IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 62756-2-I
	)	
v.	)	
	)	
DAVID MICHAEL BROWN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 9, 2009
_____	)	

Dwyer, A.C.J. — If a criminal defendant is eligible for a special sex offender sentencing alternative (SSOSA) to a standard range sentence under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the defendant is entitled to have the trial court actually consider the alternative. However, the trial court is not required to state on the record its reasons for determining that a SSOSA sentence is inappropriate. Although the trial court herein did not discuss on the record every statutory factor to be considered in reviewing a SSOSA request, the record nonetheless indicates that the trial court meaningfully considered whether a SSOSA sentence would be appropriate for David Brown before denying Brown's request. Thus, the trial court did not abuse its discretion. Further, Brown has failed to show that he received ineffective

assistance of counsel. Accordingly, we affirm.

I

In August 2005, Brown's former stepdaughter, K.B., reported to law enforcement officials that Brown had repeatedly molested her and attempted to have sexual intercourse with her multiple times from 1991 to 1997, when K.B. was between 5 and 11 years of age. K.B. reported to police that, when she was younger, Brown had threatened her that she would get into trouble if she told anyone about what he had done to her. When K.B. confronted Brown about the alleged abuse a few days after notifying the police, Brown responded that he had already discussed these matters with her. Brown then abruptly left the state of Washington. The State subsequently charged Brown by information with two counts of rape of a child in the first degree, in violation of RCW 9A.44.073, and one count of child molestation in the first degree, in violation of RCW 9A.44.083. Brown was eventually apprehended in California, extradited to Washington, and appointed counsel from the Northwest Defenders Association (NDA).

The State subsequently amended the charging information, dismissing the child molestation count. In November 2008, Brown pleaded guilty to two counts of rape of a child in the first degree. At Brown's plea hearing, another attorney with NDA stood in for the lawyer specifically appointed to defend Brown. In a signed handwritten statement submitted to the trial court concurrent with his guilty plea, Brown admitted to having had sexual intercourse with K.B. on two

occasions in 1997 and 1998. He confirmed the truth and accuracy of this statement in court before entering his guilty plea. Brown also confirmed that he understood the consequences of pleading guilty, that he had discussed these consequences with his lawyer, and that his lawyer sufficiently answered all of his questions. In particular, he confirmed his understanding that each offense carried a standard sentencing range of 120 to 160 months of imprisonment in light of his criminal history. Additionally, he confirmed his understanding that the State planned to recommend a sentence of imprisonment at the top of the standard range for each count and that the trial court was not bound to follow the State's sentencing recommendation. Further, he confirmed that, other than the State's sentencing recommendation, no one had made any promises to him in exchange for his guilty plea.

At sentencing, Brown requested that the trial court impose a120-month sentence, suspended on the condition that he undergo sex offender treatment consistent with the requirements of SSOSA. In support of this request, Brown submitted letters from various individuals attesting to his good character, research studies showing a high recidivism rate among sex offenders who are imprisoned, and the report of William Satoran, a certified sex offender treatment provider who examined Brown to determine whether he was amenable to treatment. Satoran concluded that Brown presented "as a marginal case for SSOSA and community treatment" and characterized him as a "mixed bag."

However, he ultimately recommended that Brown "be considered for SSOSA" because Brown had admitted guilt, recognized the wrongfulness of his actions, and described his actions in generally similar terms as did K.B. Satoran also concluded that, with regard to risk to the community, Brown "compare[d] favorably" to "other sex offenders who are community treatable."

Satoran made this recommendation despite finding that Brown had "not been honest with his fiancée[1] or his parents" about the nature and extent of his abusive conduct and concluding that Brown had minimized the harmful nature of his behavior. According to Satoran's report, Brown estimated that he molested K.B. "30 to 40 times over a five-year period" or as much as "a couple of times every couple of months during a four-year period, including touching and feeling her breasts and vagina, digital penetration of her vagina and rubbing his penis on her vagina." Satoran observed that "Mr. Brown . . . admits the sexual assaults though he minimizes the seriousness saying, 'I'd hardly call it molestation' although he reports digital penetration of his victim and rubbing his penis on her vagina." Brown also revealed during the examination that he had fondled another, unnamed victim—a nine year-old girl—while she slept. This incident occurred when Brown was 42 years of age, during the same time period Brown admitted to abusing K.B.

Satoran's evaluation also revealed a discrepancy between Brown's and

[1] At some point, Brown's marriage to K.B.'s mother dissolved. Brown subsequently became engaged to a woman he met while living in California after fleeing Washington.

K.B.'s accounts as to K.B.'s age when Brown abused her. Brown reported that K.B. was between 10 and 14 years of age when he abused her, rather than between the ages of 5 and 11 as reported by K.B. Satoran's report noted, however, that K.B.'s medical records indicated that physicians discovered signs of genital trauma consistent with penetration when they treated her for an asthma attack when she was "younger."[2] The records indicated that K.B. responded, "daddy do it," when her doctors asked her about the cause of her injuries. Satoran observed that this discrepancy "may denote dishonesty on the part of Mr. Brown." Satoran also noted in his report that he examined Brown only after Brown had been "turned down" after being examined by Paul Spizman, Ph. D., whom Satoran described as "a highly respected and highly qualified" sex offender treatment provider.

Satoran also sounded notes of caution about a SSOSA sentence based on Brown's history of domestic violence, past criminal convictions, and stated intention to return to California to live with his fiancée. On the latter point, Satoran commented that living in California would place Brown away from his parents, whom Satoran characterized as Brown's "major support group." Further, Satoran pointed out that Brown's fiancée's work as a circus performer "often involves children."

In addition to receiving these written materials, the trial court heard statements in support of Brown's SSOSA request from Brown's father and

[2] The record does not indicate how old K.B. was at the time of treatment.

fiancée. Brown also read an apology to K.B., her siblings, and her mother at the sentencing hearing. In his apology, Brown claimed to take full responsibility for his actions.

As it had previously indicated when Brown entered his guilty plea, the State opposed Brown's request for a SSOSA sentence, instead recommending a sentence of imprisonment at the top of the standard range: 160 months for each count. The prosecutor emphasized the opposition of K.B. and her family to a SSOSA sentence. He also highlighted Brown's efforts to keep K.B. from reporting the abuse when she was younger, Brown's denial of the abuse when confronted by K.B.'s mother with the concerns of the doctors who noticed the injuries to K.B.'s genitals when she received treatment for asthma, Brown's fleeing the state after K.B. confronted him, and Brown's admission of guilt only after he was apprehended. The prosecutor also pointed out that Spizman declined to recommend a SSOSA sentence for Brown and that Satoran only recommended that Brown "be considered" for a SSOSA sentence after concluding that he was a "marginal candidate." Although K.B. herself did not speak at the sentencing hearing, the record indicates that she opposed Brown's request. The trial court also heard comments in opposition from K.B.'s mother and K.B.'s current stepfather.

The trial court then denied Brown's request for a SSOSA sentence. It explained its reasons for doing so as follows:

> Although Mr. Brown in his letter says that he takes 100

> percent responsibility as is appropriate, I guess I'm concerned that that comes only now after having denied it to [K.B.] and having gone to California and waited to make any kind of response only after having been arrested down there.
> . . .
> Certainly, Mr. Brown, several people wrote me letters, many, many people wrote me letters saying that you were a wonderful person and a wonderful worker and that this was just some kind of aberration, but one of [Satoran's] concerns and mine, having read all this, is that there is the idea of minimizing. This wasn't an aberration, this was years of the most profound abuse of trust imaginable . . . .
> I was also struck by [how Satoran's] report was pretty equivocal and I'm not going to go into all the details for it more than that, but I'm not going to impose a [SSOSA] because I don't think it's appropriate.

The court then sentenced Brown to 160 months' imprisonment as to each count, the terms of each sentence to run concurrently.

II

Brown contends that the trial court erred in denying his request for a SSOSA sentence because it failed to consider the statutory factors governing the imposition of a SSOSA sentence in lieu of a standard range term of imprisonment. We disagree.

As a preliminary matter, the State argues that Brown cannot challenge his sentence because it is within the standard range.[3] Generally, a standard range sentence is not appealable. RCW 9.94A.585; State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). "This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the

[3] Brown does not dispute that his sentence is within the standard range.

legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." State v. Williams, 149 Wn.2d 143, 146–47, 65 P.3d 1214 (2003) (citing State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). However, "it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." Williams, 149 Wn.2d at 147. Because Brown contends that the trial court failed to consider necessary statutory factors in determining whether to impose a SSOSA sentence, his appeal is properly before us.

We review the denial of a request for a SSOSA sentence for an abuse of discretion. State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

Pursuant to the SSOSA provision of the SRA in effect at the time Brown committed his crimes,[4] the trial court, after receiving reports evaluating the defendant's amenability to treatment in lieu of incarceration, was required to

[4] The SRA specifies that "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. Our Supreme Court has "repeatedly held that sentencing courts must 'look to the statute in effect at the time [the defendant] committed the [current] crimes' when determining defendants' sentences." State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (alterations in original) (quoting State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003)). Brown admitted to raping K.B. in 1997 and 1998. Accordingly, former RCW 9.94A.120 (1997) governed the trial court's decision whether to grant Brown's SSOSA request. However, both the State and Brown erroneously cite to the current SSOSA provision, RCW 9.94A.670, in their briefing. As the law requires a sentence be determined in accordance with the law in effect at the time the offense was committed, we are bound to apply former RCW 9.94A.120 (1997).

"consider whether the offender and the community w[ould] benefit from use of this special sex offender sentencing alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this subsection." Former RCW 9.94A.120(8)(a)(ii) (1997). Our Supreme Court has made clear that, "while trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing Mail, 121 Wn.2d at 712). If there is a statutory alternative to a standard range sentence of imprisonment for which a defendant is eligible, the defendant is entitled "to ask the trial court to consider such a sentence and to have the alternative actually considered." Grayson, 154 Wn.2d at 342 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). "[T]he categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." Grayson, 154 Wn.2d at 342 (citing Garcia-Martinez, 88 Wn. App. at 330). However, a trial court is not required to enter findings in determining whether a SSOSA sentence is appropriate. Hays, 55 Wn. App. at 15. Moreover, the trial court has no obligation "to give reasons for its determination" that an alternative to a standard range sentence is inappropriate. Hays, 55 Wn. App. at 15.

The record herein indicates that the trial court appropriately considered

Brown's request for a SSOSA sentence. The trial court stated multiple times during the sentencing hearing that it had reviewed the materials Brown had submitted in support of his request. It specifically noted Satoran's concerns about Brown minimizing his behavior. Furthermore, K.B. and her family clearly and strongly opposed Brown's request, and the court was required to consider this opposition in reaching its determination. Former RCW 9.94A.120(8)(a)(ii).

That the trial court did not specifically address on the record whether a SSOSA sentence would benefit Brown and the community is of no consequence. The trial court was not required to enter findings or give specific reasons for its determination that a SSOSA sentence was not warranted. Hays, 55 Wn. App. at 15. Moreover, Brown does not point to anything in Satoran's evaluation that supports the conclusion that the grant of a SSOSA sentence would benefit the community. Rather, Brown cites only to general studies about recidivism rates. Satoran's evaluation, however, raises concerns as to whether a SSOSA sentence in Brown's case would benefit the community. Satoran noted that Brown intended to live not in Washington near his parents—Brown's "major support group"—but in California with his fiancée, whose work involved children. As the trial court observed at the sentencing hearing, Satoran's evaluation was equivocal. Indeed, Satoran characterized Brown as only a "marginal case," and did so only after another "highly respected" therapist had declined to recommend Brown for a SSOSA sentence.

The situation in this case is unlike that in Grayson, upon which Brown relies. There, our Supreme Court reversed the trial court's denial of Grayson's request for an alternative sentence. The trial court denied Grayson's request because the requested alternative sentencing program was insufficiently funded and did not articulate "any other reasons for denying" the request. Grayson, 154 Wn.2d at 342. Although the trial court in Grayson was not barred from considering program funding and the realistic efficacy of an alternative sentence, 154 Wn.2d at 340–41, funding was not among the statutory factors the trial court was supposed to consider in evaluating the request, and the circumstances of that case indicated that the trial court "categorically refused to consider a statutorily authorized sentencing alternative." 154 Wn.2d at 342. In contrast, the record herein indicates that the trial court meaningfully considered both Satoran's evaluation of Brown and the opinion of the victim, as was required by statute. The trial court did not abuse its discretion in denying Brown's request.

III

In a statement of additional grounds, Brown also contends that he received ineffective assistance of counsel both when he pleaded guilty and at his sentencing hearing. Again, we disagree.

To prevail on a claim of ineffective assistance of counsel, Brown must show (1) that defense counsel was deficient and (2) that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668,

687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Defense counsel's performance is deficient if there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding's results would have been different. McFarland, 127 Wn.2d at 335. Counsel's representation is presumed to have been reasonable, and all significant decisions by counsel are presumed to be an exercise of reasonable professional judgment. McFarland, 127 Wn.2d at 335. In the context of a guilty plea, "a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." In re Pers. Restraint of Elmore, 162 Wn.2d 236, 254, 172 P.3d 335 (2007) (citing In re Pers. Restraint of Riley, 122 Wn.2d 772, 780–81, 863 P.2d 554 (1993)). "A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice." Elmore, 162 Wn.2d at 254 (citing Riley, 122 Wn.2d at 782).

Brown argues that he entered his guilty plea "prematurely" because the public defender who temporarily stood in at the plea hearing was not as familiar with the charges against him as was his other counsel. The record belies this assertion. Brown confirmed in court that he had the opportunity to ask questions of his lawyer, that his lawyer sufficiently answered his questions, and that he understood the consequences of pleading guilty to the charges against him. His unsupported allegation that his appointed counsel mistakenly told him that

Satoran would not consider the earlier, unfavorable evaluation by Spizman does not establish prejudice.

Nor has Brown established that he suffered any prejudice when his counsel conceded at the sentencing hearing that Brown was not amenable to treatment in 2005. The record indicates that Brown was dismissive of K.B.'s allegations in 2005 when she confronted him after notifying police that she had been abused. It was Brown who then fled the state after K.B. revealed that he had abused her. To this day, Brown continues to downplay his admitted abusive conduct. In a signed, handwritten statement submitted to the trial court, he admitted to having sexual intercourse with K.B. on two occasions. Satoran's report indicates that Brown confirmed rubbing his penis against K.B.'s vagina. Yet in his statement of additional grounds, Brown maintains that he "did not . . . have sexual intercourse with [K.B.] whereby my genitals penetrated or touched hers." And he claims that "my touching [of K.B.] was never forced at any time and was always consensual," resulting in, what he calls, "my unfortunate shortfall [in] this situation developing between [K.B.] and myself." In light of Brown's lack of candor, his inconsistencies, and his persistent minimization of his abuse of K.B., we are not persuaded that his counsel's argument prevented him from obtaining a SSOSA sentence. Brown has not shown that he received ineffective assistance of counsel.

Affirmed.

Dwyer, A.C.J.

We concur:

Lau, J.

Grosse, J.