IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICHARD ALLEN DUNN, Appellant.	)	No. 67239-8-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: September 17, 2012

Grosse, J. — If the legislature intends to impose multiple punishments for the same offense, their imposition does not violate double jeopardy. Legislative intent is clear in authorizing multiple sentencing consequences stemming from a jury finding of sexual motivation. Richard Dunn's exceptional sentence based upon the aggravating factor of sexual motivation does not place him in double jeopardy even though the jury finding also had the effect of increasing Dunn's offender score. We affirm Dunn's convictions, but remand his judgment and sentence to remove references to his vacated convictions for possession of child pornography.

FACTS

Richard Dunn kidnapped a six-year-old boy from an apartment complex playground in June 2001. Over a 24-hour period, Dunn physically and sexually assaulted the child. In 2004, a jury convicted Dunn of first degree kidnapping, first degree child molestation, and six counts of possession of child pornography. With respect to the kidnapping and possession of pornography counts, the jury found that Dunn committed the offenses with sexual motivation. With respect to the child

molestation count, the jury found that Dunn acted with deliberate cruelty and the victim was particularly vulnerable. Based on an offender score of 21, Dunn's standard range was 149 to 198 months. The sentencing court determined that each of the aggravating factors found by the jury was sufficient to justify imposition of an exceptional sentence of 360 months.

In Dunn's first appeal, we affirmed his convictions in an unpublished decision.[1] We rejected Dunn's claim that his child molestation and kidnapping convictions violated double jeopardy and his challenge to the exceptional sentence. Even if the sentencing court lacked statutory authority prior to the 2005 amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, to submit the aggravating factors of deliberate cruelty and vulnerable victim to the jury, we determined that the sexual motivation factor was properly submitted to the jury and the sentencing court expressly found that this factor alone justified the exceptional sentence.

Dunn then filed a personal restraint petition and this court granted relief on several bases. First, the State conceded, and we agreed, that based on the Supreme Court's decision in State v. Sutherby,[2] the proper unit of prosecution for possession of child pornography is one count per possession without regard to the number of images possessed or the number of children depicted. Following Sutherby, we vacated five of Dunn's six convictions for possession of child pornography. We also concluded that Dunn's counsel was deficient for failing to argue that his molestation and kidnapping

[1] State v. Dunn, No. 55537-5, 2007 WL 1180404 (Wash. Ct. App. April 23, 2007).
[2] 165 Wn.2d 870, 204 P.3d 916 (2009).

convictions encompassed the same criminal conduct and directed the court to correct Dunn's offender score upon resentencing. Finally, we determined that the deliberate cruelty and vulnerable victim aggravating factors should be vacated because the sentencing court had no authority at the time to empanel a jury to determine the presence of those factors. We noted, however, that the sexual motivation finding was valid and the trial court could properly consider that aggravating factor on resentencing.

Upon resentencing in 2011, the parties agreed that Dunn's offender score was a three, based on his current conviction for one count of possession of child pornography. His standard range was 67 to 89 months.

At the resentencing hearing, Dunn objected for the first time to the imposition of an exceptional sentence on double jeopardy grounds. He argued that an exceptional sentence could not be based on the jury's finding of sexual motivation because that finding also increased his offender score due to the tripling provision for prior and current sex offenses. The trial court rejected Dunn's argument and imposed an exceptional sentence of 250 months. Dunn again appeals.

DOUBLE JEOPARDY

As he argued below, Dunn claims he was punished twice for the same offense because the trial court relied on the jury's finding of sexual motivation to impose an exceptional sentence while the aggravating factor also had the effect of increasing his offender score.

"Both our federal and state constitutions protect persons from being twice put in jeopardy for the same offense."[3] This includes, "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense."[4]

"A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct."[5] With respect to multiple or cumulative punishments imposed in a single proceeding, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[6] If the legislature intends multiple punishments, double jeopardy is not violated.[7] "In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed."[8]

The argument Dunn makes here is similar to the claim raised by defendants in numerous cases that double jeopardy prohibits the imposition of a firearm enhancement where use of a firearm is an element of the underlying crime.[9] In such cases, the defendants claimed they could not lawfully be punished more than once

[3] State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend. V; Wash. Const. art. I, § 9.
[4] State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).
[5] State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).
[6] Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).
[7] Kelley, 168 Wn.2d at 77.
[8] Kelley, 168 Wn.2d at 77-78.
[9] See Kelley, 168 Wn.2d at 84; see also State v. Aguirre, 168 Wn.2d 350, 367, 229 P.3d 669 (2010).

based on the jury's single determination that they were armed with a firearm. Our courts have rejected these arguments because, in reviewing the firearm enhancement provisions at issue, it is clear the legislature intended cumulative punishment.[10]

Likewise here, the statutory scheme reveals that the legislature specifically provided for multiple sentencing consequences to follow from a jury's finding that a crime was committed with sexual motivation. An offense constitutes a sex offense if a jury finds sexual motivation.[11] The sex offense designation has numerous implications. For example, conviction for a sex offense results in a longer term of community custody,[12] and ineligibility for some special sentencing alternatives.[13] Conviction for certain offenses with a sexual motivation finding may also result in imposition of an indeterminate sentence[14] and creates a duty to register.[15] And when calculating the offender score for a sex offense, other sex offenses are counted as three points, rather than one point.[16] Finally, a finding of sexual motivation provides a basis for the imposition of an exceptional sentence.[17]

The legislature was aware that a sexual motivation finding would affect the offender score calculation and could also support the imposition of an exceptional sentence. Both of these provisions were added to the SRA in the same 1990

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[10] Kelley, 168 Wn.2d at 79-80; Aguirre, 168 Wn.2d at 366-67.
[11] RCW 9.94A.030(45)(c).
[12] RCW 9.94A.701.
[13] See RCW 9.94A.650; RCW 9.94A.655; RCW 9.94A.660.
[14] RCW 9.94A.507.
[15] RCW 9A.44.130.
[16] RCW 9.94A.525(17).
[17] RCW 9.94A.535(3)(f).

legislation.[18] While the legislature has placed limits on the use of some aggravating factors,[19] an exceptional sentence may be imposed based on a sexual motivation jury finding without limitation.

Moreover, as the State points out, under Dunn's interpretation, an exceptional sentence could be imposed only if no current or prior sex offences were included in the offender score. Thus, a first time sex offender could be subject to an exceptional sentence above the standard range, but a recidivist sex offender could not. Such a result appears to be the opposite of what the legislature intended. We conclude that imposition of an exceptional sentence based on the jury's finding of sexual motivation does not offend double jeopardy.

AMENDED JUDGMENT AND SENTENCE

Dunn also asserts a double jeopardy violation because the judgment and sentence entered after this court granted relief on collateral review makes reference to his vacated convictions for possession of child pornography. We agree that the amended judgment and sentence is inconsistent with our Supreme Court's decision in State v. Turner:

> To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction-nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.[20]

[18] See Laws of 1990, ch. 3 §§ 603, 706.
[19] See RCW 9.94A.535(3)(c),(d),(e),(h),(l),(u), and (z)
[20] 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010).

In the collateral attack proceeding, the State properly conceded that five of Dunn's six convictions for possession of pornography had to be vacated to avoid double jeopardy. But the judgment entered following resentencing set forth the jury's verdict of "guilty" on the six charged counts in the "FINDINGS" section. In the "JUDGMENT" section, the court vacated five of the counts: "The Court VACATES Counts IV, V, VI, VII, and VIII." The "ORDER" section shows the court sentenced Dunn only on counts I and III, the kidnapping count and one possession of pornography count.

Nothing here indicates that the court was attempting to hold the vacated convictions in abeyance or conditionally vacate them, this practice being the Court's principal concern in Turner. Nevertheless, Turner emphasizes the importance of eliminating from the judgment, sentence, and accompanying orders any reference to the vacated convictions. We remand with directions to correct the judgment and sentence in a manner consistent with Turner.

SPECIAL VERDICT INSTRUCTION

Relying on State v. Bashaw,[21] Dunn challenges the jury's finding of sexual motivation because the jury was improperly instructed that that it had to be unanimous in order to answer "no" to the special verdict form. But a defendant is generally prohibited from raising issues in a subsequent appeal that were or could have been

[21] 169 Wn.2d 133, 234 P.3d 195 (2010)

raised in the first appeal.[22] An exception to this rule may apply in instances where the trial court decides to exercise its discretion to revisit an issue that was not the subject of the initial appeal.[23] In Dunn's case, the trial court did not exercise its independent judgment to review and consider the special verdict instruction at the resentencing.[24] Therefore, Dunn may not challenge the special verdict instruction in his second appeal.

Even if this issue was properly before us, our Supreme Court recently reconsidered and overruled Bashaw, to the extent that the decision adopted a nonunanimity rule with respect to aggravating circumstances.[25] The court concluded that such a rule "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity."[26] Therefore, if the jury instruction given in Dunn's case implied that the jury had to be unanimous in order to find either the presence or absence of an aggravating circumstance, the instruction was correct.[27]

Finally, Dunn submits a statement of additional grounds. He refers to an "interlocutory appeal" and alleges a wrongful denial of funding. Dunn does not cite to

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[22] State v. Mandanas, 163 Wn. App. 712, 716, 262 P.3d 522 (2011).
[23] See RAP 2.5(c)(1); State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); State v. Kilgore, 167 Wn.2d 28, 39, 216 P.3d 393 (2009).
[24] In contrast, the trial court did consider and reject Dunn's argument at resentencing that imposition of an exceptional sentence based on the sexual motivation jury finding violated double jeopardy.
[25] State v. Nuñez, No. 85789-0, 2012 WL 2044377 at *1 (Wash. June 7, 2012).
[26] Nuñez, 2012 WL 2044377 at *1.
[27] In light of our determination that the issue is not properly before us, and is without merit in any event, it is unnecessary to entertain the State's motion to transfer the record from Dunn's first appeal.

the record and the nature of the alleged error is unclear.[28] We are unable to evaluate his claim.

We affirm Dunn's convictions and remand his judgment and sentence.

Grosse, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

[28] It appears that the trial court made findings of indigency with respect to the current appeal allowing the costs of Dunn's appeal to be paid with public funds.