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

STATE OF WASHINGTON,	)	No. 30126-5-III
Respondent,	)	
v.	)	
FRANK PATRICK MANN,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Frank Patrick Mann appeals his aggravated exceptional sentence following his convictions for one count of first degree child molestation and three counts of first degree child rape. He mainly contends for the first time on appeal that the trial court improperly instructed the jury on the abuse of trust aggravating factor because the instructions did not specify which first degree child-rape count the jury considered before making its finding. Additionally, Mr. Mann asserts procedural and constitutional sentencing challenges. Finally, he contends the court's findings inadequately support the court's imposition of his legal financial obligations (LFOs). We affirm.

FACTS

In 2004, a jury found Frank Patrick Mann guilty of one count of first degree child molestation and three counts of first degree child rape. In an unpublished opinion, this court affirmed the convictions, but remanded for resentencing. *State v. Mann*, noted at 128 Wn. App. 1010, 2005 WL 1406008. On resentencing, the trial court determined that it lacked authority to impanel a jury to consider an aggravating factor. This court reversed. *State v. Mann*, 146 Wn. App. 349, 189 P.3d 843 (2008).

But in March 2011 after *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (rejecting post-trial jury exceptional sentencing determinations) and the Laws of 2007, ch. 205, § 1 (addressing *Pillatos* and permitting later jury determinations of aggravating circumstances), the State filed its notice of intent to seek aggravating circumstances, alleging "the following aggravating circumstance(s) exist(s) for the charged *crime*: Abuse of Trust, Zone of Privacy, Prolonged Pattern of Sexual Abuse, and Multiple Current Offenses that result in a 9+(12) offender score." Clerks Papers (CP) at 63 (emphasis added).

The court instructed the jury its duty was to "determine whether any of the following aggravating circumstances exists: Whether the defendant used his position of

trust to facilitate the commission of *the crime*." CP at 94 (Jury Instruction No. 3) (emphasis added). The jury was given a special verdict form asking, "Did the defendant use his position of trust to facilitate the commission of *the crime*?" CP at 102 (emphasis added). Neither party made any exceptions or objections to the final jury instructions or special verdict form.

The jury answered, "Yes" on the verdict form. CP at 102. The court resentenced Mr. Mann to 198 months (high-end of the standard range) on count I• first degree child molestation, and to exceptional sentences of 478 months (high-end of 318 months plus 160 months) on each of counts II, III and IV• first degree rape of a child, with the sentences on all counts to be served concurrently.

The court entered written findings of fact and conclusions of law. The court found Mr. Mann's "offender score is 12" and that the jury found he, "abused his position of trust in the commission of these crimes." CP at 145-46. The court concluded Mr. Mann, "used his position of trust to facilitate multiple sexual assaults of the victim . . . is a real danger to the community and a standard range sentence is too lenient under the facts and circumstances of this case." CP at 146. The court further concluded, "Either one of the bases found here alone would justify the exceptional sentence imposed. This court would impose the same sentence based upon any one of the factors stated above standing alone." CP at 147.

At sentencing, the court found Mr. Mann "has the present ability or likely future ability to pay the . . . financial obligations imposed herein." CP at 106. Prior to making this finding, the court "considered the total amount owing, the defendant's past, present, and future ability to pay [LFOs], including the defendant's financial resources and the likelihood that the defendant's status will change." *Id.* Mr. Mann appealed.

ANALYSIS

A. Abuse of Trust• Unanimity

The issue is whether the trial court erred in its abuse of trust instructions by depriving Mr. Mann of jury unanimity.

Mr. Mann correctly notes that the jury's finding of abuse of trust might have applied to one, some, or all of his crimes. He argues from this that he was denied a unanimous verdict by the court's failure to instruct the jury that its verdict must be unanimous. He argues that a unanimity instruction would have required a unanimous jury verdict on exactly which crime or crimes this aggravating factor applied to. The State responds that we need not address this assignment of error since there was no objection raised at trial and any error does not amount to manifest constitutional error in any event.

An aggravating factor is not an element of the underlying crime; nonetheless, it must be proved as if it were an element. *State v. Roswell*, 165 Wn.2d 186, 193, 196 P.3d

705 (2008). And so the jury must be unanimous to find the aggravating factors: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." RCW 9.94A.537(3). And our Supreme Court has referred to the failure to require a unanimous verdict as manifest constitutional error. *State v. O'Hara*, 167 Wn.2d 91, 101, 217 P.3d 756, (2009) (citing *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974)).

But any error occasioned by the court's failure to give a unanimity instruction here would be harmless. Mr. Mann's offender score was 12. This high offender score is itself an aggravating factor. RCW 9.94A.535(2)(c). The sentencing court then correctly concluded that this high offender score alone justified an exceptional sentence independent of Mr. Mann's abuse of trust: "[e]ither one of the bases found here alone would justify the exceptional sentence imposed. This court would impose the same sentence based upon any one of the factors stated above standing alone." CP at 147. We will uphold an exceptional sentence even where we invalidate an aggravating factor if we are convinced that the court would impose the same sentence on the basis of a valid factor. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). And here the sentencing court said it would do just that. We then affirm the exceptional sentence.

B. Constitutional Challenge to RCW 9.94A.535

The issue is whether RCW 9.94A.535 is unconstitutionally void for vagueness. Mr. Mann contends the terms "substantial and compelling" are too subjective.

We review a vagueness challenge to a statute's constitutionality de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). A challenger bears the burden of proving beyond a reasonable doubt that a statute is unconstitutionally vague and, because we presume a statute is constitutional and the standard for finding a statute unconstitutionally vague is high, solely in exceptional cases may a challenger overcome this presumption. *Id*. at 11.

RCW 9.94A.535 states, "The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537."

Mr. Mann asserts his right to due process was violated because no objective standard exists for what constitutes a "substantial and compelling" reason to impose an exceptional sentence and that his right to appeal was violated because the trial court did not articulate its reasons for the length of the sentence imposed.

"[O]ur Supreme Court has made clear that, because sentencing guidelines neither define conduct nor 'allow for arbitrary arrest and criminal prosecution by the State,' the

due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." *State v. Duncalf*, 164 Wn. App. 900, 911 n.2, 267 P.3d 414 (2011) (quoting *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003)), *review granted*, 173 Wn.2d 1026, 273 P.3d 982 (2012). Mr. Mann "has no liberty interest in being sentenced below the maximum term authorized by the jury's special verdict finding." *Duncalf*, 164 Wn. App. at 911 n.2. Because Mr. Mann has no right to be sentenced below the maximum term authorized by the jury's finding of the aggravating circumstance, no right has been violated. Moreover, "'the sentencing court need not state reasons in addition to those relied upon to justify the imposition of an exceptional sentence above the standard range in the first instance.'" *State v. Ritchie*, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995) (quoting *State v. Ross*, 71 Wn. App. 556, 573, 861 P.2d 473, 883 P.2d 329 (1993)). Thus, a definition for the terms "substantial and compelling" would be unnecessary. Accordingly, Mr. Mann fails to meet his burden to prove RCW 9.94A.535 is unconstitutional.

C. LFO Findings

The issue is whether substantial evidence supports the court's finding that Mr. Mann had the current or future ability to pay LFOs. He argues the court failed to look into his resources and the nature of the burden of imposing LFOs.

We need not determine if substantial evidence supports the trial court's finding

that Mr. Mann had the ability or likely future ability to pay the imposed LFOs because no evidence shows the State has attempted to collect the LFOs. The proper time for inquiring into the defendant's ability to pay comes at "'the point of collection and when sanctions are sought for nonpayment.'" *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (quoting *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)).

Affirmed.

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

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Brown, J.

WE CONCUR:

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Sweeney, J.

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Siddoway, A.C.J.