IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NEIL GRENNING, Appellant.	No. 41461-9-II UNPUBLISHED OPINION

Hunt, J. — Neil Grenning appeals his exceptional sentence created by the resentencing court's running his standard range sentences for each class of his 51 sex-related convictions consecutively. He argues that (1) the State failed to charge the aggravating circumstances in the information and, thus, did not provide adequate notice; (2) former RCW 9.94A.712 (2001), governing sentencing of nonpersistent sex offenders, did not support consecutive sentences; (3) former RCW 9.94A.400(1)(a) (1998) and RCW 9.94A.589(1)(a)[1] did not support consecutive sentences based on judicially found facts of aggravating circumstances where *Apprendi v. New Jersey*[2] and *Blakely v. Washington*[3] required a jury to find such facts; and (4) the aggravating

[1] The portions of former RCW 9.94A.400 (recodified as RCW 9.94A.589(1)(a), pursuant to Laws of 2001 ch. 10 § 6) and RCW 9.94A.589, to which we cite, are substantively identical. The relevant portions of former RCW 9.94A.400 differ from RCW 9.94A.589 in its internal citations to other provisions of the RCW that were recodified as part of the reorganization of ch. 9.94A RCW under Laws of 2001 ch. 10 § 6. Therefore, for clarity we cite only RCW 9.94A.589 in this opinion.

circumstances that the resentencing court found were invalid. The State concedes that the resentencing court erred in imposing certain community custody conditions under former RCW 9.94A.712.

In his Statement of Additional Grounds (SAG), Grenning argues that (1) the resentencing court erred by failing to engage in the "same criminal conduct" analysis under RCW 9.94A.589(1)(a)[4]; (2) RCW 9.94A.589(1)(a) is unconstitutional; and (3) the resentencing court violated the appearance of fairness doctrine. Accepting the State's concession of error, we vacate the community custody conditions imposed under former RCW 9.94A.712 and remand for correction of the judgment and sentence, including the possibility of fashioning legal community custody conditions. Holding that the resentencing court properly imposed consecutive sentences, we otherwise affirm.

FACTS

I. 2004 Charges, Trial, and Sentencing

In 2004, the State charged Neil Grenning with 72 sex offenses against 2 victims,[5]

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[2] *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[3] *Blakely v. Washington*, 542 U.S. 296, 313, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[4] SAG at 2.

[5] Specifically, the State charged Grenning with the following: (1) 26 counts of sexual exploitation of a minor in violation of RCW 9.68A.040; (2) 20 counts of possession of depictions of a minor engaged in sexually explicit conduct with sexual motivation in violation of former RCW 9.68A.070 (1990) and former RCW 9.94A.030 (2001); (3) 17 counts of first degree child rape in violation of RCW 9A.44.073; (4) 6 counts of first degree child molestation in violation of RCW 9A.44.083; (5) 2 counts of attempted first degree child rape in violation of RCW 9A.28.020, former RCW 9A.28.020 (1994), and RCW 9A.44.073; (6) and 1 count of second degree assault of a child with sexual motivation in violation of RCW 9A.36.021(1)(f), RCW 9A.36.130(1)(a), and former RCW 9.94A.030 (2001).

between April 1, 2001, and September 30, 2001, and between July 1, 2001, and March 3, 2002, respectively. With the exception of one count of first degree child rape, a jury convicted Grenning as charged. The jury also returned a special verdict finding that Grenning had committed second degree assault of a child with sexual motivation. The State filed a single-page notice of intent to seek an exceptional sentence.

Ten weeks before sentencing, on August 13, 2004, the State filed a multi-page Special Allegation of Aggravating Circumstances and Notice of State's Intent to Seek Exceptional Sentence setting forth its recommendation of an exceptional sentence based on the following aggravating circumstances: (1) Grenning's deliberate cruelty, (2) the victims' particular vulnerability or incapability of resistance due to extreme youth, (3) Grenning's abuse of a position of trust, (4) Grenning's commissions of multiple incidents per victim, (5) Grenning's sexual motivation in the commission of certain crimes, and (6) Grenning's participation in an ongoing pattern of sexual abuse of a person under 18 years old manifested by multiple incidents of a prolonged period of time. The State also asserted that the "Multiple Offense Policy" of RCW 9.94A.589[6] resulted in "a presumptive sentence that [wa]s clearly too lenient in light of the purposes of the Sentencing Reform Act." Clerk's Papers (CP) at 38. The State noted that the jury had already found the following aggravating circumstances: (1) sexual motivation, (2) an ongoing pattern of sexual abuse, and (3) the presumptive sentence was "clearly too lenient." CP

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[6] Here, the relevant part of RCW 9.94A.589 is RCW 9.94A.589(1)(a), which provided that trial courts must impose concurrent sentences, rather than consecutive sentences, unless (1) one or more of the aggravating circumstances listed in former RCW 9.95A.535 applied to the convictions, or (2) the defendant was guilty of two or more "serious violent offenses." *See* former RCW 9.94A.030(37) (2000) and former RCW 9.94A.030(39) (2001).

at 38.

The trial court imposed an exceptional sentence, comprising consecutive groups of sentences. In its "findings of fact and conclusions of law regarding exceptional sentence," the trial court determined that Grenning had an offender score of 99 for each of his 71 convictions. CP at 49. The trial court also found the following aggravating circumstances: (1) that Grenning had "victimized more th[a]n one child during [his] sexual assaults," "analogous"[7] to the aggravating circumstance of former RCW 9.94A.390(2)(d)(i) (2000) (recodified as RCW 9.94A.535(2)(d)(i), pursuant to Laws of 2001 ch. 10 § 6) and former RCW 9.94A.535(2)(d)(i) (2001)[8][9]; (2) that failure to impose an exceptional sentence would result in "'free crimes'" by allowing Grenning to "escape punishment for a majority of [his] sexual offenses"[10]; (3) that not imposing an exceptional sentence would permit "a sentence that [wa]s clearly too lenient in light of the purposes of the Sentencing Reform Act"[11]; (4) that Grenning had raped, attempted to rape, molested, and sexually

[7] CP at 50.

[8] Again, for the purpose of our analysis, the relevant portions of former RCW 9.94A.390 differs from former RCW 9.94A.535 in its internal citations to other provisions of the RCW that were recodified as part of the reorganization of ch. 9.94A RCW under Laws of 2001 ch. 10 § 6. Because the relevant portions of former RCW 9.94A.535 that we cite to in this opinion are substantively identical to former RCW 9.94A.390, for the purposes of clarity we refer to both provisions as former RCW 9.94A.535 throughout this opinion.

[9] "The current offense involved multiple victims or multiple incidents per victim." Former RCW 9.94A.535(2)(d)(i).

[10] CP at 50.

[11] CP at 50. The trial court did not cite any statutory provision for this aggravating circumstance. But former RCW 9.94A.390(2)(i) and former RCW 9.94A.535(2)(i), which were in effect when Grenning committed his crimes (April 1, 2001, to March 3, 2002), provided the following aggravating circumstance: "The operation of the multiple offense policy . . . results in a

exploited his victims multiple times, which "establish[ed] that [Grenning's] conduct was more [e]gregious th[a]n the typical case," under former RCW 9.94A.535(2)(d)(i)[12]; (5) that Grenning had committed second degree assault of a child with sexual motivation and that the sexual motivation finding "[wa]s supported by the jury's verdict"[13] under former RCW 9.94A.535(2)(f)[14]; and (6) that Grenning had committed multiple penetrations and attempted penetrations of his victims' anuses and multiple molestations and exploitations of both victims, which multiple acts "justif[ied] an exceptional sentence because multiple sexual acts over a period of time are more degrading and have a more serious impact of the victim th[a]n a single act."[15] The trial court also concluded:

> The grounds listed in [the findings of fact and conclusions of law regarding exceptional sentence], taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the exact same sentences even if only one of the grounds listed . . . is valid.

CP at 59-60.

The trial court sentenced Grenning to a total of 1,404 months of confinement (117 years), with credit for approximately 30 months of time served. The trial court imposed the high end

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presumptive sentence that is clearly too lenient in light of the purpose of [the Sentencing Reform Act]."

[12] CP at 51.

[13] CP at 52.

[14] Former RCW 9.94A.535(2)(f) defines a "sexual motivation" finding as an aggravating circumstance.

[15] CP at 55.

standard range for each offense, ran the sentences for the convictions within each class of offense concurrently, and then ran each class of offenses consecutively to one another.[16] For some convictions, the trial court also ordered Grenning to serve community custody for "the remainder of [his] life" under former RCW 9.94A.712. CP at 109-10.

II. 2004 Appeal and Remand for Retrial of 20 Reversed Counts; *Vance*[17]

Grenning appealed. We affirmed 51 of his convictions and sentences and reversed the 20 convictions for possession of depictions of minors engaged in sexually explicit conduct with sexual motivation. *See State v. Grenning*, 142 Wn. App. 518, 536, 174 P.3d 706 (2008), *aff'd*, 169 Wn.2d 47, 234 P.3d 169 (2010). We also addressed Grenning's argument that the trial court's imposition of consecutive sentences for his affirmed convictions violated his Sixth Amendment[18] jury trial right under *Apprendi*[19] and *Blakely*[20]; but we affirmed these exceptional

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[16] For example, at the time of Grenning's 2001 and 2002 crimes and his 2004 sentencing, the standard sentencing range for first degree child rape with an offender score of 99 was 240 to 318 months. The trial court imposed a 318-month sentence for each of Grenning's 16 child-rape convictions, with all 16 of the 318-month sentences running concurrently with each other. The trial court then ordered this group of concurrent sentences to run consecutively with the groups of concurrent sentences imposed for each of the other types of crimes—sexual exploitation of a minor, first degree child molestation, etc.

[17] *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010).

[18] U.S. Const., amend. VI.

[19] *Apprendi*, 530 U.S. at 490.

[20] *Blakely*, 542 U.S. at 313; *Grenning*, 142 Wn. App. at 544. RCW 9.94A.589(1)(a) provided that a trial court could impose consecutive sentences for non-serious violent offenses only if the aggravating circumstances of former RCW 9.94A.535 were present. We noted that (1) under RCW 9.94A.589(1)(a), a trial court could impose consecutive sentences for "violent offenses that are not serious" only if the aggravating circumstances of former RCW 9.94A.535 applied; (2) our Supreme Court held in *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 743, 147 P.3d 573

consecutive sentences on alternate grounds.[21]

We held that judicial fact-finding of aggravating circumstances is permissible if the trial court imposes consecutive sentences under former RCW 9.94A.712,[22] which allowed judicial fact-finding of aggravating circumstances, without violating *Blakely* or *Apprendi*, because (1) a defendant's maximum sentence under former RCW 9.94A.712(3) will always be the statutory maximum sentence for the offense, and (2) the Sixth Amendment does not bar judicial fact-finding related to a sentence that does not exceed the relevant statutory maximum. *Grenning*, 142 Wn. App. at 544-45. We also held that the trial court had properly imposed Grenning's exceptional consecutive sentences because "the jury returned a special verdict finding that Grenning committed the second degree assault of a child with sexual motivation" and "[a] finding of sexual motivation for the offense is an aggravating factor that allows the court to impose an exceptional sentence." *Grenning*, 142 Wn. App. at 545 (citing former RCW 9.94A.535(3)(f) (2008)). We did not, however, explain whether the sexual motivation finding supported an exceptional

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(2006) (*overruled by Vance*, 168 Wn.2d at 762), that, for the purpose of imposing consecutive sentences, *Blakely* requires the jury, not the trial court, to find former RCW 9.94A.535's aggravating circumstances; and (3) because the trial court, and not the jury, had found the aggravating circumstances, it was "impermissible" under *VanDelft* for the trial court to have imposed consecutive sentences on Grenning under former RCW 9.94A.589(1)(a). *Grenning*, 142 Wn. App. at 544.

[21] *Grenning*, 142 Wn. App. at 546.

[22] Former RCW 9.94A.712 became effective on September 20, 2001, and applied to nonpersistent offenders who committed certain sex crimes on or after September 1, 2001. Laws of 2001, 2d Spec. Sess., page ii; Laws of 2001, 2d Spec. Sess., ch. 12, § 303. The statute required trial courts to impose a minimum sentence "either within the standard sentence range for the offense, or outside the standard sentence range pursuant to [former] RCW 9.94A.535." Former RCW 9.94A.712(3) also required the trial court to impose a maximum sentence "consisting of the statutory maximum sentence for the offense."

sentence for only the second degree child assault conviction or whether that finding also supported imposition of consecutive sentences for all of Grenning's affirmed convictions. Thus, that question remained unanswered when we affirmed Grenning's convictions and exceptional sentences, reversed the 20 counts of child pornography possession, and remanded these reversed counts for retrial.

Granting Grenning's petition for review, the Washington Supreme Court affirmed our reversal of his 20 convictions for possession of depictions of minors engaged in sexually explicit conduct and remanded for a new trial on those 20 counts. *State v. Grenning*, 169 Wn.2d 47, 61, 234 P.3d 169 (2010). The Supreme Court did not address Grenning's challenges to the imposition of his consecutive sentences; thus, our 2004 opinion remained in effect on those issues.

On May 6, 2010, our Supreme Court issued *Vance*.[23] Based on the United States Supreme Court's decision in *Oregon v. Ice*,[24] our Washington Supreme Court overruled its earlier decision in *VanDelft*[25] and held that the trial judge's imposition of exceptional consecutive sentences based on the judge's own factual findings did not violate the defendant's constitutional right to a jury trial. *Vance*, 168 Wn.2d at 762-63.

[23] *Vance*, 168 Wn.2d 754.

[24] *Oregon v. Ice*, 555 U.S. 160, 164, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).

[25] *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 743, 147 P.3d 573 (2006) (*overruled by State v. Vance*, 168 Wn.2d 754, 762, 230 P. 3d 1055 (2010)).

III. 2010 Resentencing on Remand

On remand, the State chose not to retry the 20 child–pornography-possession charges. Instead, it asked a different superior court judge[26] to resentence Grenning on the affirmed 51 convictions by reducing his offender score from 99 to 96 and by subtracting 12 months from the original exceptional consecutive sentences.[27] Grenning's newly appointed counsel requested, and received, a continuance to provide time to prepare. The State reiterated its intent to request the exceptional sentence.

Resentencing occurred in October 2010, five months after the Supreme Court's *Vance* decision upholding former RCW 9.94A.535(2) (2003).[28] After subtracting 12 months for the 20 reversed child pornography possession convictions, the State (1) requested almost the same exceptional sentence that the 2004 trial court had imposed, noting that only a small part of the original sentence had been attributable to these 20 reversed convictions; and (2) argued that the original reasons for imposing an exceptional sentence remained, mainly, that a standard range sentence would result in Grenning's going unpunished for many crimes.

Grenning objected,[29] arguing that the State had failed to provide "notice of any intent to

[26] A different judge presided over Grenning's 2010 resentencing on remand. We refer to that court as "the resentencing court" to distinguish it from the original trial court, which had imposed the 2004 sentences, the subject of the previous 2004 appeal.

[27] In 2004, the trial court had sentenced Grenning to concurrent 12 months for each of his 20 convictions for possession of depictions of minors engaged in sexually explicit conduct. The trial court had also ordered these 20 concurrent possession sentences to run consecutively to the sentences imposed for the other types of crime. Thus, vacating these 20 possession convictions and sentences resulted in a net decrease of 12 months of confinement.

[28] *Vance*, 168 Wn.2d at 762-63.

[29] Grenning did not, however, contest his revised offender score.

seek an exceptional sentence in any of the charging documents." Verbatim Report of Proceedings (VRP) (Oct. 26, 2010) at 6. Grenning next contended that the resentencing court "need[ed] to make a determination" about whether it was sentencing him under former RCW 9.94A.712 (consecutive sentences for certain non-persistent sex offenses) or under RCW 9.94A.589(1)(a) (consecutive sentences for non-serious violent offenses if former RCW 9.94A.535 aggravating factors are present). VRP (Oct. 26, 2010) at 6. Grenning further argued that the resentencing court could not impose consecutive sentences under former RCW 9.94A.712 because (1) that statute applied only to crimes committed on or after September 1, 2001; and (2) the State had not asked the jury to specify when Grenning had committed his crimes within the charging period. Grenning also argued that the resentencing court could not impose consecutive sentences under RCW 9.94A.589(1)(a) because *Apprendi* and *Blakely* entitled him to have a jury find former RCW 9.94A.535 aggravating factors, not the trial court (who had found these factors in 2004).[30]

The resentencing court agreed with the 2004 trial court's findings that "the sentences should run consecutive[ly] in large part because there were multiple acts committed"[31] and, in light of Grenning's high offender score, a standard range sentence would result in some crimes going unpunished.[32] The resentencing court further noted:

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[30] Grenning advanced this argument even though our Supreme Court had issued *Vance*, holding to the contrary, nearly six months earlier. *Vance*, 168 Wn.2d at 762-63 (holding the trial court's imposition of exceptional consecutive sentences based on the court's own factual findings did not violate the defendant's constitutional right to a jury trial).

[31] VRP (Oct. 26, 2010) at 16.

[32] More specifically, the resentencing court concluded:

> So I will affirm his sentence of now 1392 months in the Department of

> There was a special jury verdict finding that he committed the second degree assault of a child [with] sexual motivation, which is a statutory aggravating factor, and the Court can then impose the consecutive sentences.
>
> I will also point out that the State did file a Notice of Intent to seek [an] exceptional sentence well in advance of the trial and sentencing date in this case.

VRP (Oct. 26, 2010) at 16. The resentencing court also remarked that (1) Grenning's case, including his exceptional sentence, had already been reviewed on appeal; (2) neither the Court of Appeals nor the Supreme Court had ruled his 2004 exceptional sentence unlawful; and (3) the Supreme Court did not "even address the issue of the length of sentence." VRP (Oct. 26, 2010) at 15.

The resentencing court reduced Grenning's offender score from 99 to 96 and resentenced him to an exceptional sentence, comprising consecutive sentences for the groups of the remaining affirmed convictions.[33] Grenning appeals this 2010 resentencing.

ANALYSIS

I. Consecutive Sentences

> Corrections based upon his offender's score of 96 and the prior findings that the sentences should run consecutive in large part because there were multiple acts committed. These are not all part of the same criminal conduct. That has already been up to the Court of Appeals.

VRP (Oct. 26, 2010) at 16.

[33] The resentencing court also amended the trial court's 2004 "findings of fact and conclusions of law regarding exceptional sentence": (1) to remove references to Grenning's 20 convictions for possession of depictions of minors engaged in sexually explicit conduct with sexual motivation, (2) to lower Grenning's offender score from 99 to 96, (3) to reduce Grenning's imprisonment term from 1,404 months to 1,392 months, and (4) to eliminate the community custody conditions for Grenning's reversed convictions. The resentencing court made no other changes to the original 2004 sentence.

Grenning challenges his consecutive sentences on four grounds: (1) The State had failed to charge the aggravating circumstances in the June 7, 2004 amended information; (2) the 2010 resentencing court improperly relied on former RCW 9.94A.712 (nonpersistent sex offender sentencing) to impose consecutive sentences; (3) in the alternative, the resentencing court improperly relied on RCW 9.94A.589(1)(a) to impose consecutive sentences because, by engaging in judicial fact-finding[34] for former RCW 9.94A.535 aggravating circumstances, the resentencing court violated *Blakely* and *Apprendi*; and (4) the aggravating circumstances of former RCW 9.94A.535, under which the resentencing court imposed consecutive sentences, were invalid.

In response to Grenning's first point, the State argues that he was not entitled to pretrial notice of the aggravating circumstances for an exceptional sentence post-trial. Conceding Grenning's second point, however, the State agrees that former RCW 9.94A.712 could not have served as a basis for imposing consecutive sentences. Instead, in response to Grenning's third and fourth points, the State contends that (1) the resentencing court had authority to find aggravating circumstances under former RCW 9.94A.535 and to impose consecutive sentences under RCW 9.94A.589(1)(a); and (2) the resentencing court had at least one valid aggravating circumstance on which to justify its imposition of consecutive sentences. We agree with the State.

A. Standard of Review

[34] Because the 2010 resentencing court did not issue its own findings of fact, there could be a question about whether the resentencing court actually engaged in fact-finding, or whether the resentencing court simply adopted the 2004 trial court's findings with some modifications. Regardless, for purposes of resolving the issues at hand, we assume that the 2010 resentencing court did engage in judicial fact-finding.

We review a trial court's imposition of consecutive sentences for an abuse of discretion.[35] A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; an abuse of discretion also occurs when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); *State v. Ramirez-Estevez*, 164 Wn. App. 284, 289-90, 263 P.3d 1257 (2011), *review denied*, 173 Wn.2d 1030 (2012). Here, the resentencing court did not abuse its discretion.

B. Absence of Aggravating Circumstances from Information

Relying on *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009)[36], Grenning argues that we should vacate his exceptional sentence because the State did not charge the aggravating circumstances in the information.[37] This argument fails.

On April 19, 2012, the Washington Supreme Court issued *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012), in which it revisited its *Powell* decision and held:

> [A]n aggravating factor is not the functional equivalent of an essential element, and, thus, need not be charged in the information. Because the charging document here contained the essential elements of the crimes charged and Siers was given notice prior to trial of the State's intent to seek an aggravated sentence, Siers's

[35] *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

[36] *Overruled by State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012).

[37] "[A] majority of the Court—three dissenting justices and two concurring justices—agreed that as a matter of constitutional law aggravating factors must be pled in the information. *Powell*, 167 Wn.2d at 695 (Owens, J. dissenting, joined by Justices Sanders and Chambers); 689-90 (Justices Stephens and C. Johnson concurring in result, but agreeing with the dissent that aggravating factors have to be included in the information)." Br. of Appellant at 30 (citing *Powell*).

> due process rights were not violated.
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> . . . .
>
> We, therefore, overrule this court's decision [. . .] and adopt the position advanced by the lead opinion in *Powell* to the effect that, so 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 under article 1, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, or due process." *Powell*, 167 Wn.2d at 687.

Siers, 174 Wn.2d at 271, 276-7 (second and third alterations in original). *Siers* controls here.

Consistent with *Siers*, Grenning received constitutionally adequate notice of the essential elements of the substantive sex-crime charges against him, as well as notice of the State's intent to seek an exceptional sentence. In 2004, immediately after the jury's verdict, the State first gave Grenning notice of its intent to seek an exceptional sentence for his exceptionally large number of sex-crimes against children, which, because of his exceptionally high offender score, would otherwise go unpunished. Thereafter, the State continued to pursue Grenning's exceptional sentence during his previous appeal and through his 2010 resentencing, at which the State reiterated its intent to seek the same exceptional consecutive sentences it had sought and the trial court had imposed in 2004 (with the exception of first adjusting the offender score and subtracting 12 months attributable to the reversed 20 child pornography possession convictions, which the State chose not to retry).[38] *Grenning*, 169 Wn.2d at 47.

[38] We note that, during the 2010 resentencing, the State did not attempt to assert different aggravating factors or to run all the individual standard-range sentences for Grenning's 51 convictions consecutively; again, it ran only groups of sentences consecutively as before. Thus, Grenning cannot claim lack of notice based on any change in the State's recommendation over a period of at least six years.

Furthermore, the sentencing-relevant facts in *Powell* and *Siers* differed significantly from those here. Powell was convicted of a single crime, first degree murder, for which the trial court imposed an exceptional sentence outside the standard range. Accordingly, the justices in *Powell* treated the aggravating factors as "functionally equivalent to elements of the crime" because they would "justif[y]" an exceptional sentence "above an offense's standard sentencing range." *Powell*, 167 Wn.2d at 689 (Stephens, J., concurring). Siers was convicted of two counts of second degree assault, with a deadly weapon enhancement on each count; "[t]he jury also returned a special verdict on count II, finding that Siers had committed the assault on [the victim] while [the victim] was acting as a good Samaritan" under RCW 9.94A.535(3)(w), for which the trial court imposed a sentence at the high end of the standard range. *Siers*, 174 Wn.2d at 272.

Here, with ample notice to Grenning, both the trial court in 2004 and the resentencing court in 2010 imposed standard-range sentences for each of his 51 affirmed convictions. Unlike Powell's above-the-standard-range exceptional sentence for his single murder conviction[39] or Siers' high-end-standard–range sentence "'to give some weight to the jury's finding of a good Samaritan aggravator,'"[40] Grenning's sentences for his 51 child-sex-abuse convictions became exceptional only in the running of sub-groups of standard-range sentences consecutively. In accord with the *Siers* holding that the State need not charge aggravating sentencing factors in the information, we hold that the State did not violate Grenning's due process rights by alleging the supporting exceptional-sentence aggravating factors following the jury's 2004 verdict instead of

[39] *Powell*, 167 Wn.2d at 676.

[40] *Siers*, 174 Wn.2d at 273.

in the information.[41]

C. Former RCW 9.94A.712

Grenning argues that the resentencing court erroneously imposed consecutive sentences under former RCW 9.94A.712 because that statute applies only to certain sex offenses committed on or after September 1, 2001, and the State never asked the jury to specify when Grenning committed his crimes within the charging periods of April 1, 2001, to September 30, 2001, and July 1, 2001, to March 3, 2002. The State concedes that, because "[t]he jury was not asked to return a special interrogatory finding that any of [Grenning's] crimes occurred after September 1, 2001 . . . the provisions of former RCW 9.94A.712 cannot be applied to [Grenning's] crimes without running afoul of the prohibitions against ex post facto laws and due process violations." Br. of Resp't at 25-26. Accordingly, the State asks us to vacate the community custody conditions of Grenning's sentence that relied on former RCW 9.94A.712, namely the community custody conditions imposed for his rape and molestation convictions. We accept the State's concession and recommendation.

Because the jury never determined that Grenning committed his crimes on or after September 1, 2001, we vacate the community custody conditions of his sentence imposed under

[41] We acknowledge that, unlike Grenning, Siers received pre-trial notice of the State's intent to seek an exceptional sentence. Nevertheless, Grenning's having received notice after the jury's verdict was constitutionally adequate notice under the plain language of the *Siers* holding. Furthermore, because Grenning shows neither lack of actual notice nor prejudice flowing from the State's post-verdict notice of its intent to seek an exceptional sentence, the timing of the State's notice here provides no reason to reverse the resentencing court's re-imposition of consecutive standard-range sentences for groups of Grenning's 51 previously affirmed convictions for sex crimes against children.

former RCW 9.94A.712. On remand, the resentencing court should revise Grenning's community custody conditions by applying the community custody statutes in effect at the time of Grenning's crimes, committed on or after April 1, 2001,[42] and before September 1, 2001.

D. RCW 9.94A.589(1)(a) and former RCW 9.94A.535

Even if the resentencing court wrongly relied on former RCW 9.94A.712 as a basis for imposing an exceptional sentence and community custody conditions, we may affirm Grenning's consecutive sentences on any grounds that the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)). We now address Grenning's argument that (1) RCW 9.94A.589(1)(a) permitted the imposition of consecutive sentences only if the aggravating circumstances of former RCW 9.94A.535 were present; and (2) the resentencing court, and not the jury, found former RCW 9.94A.535's aggravating circumstances and this judicial fact-finding violated *Blakely* and *Apprendi*.[43] This latter argument ignores and fails in light of the United States Supreme Court's decision in *Ice*[44] and our Supreme Court's subsequent decision in *Vance*.[45] We hold the resentencing court correctly relied on the alternative basis of RCW 9.94A.589(1)(a) and former RCW 9.94A.535 to impose consecutive sentences on Grenning.

In *Ice*, the United States Supreme Court held that an Oregon statutory sentencing scheme

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[42] April 1, 2001, is the earliest date in Grenning's charging periods.

[43] *Blakely*, 542 U.S. at 313; *Apprendi*, 530 U.S. at 490.

[44] *Ice*, 555 U.S. at 163-65.

[45] *Vance*, 168 Wn.2d at 756.

was constitutional, even though the sentencing scheme allowed the court, and not the jury, to find facts that would permit imposition of consecutive sentences.[46] The *Ice* court explained that the imposition of consecutive sentences did not implicate *Blakely* and *Apprendi* because:

> The decision to impose sentences consecutively is not within the jury function that "extends down centuries into the common law." *Apprendi*, 530 U.S. at 477. . . . Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of the state legislatures.

Ice, 555 U.S. at 168. A year later, our Supreme Court recognized that *VanDelft*, in which it had held that a jury must find facts that supported the imposition of consecutive sentences, was no longer good law:

> *Ice* held that under *Blakely* and *Apprendi* . . . a sentencing judge does not run afoul of the Sixth Amendment by finding facts necessary to impose consecutive, rather than concurrent, sentences for discrete crimes. *Ice*, 129 S. Ct. at 717.
>
> . . . .
>
> In *VanDelft* we applied *Apprendi* and *Blakely* to find that the Sixth Amendment requires a jury, not a judge, to find facts to support consecutive sentences. . . . *Ice* squarely overrules *VanDelft*.

Vance, 168 Wn.2d at 762.

Here, *Vance* thus permitted the resentencing court to find a former RCW 9.94A.535 aggravating circumstance; contrary to Grenning's argument, a jury was not required to make this finding.[47] The resentencing court properly used those aggravating circumstances to impose

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[46] *Ice*, 555 U.S. at 172.

[47] Grenning baldly asserts that "*Vance* was wrongly decided" and that "[*Ice*] should be rejected on independent state grounds." Br. of Appellant at 38. We decline Grenning's request to disregard or to overrule *Vance*; we are bound by our Supreme Court's decision until such time as our Supreme Court overrules itself. *State v. Burkins*, 94 Wn. App. 677, 701-02, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999). And our Supreme Court has already decided not to reject *Ice* on

consecutive standard-range sentences for Grenning's multiple discrete crimes under RCW 9.94A.589(1)(a). Accordingly, we hold that the resentencing court did not engage in impermissible judicial fact-finding and that it did not abuse its discretion by imposing consecutive sentences.

E. Aggravating Circumstances

Finally, Grenning challenges the individual aggravating circumstances on which the resentencing court relied to run his standard-range sentences consecutively. These challenges fail.

1. Sexual motivation

First, Grenning argues that, although the jury properly found the sexual motivation aggravating circumstance, this particular finding "applies to one count only," namely the second degree child assault count, which finding cannot support consecutive sentences for convictions that did not include the same sexual motivation finding. Br. of Appellant at 21. Even assuming, without deciding, that Grenning is correct, he failed to object to this aggravating circumstance during his 2010 resentencing; therefore, we do not address it for the first time on appeal. RAP 2.5(a)(3).[48]

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independent state grounds.

Grenning also argues for the first time in his reply brief that *Vance* does not apply to him because our Supreme Court issued it after he committed his crimes. We do not address arguments raised for the first time in a reply brief. *Johnson v. State*, 164 Wn. App. 740, 753, 265 P.3d 199 (2011) (citing *Stanzel v. City of Puyallup*, 150 Wn. App. 835, 851, 209 P.3d 534 (2009), *review denied*, 168 Wn.2d 1018 (2010)), *review denied*, 173 Wn.2d 1027 (2012). Therefore, we do not further consider this argument.

[48] Although we may review an unpreserved assignment of error if the appellant demonstrates "a manifest error affecting a constitutional right," Grenning makes no such argument. RAP 2.5(a)(3).

2. "Free crimes"

Next, Grenning argues that the resentencing court erred by basing his consecutive sentences, in part, on the "free crimes" aggravating circumstance because (1) the legislature did not enact this aggravating circumstance until 2005,[49] long after he had committed his crimes sometime between April 1, 2001, and March 3, 2002; and (2) the Sentencing Reform Act clearly provides that "any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Br. of Appellant at 24 (quoting RCW 9.94A.345). Again, Grenning raises this argument for the first time on appeal in violation of RAP 2.5(a)(3), without arguing or showing that it was a manifest constitutional error; therefore, we do not further address it.[50]

[49] Laws of 2005, ch. 68, § 3.

[50] Moreover, even if we were to invalidate *one* of the resentencing court's aggravating circumstances, we can affirm the exceptional sentence if we are confident that the resentencing court would have imposed the same sentence based on the remaining valid factors. *State v. Post*, 118 Wn.2d 596, 616-17, 826 P.2d 172, 837 P.2d 599 (1992). Such is the case here: The 2004 trial court expressly concluded:

> The grounds listed in [the findings of fact and conclusions of law regarding exceptional sentence], taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the exact same sentences even if only one of the grounds listed . . . is valid.

CP at 59-60. The 2010 resentencing court left this conclusion unchanged.

3. Multiple incidents and multiple victims

Grenning also argues that the resentencing court improperly relied on the "multiple incidents or multiple victims" aggravating circumstance because this circumstance "cannot support [an] exceptional sentence where each and every incident against each victim is charged in a separate count." Br. of Appellant at 19 n.7. Again, Grenning failed to raise this challenge during his 2004 sentencing, his appeal of that sentence, or his 2010 resentence; and he does not argue that this was a manifest error affecting a constitutional right that falls within the RAP 2.5(a)(3) exception to the general rule requiring preservation of issues for appeal. Accordingly, we do not further consider this argument.

4. "Clearly too lenient" sentence

Lastly, Grenning asks us to conduct a *Gunwall* analysis[51] and to determine that article I, sections 21 and 22 of the Washington Constitution required a jury to have found the "clearly too lenient" aggravating circumstance here. Br. of Appellant at 39. [52] Again, we do not consider this argument, also raised for the first time on appeal, because Grenning has failed to assert a manifest

[51] *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

[52] The Sentencing Reform Act provides that any sentence "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345; *see also State v. Calhoun*, 163 Wn. App. 153, 162, 257 P.3d 693 (2011), *review denied*, 173 Wn.2d 1018 (2012). Former RCW 9.94A.535(2)(i), applicable at the time of Grenning's 2001-2002 crimes, included the following aggravating circumstance: "The operation of the multiple offense policy . . . results in a presumptive sentence that is *clearly too lenient* in light of the purpose of [the Sentencing Reform Act]." (Emphasis added.) Several years after Grenning committed his crimes, our legislature expressly provided that a judge, instead of a jury, could find the "free crimes" aggravating circumstance. Laws of 2005, ch. 68, § 3. Thus, the "'free crimes'" aggravating circumstance would not have applied here.

constitutional error exception.[53] RAP 2.5(a)(3); *State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011); *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011).

II. Statement of Additional Grounds

In his SAG, Grenning argues that (1) the resentencing court failed to conduct a "same criminal conduct" analysis[54]; (2) RCW 9.94A.589(1)(a) is unconstitutional because sentences imposed under this statute lead to "absurd result[s]" that violate his "equal protection rights"[55]; and (3) the resentencing court violated the appearance of fairness doctrine. These arguments fail.

The 2004 trial court entered, and the 2010 resentencing court adopted, extensive findings of fact about Grenning's "opportunit[ies] to pause, reflect, and either cease his [crimes] or proceed to commit further [crimes]." CP at 40-47. This was a "same criminal conduct" analysis under RCW 9.94A.589(1)(a).[56] In baldly asserting that RCW 9.94A.589(1)(a) leads to "absurd result[s]," [57] Grenning fails to carry his burden to establish that this statute is "unconstitutional

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[53] Moreover, as the State notes, our Supreme Court has already concluded that the Washington constitution is no more protective of the right to a jury fact-finder on sentencing matters than is the federal constitution. *See* Br. of Resp't at 15-17 (citing *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003)). And, except for the unique circumstances involving death penalties, *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), we are aware of no case holding that the federal constitution requires a jury, instead of the court, to render an aggravating factor finding, especially in the context here involving standard-range sentences that become "exceptional" only by virtue of their being run consecutively.

[54] SAG at 19.

[55] SAG at 5.

[56] "Two crimes against a single victim constitute the 'same criminal conduct' if they (a) involve the same criminal intent; (b) were committed at the same time; and (c) were committed at the same place." *State v. Grantham*, 84 Wn. App. 854, 857-58, 932 P.2d 657 (1997) (quoting former RCW 9.94A.400(1)(a)).

beyond a reasonable doubt."[58] And to the extent that Grenning argues it is unconstitutional to treat "other current offenses" as "prior convictions,"[59] Grenning similarly fails to carry his burden of showing that RCW 9.94A.589(1)(a) is "unconstitutional beyond a reasonable doubt." *Enquist*, 163 Wn. App. at 45. Instead, his argument primarily comprises unsupported assertions such as (1) treating first-time offenders as recidivist offenders is an "anomaly"; (2) Washington's sentencing regime is "wholly inconsistent with well-established federal law"; and (3) we should agree with an Oregon appellate court decision that treating current offenses as prior convictions is wrong.[60]

Grenning also contends that the current-offenses-as-prior-convictions mechanism violates various constitutional provisions; but he does not attempt to supply any reasoning to support his contention. In contrast, our Supreme Court has already decided that he has no constitutional right to have the State prove beyond a reasonable doubt, and to have a jury find, the existence of his prior convictions. *See, e.g.*, *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) ("This court has repeatedly . . . held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.") Finally, no "reasonably disinterested person" would believe that the resentencing court was not fair, impartial, and neutral to Grenning simply because it did not specifically address each of

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[57] SAG at 5.

[58] *State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011), *review denied*, 173 Wn.2d 1008 (2012).

[59] SAG at 6.

[60] SAG at 11, 15.

Grenning's resentencing counsel's arguments. *State v. Ring*, 134 Wn. App. 716, 722, 141 P.3d 669 (2006).

We vacate the community custody conditions that the resentencing court imposed under former RCW 9.94A.712; and we remand for reconsideration of those conditions, applying the community custody statutes that were in effect during Grenning's crimes (assuming that Grenning committed his crimes on or after April 1, 2001, and before September 1, 2001). We otherwise affirm Grenning's 2010 resentencing.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Johanson, A.C.J.

Penoyar, J.