresser drawer, and the officer observed about ten pairs of women's panties.
>
> 25. [Meacham] immediately pointed out the three pairs he had taken from [the victim] in January.

CP at 49-51.

Additionally, Meacham stipulated to the following facts regarding the State's allegation that he committed the residential burglaries with sexual motivation:

> 1. On February 22, 2008, a search warrant was obtained for [Meacham]'s house to recover the clothing [Meacham] was wearing on February 20 and the backpack he possessed.
> 2. [Meacham] stated that the backpack was probably in his bedroom.
> 3. [stricken]
> 4. The door was secured by a hasp and a padlock.
> 5. [stricken]
> 6. [Meacham] admitted that when he removed clothing from the dryer he "wanted

> something female."
> 7. The items taken in January were separated. The panties were placed into a drawer with other panties and the other clothing was stored in a bag in [Meacham]'s closet.
> 8. [Meacham] stated that these other pairs of panties were par[t] of "a collection of woman's underwear from past relationships."
> 9. [Meacham] was immediately able to identify the specific panties that he [had] taken from [the victim] out of approximately ten pairs.
> 10. The panties taken on February 20 had been placed between [Meacham]'s mattress and box spring.
> 11. [stricken]
> 12. [Meacham] eventually admitted that he had thrown the backpack and the remaining women's panties into the Dumpster at his work.

CP at 52.

The trial court allowed the State to present brief testimony from the victim and to show the security video from Meacham's second residential burglary.[3] Meacham did not deny committing the burglaries, but he denied having done so with sexual motivation. The trial court concluded that the State proved beyond a reasonable doubt that Meacham had committed the burglaries "for the purpose of his sexual gratification." CP at 11. It sentenced Meacham on June 7, 2010, under former RCW 9.94A.712 (2006)[4] to a minimum term of 35 months and a maximum term of 120 months for each count, which included an 18 month sentence enhancement on each count under former RCW 9.94A.533(8)(a)(ii) (2007) for committing the offenses with sexual

[3] Although the trial court allowed the State to present brief testimony from the victim and to show the security video, the trial court's factual findings are nearly identical to the stipulated facts contained in the bill of particulars and do not contain any additional findings not contained in the bill of particulars.

[4] The version of the sentencing form the trial court used was titled, "Felony Judgment and Sentence—Prison[,] RCW 9.94A.507 (former RCW 9.94A.712) Prison Confinement (Sex Offense and Kidnapping of a Minor Offense)." CP at 13 (boldface omitted). It appears that this sentencing form was developed after Meacham committed his crimes and that the trial court sentenced him under former RCW 9.94A.712, not former RCW 9.94A.507 (2008), in effect at the time of Meacham's sentencing.

motivation. The trial court ordered that the 18 month enhancements be served consecutively, resulting in a minimum term of 53 months. Meacham timely appeals his sentence enhancement.

ANALYSIS

I. Sexual Motivation Sentencing Enhancement

Meacham first contends that sufficient evidence does not support the trial court's conclusion that he committed his offenses with a sexual motivation. We agree.

We review a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371 (2008). Because Meacham does not assign error to any of the trial court's findings of fact, they are verities on appeal.[5] *Carlson*, 143 Wn. App. at 519. Accordingly, we address only whether the trial court's unchallenged findings support its conclusion that Meacham committed his offenses with sexual motivation. Thus, in addressing Meacham's claim, we are limited to consideration of the trial court's findings of fact and may not review the victim's testimony for facts that were not found by the trial court or consider facts argued during oral argument before us.

To enhance Meacham's sentence under former RCW 9.94A.835 (2006), the trial court had to find beyond a reasonable doubt that Meacham committed his offenses with a sexual motivation. "Sexual motivation," as used in former RCW 9.94A.835, "means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Former RCW 9.94A.030(43) (2006).

In *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), our Supreme Court addressed

[5] Although Meacham's brief assigns error to findings of fact "2.1" and "2.3," no such findings exist in the record. Br. of Appellant at 1.

the constitutionality of former RCW 13.40.135 (1990), which is the juvenile counterpart to former RCW 9.94A.835.[6] In holding that former RCW 13.40.135 was not unconstitutionally vague, our Supreme Court noted:

> "Inherent in [former RCW 13.40.135(2)] is the requirement that the finding of sexual motivation be *based on some conduct* forming part of the body of the underlying felony. The statute does not criminalize sexual motivation. Rather, the statute makes sexual motivation *manifested by the defendant's conduct* in the *course of committing a felony* an aggravating factor in sentencing"

Halstien, 122 Wn.2d at 120 (emphasis in original) (quoting *State v. Halstien*, 65 Wn. App. 845, 853, 829 P.2d 1145 (1992)). The *Halstien* court further noted that an enhanced sentence under former RCW 13.40.135 "requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification." 122 Wn.2d at 120.

In concluding that Meacham committed his offenses for the purpose of his sexual gratification, the trial court's findings of fact based on Meacham's stipulation indicate that it relied on Meacham entering a 29-year-old female's garage multiple times looking for female clothing and taking bras, panties, socks, and shirts from a dryer in that garage. The trial court concluded that Meacham's crimes were sexually motivated based on his conduct after committing the

[6] Although *Halstien* addressed the juvenile sexual motivation statute, former RCW 13.40.135, it noted that the adult sexual motivation statute, former RCW 9.94A.127 (1990), later recodified as former RCW 9.94A.835, was "extremely similar but not identical to the juvenile statute, containing slight changes in wording to accommodate the differences between proceedings in which an adult is charged with a 'crime' and tried before a jury, and a juvenile is charged with an 'offense' and heard before a judge." 122 Wn.2d at 115 n.1. Because former RCW 9.94A.835 is substantially similar to former RCW 13.40.135, we apply the reasoning of *Halstien* to its interpretation of the adult sexual motivation statute. *See also State v. Vars*, 157 Wn. App. 482, 496-97, 237 P.3d 378 (2010) (applying the reasoning of *Halstien* to its interpretation of the adult sexual motivation statute).

burglaries, which conduct included: (1) Meacham separating the panties from the other clothes he took during his first burglary and storing the stolen panties in a dresser drawer alongside other panties he had kept from previous relationships and (2) Meacham storing two pairs of panties and one bra from the second burglary between his mattress and box spring.

As an initial matter, Meacham asserts that the trial court may not rely on his conduct after the commission of a crime as evidence that the crime was sexually motivated, citing *Halstien*. But we need not address Meacham's contention because the evidence is not sufficient to infer that he committed burglary for the purpose of his sexual gratification.

Here, the trial court's findings of fact based on Meacham's stipulation show only that Meacham stole women's underwear and other clothing and that he stored panties and bras either in a dresser drawer or between his mattress and box spring. But the theft of clothing and storage of underwear, without more, is not sufficient to prove that Meacham committed his burglaries for the purpose of his sexual gratification. Accordingly, the trial court erred by imposing sexual motivation sentencing enhancements, and we vacate and reverse Meacham's sentence enhancements and remand for resentencing without sentence enhancements or conditions relating to sexual motivation.

II. Sentencing Error

Next, Meacham argues that the trial court erred in sentencing him to minimum and maximum terms of confinement, under former RCW 9.94A.712. The State concedes that the trial court erred by sentencing Meacham under former RCW 9.94A.712. Former RCW

9.94A.712[7] does not apply to residential burglary convictions, nor does it apply to offenders who, like Meacham, do not have a prior sex offense conviction and do not have a prior conviction for a crime listed in former RCW 9.94A.030(33)(b) (2006). We accept the State's concession, vacate Meacham's sentence, and remand for resentencing without sentence enhancements or conditions relating to sexual motivation.

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.

Van Deren, J.

We concur:

Worswick, A.C.J.

Johanson, J.

[7] Former RCW 9.94A.712 provides in part:

> (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
>
> (a) Is convicted of:
>
> (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;
>
> (ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or
>
> . . . .
>
> (b) Has a prior conviction for an offense listed in [former] RCW 9.94A.030(33)(b) [(2006)], and is convicted of any sex offense which was committed after September 1, 2001.