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

STATE OF WASHINGTON.	)	No. 30342-0-III
Respondent,	)	
	)	
v.	)	
	)	
JAMES STEPHEN DUVALL JR.,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	
	)	

Siddoway, A.C.J. — By special verdict, a jury found James Duvall Jr. manifested deliberate cruelty to his victim when committing assault in the third degree. The court then imposed an exceptional sentence above the standard range.

RCW 9.94A.535 permits a court to order a sentence above the standard range "if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." Here, the trial court implicitly concluded that the facts found by the jury in the special verdict were substantial and compelling reasons justifying an exceptional sentence. We reject Mr. Duvall's argument that the court must use the words "substantial and compelling" in setting forth reasons for its decision in written findings of fact and conclusions of law, and hold that the court properly imposed the exceptional sentence.

FACTS AND PROCEDURAL BACKGROUND

A jury convicted Mr. Duvall of assault in the third degree. By special verdict, the jury also found that Mr. Duvall's conduct during the crime manifested deliberate cruelty to his victim. At the sentencing hearing, the court determined Mr. Duvall's offender score to be zero, as he had committed no prior crimes. The standard range for a conviction of assault in the third degree was 1 to 3 months. Based on the jury's special verdict, the court issued an exceptional sentence of 18 months.

The trial court issued written findings of fact and conclusions of law regarding the exceptional sentence, which stated, "The jury was presented with a special verdict, which asked them whether they believed that the defendant acted with deliberate cruelty when he committed the act in which he was convicted. The jury answered that they believed such an aggravating factor existed." Clerk's Papers (CP) at 55. The court acknowledged the jury's finding and stated the facts dictated an exceptional sentence in this matter. It then concluded, "Based upon the finding of the jury that the defendant acted with deliberate cruelty in committing the acts of which he was convicted, and the court finding that such a finding was appropriate, the court concludes that an exceptional sentence upward is appropriate and best serves the interests of justice." *Id.*

Mr. Duvall timely filed a notice of appeal on October 20 and claims the court erred in issuing an exceptional sentence.

ANALYSIS

I

As a threshold matter, Mr. Duvall asks this court to disregard sections of the State's brief for failure to follow the Rules of Appellate Procedure because the State improperly cited to evidence from the trial not included in the appellate record. RAP 10.4(f) provides that "[a] reference to the record should designate the page and part of the record." While the facts summarized by the State are in the sentencing court transcript, no citations are provided. This court may adequately resolve the issues raised by Mr. Duvall without relying on the facts cited and, therefore, will not consider them.

Mr. Duvall also claims the State failed to accurately cite case law. We may overlook procedural infirmities where the flaw is minor, we are not greatly inconvenienced, and the other party is not prejudiced. *State v. Olson*, 126 Wn.2d 315, 319, 323, 893 P.2d 629 (1995); RAP 1.2(a) (the rules should be "liberally interpreted to promote justice and facilitate the decision of cases on the merits"). While the State did not provide pinpoint citations, Mr. Duvall himself does not cite authority for the State's deficiencies and the court can adequately discern the nature of the State's argument.

II

Mr. Duvall assigns error to the form of the court's findings of fact and conclusions of law, claiming it failed to make findings of fact or include "substantial and compelling"

reasons that justify imposing the exceptional sentence.

Generally, a trial court must impose a sentence within the standard range. RCW 9.94A.505(2)(a)(i). The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, permits a court to order a sentence above the standard range "if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA then sets forth an exclusive list of factors that can support a sentence above the standard range to be considered by the jury. RCW 9.94A.535(2)-(3). One of those factors allows a jury to consider whether the "offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). Here, the court based its exceptional sentence on the jury's finding of deliberate cruelty to the victim.

Ordinarily, if the court imposes a sentence outside the standard range, the sentence is reviewable only as provided in RCW 9.94A.585(4).[1] RCW 9.94A.535. Under RCW 9.94A.585(4), we review (1) "whether the record supports the jury's special verdict on the aggravating circumstances" under the clearly erroneous standard; (2) whether, as a matter of law, the reasons justify an exceptional sentence under a de novo standard; and (3) whether the sentence is clearly excessive or too lenient under an abuse of discretion

[1] "To reverse a sentence which is outside the standard range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

standard. *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). However, Mr. Duvall does not challenge the adequacy of the sentence. Instead, Mr. Duvall argues the trial court failed to properly include "substantial and compelling" reasons within its findings of fact and conclusions of law to justify the exceptional sentence and, as a result, he cannot challenge the excessiveness of the sentence.

Prior to 2004, Washington courts allowed sentence enhancements to be imposed based on the trial court's own factual findings, as opposed to the jury, and without requiring proof beyond a reasonable doubt. *In re Pers. Restraint of Jackson*, 175 Wn.2d 155, 159, 283 P.3d 1089 (2012). In 2004, the Supreme Court held that all factual findings necessary to impose a sentence beyond the statutory range must be submitted to the jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Now, if the jury finds the alleged aggravating circumstances beyond a reasonable doubt, the trial judge is bound by the jury's finding and left "only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006); *State v. Williams-Walker*, 167 Wn.2d 889, 899, 225 P.3d 913 (2010); *Hale*, 146 Wn. App. at 306; *see also*

RCW 9.94A.537(6).

The legislature has since amended our statutes to conform to *Blakely*, but RCW 9.94A.535 still requires a trial court to enter findings of fact and conclusions of law to justify sentences outside the standard range. *Hale*, 146 Wn. App. at 306.[2] Specifically, it provides that "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Here, the court's findings and conclusions stated that the jury found Mr. Duvall acted with deliberate cruelty when he committed the act in which he was convicted, mirroring the jury's determination in line with *Blakely*. The court then concluded:

> Based upon the finding of the jury that the defendant acted with deliberate cruelty in committing the acts of which he was convicted, and the court finding that such a finding was appropriate, the court concludes that an exceptional sentence upward is appropriate and best serves the interests of justice.

CP at 55.

By noting the jury's finding, agreeing that it was appropriate, and concluding that an exceptional sentence upward is appropriate and serves the interests of justice, the trial

[2] In *Hale*, the court was faced with a similar question and noted, "Absent legislative directive, it may suffice for the trial court to attach the jury's verdict to the judgment and sentence, instead of entering findings and conclusions, when the jury finds aggravating circumstances and it imposes an exceptional sentence. We do not decide that issue here because the trial court entered findings and conclusions at our directions." 146 Wn. App. at 306 n.4.

court implicitly found substantial and compelling reasons justifying the exceptional sentence. RCW 9.94A.535 does not require the court to recite the words "substantial and compelling," which would add nothing to the clear import of the court's reason for imposing the sentence. The trial court's findings and conclusions satisfy the SRA.

Mr. Duvall also argues that the allegedly improper findings and conclusions prevented him from arguing that his exceptional sentence was clearly excessive. RCW 9.94A.585(4) provides the only method by which to appeal an exceptional sentence. The form of the court's findings and conclusions did not prevent Mr. Duvall from challenging his sentence on the basis of the two grounds provided by that provision. He has failed to demonstrate either.

Affirmed.

A majority of the panel has determined that 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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Siddoway, A.C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.