IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KELLY T. SCHUMACHER, Appellant.	No. 40791-4-II UNPUBLISHED OPINION

Hunt, J. — Kelly T. Schumacher appeals his 36-month exceptional sentence imposed following his conviction for violation of a no-contact order. Schumacher argues that this sentence was clearly excessive because (1) the sentence was two and one-half times the standard range sentence for Schumacher's crime and offender score, and (2) the contact that led to his conviction was neither violent nor initiated by him. We affirm.

FACTS

Stacy Cottrell is the protected party in a no-contact order issued against Kelly T. Schumacher after an assault conviction. When Aberdeen Police officers responded to a report of an argument on a sidewalk between Schumacher and Cottrell, Schumacher and Cottrell started walking away from each other.

The State charged Schumacher with a felony no-contact order violation under RCW 26.50.110(5) because he already had four convictions for protection order violations.

Schumacher waived his right to a jury and, at his bench trial, stipulated to his four prior convictions. Cottrell and the officers testified. The trial court found Schumacher guilty as charged. Schumacher's standard sentencing range was 12 to 14 months. Contending that Schumacher's prior unscored misdemeanor convictions resulted in a standard range that was clearly too lenient, the State (1) requested an exceptional sentence of 36 months under RCW 9.94A.535(2)(b)[1], and (2) presented evidence of Schumacher's five prior simple assault convictions and two prior fourth degree assault convictions.[2] Schumacher argued for a sentence at the low end of the standard range.

---

[1] RCW 9.94A.535 provides in pertinent part:

> 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.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. . . .
>
> (2) Aggravating Circumstances—Considered and Imposed by the Court
> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> . . .
>
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

[2] We recognize that some Washington courts have held RCW 9.94A.535(2)(b) unconstitutional as applied to defendants who were denied their right to have a jury determine whether their standard-range sentences were "clearly too lenient" given their unscored criminal histories. *See State v. Saltz*, 137 Wn. App. 576, 582, 154 P.3d 282, 286 (2007). We do not address this issue here, however, because (1) neither party raises this constitutional issue on appeal, and (2) Schumacher expressly waived his right to a jury, which was not true of the defendants in the cases holding RCW 9.94A.535(2)(b) unconstitutional as applied. *See State v. Hughes*, 154 Wn.2d 118, 200, 110 P.3d 192 (2005), *overruled on other grounds* by *Washington v. Recuenco*, 58 U.S. 212, 126 S. Ct. 2546, 165 L. E. 2d 466 (2006).

On June 1st, 2010, the trial court imposed a 36-month exceptional sentence after entering the following findings of fact:

> 1.
>
> The State proved beyond a reasonable doubt at trial the existence of four prior no contact order violations committed by the defendant.
>
> 2.
>
> The court finds that the defendant has multiple prior convictions for misdemeanor assault as shown by the records maintained by the Administrator of the Court and certified court records provided herein.
>
> 3.
>
> The court finds that the defendant has demonstrated himself to be a danger to be at large and that the defendant has, by his prior conduct, demonstrated that it is likely he will continue to commit prior [sic] violent acts in violation of the law.
>
> 4.
>
> The court finds that the standard range of punishment in this case is not adequate to punish the defendant for his current conduct or protect the public.

Clerk's Papers (CP) 62-63. Schumacher appeals his exceptional sentence.[3]

ANALYSIS

Schumacher argues that his 36-month sentence is clearly excessive.[4] We review the length of an exceptional sentence for an abuse of discretion and determine whether "no reasonable person would adopt the position taken by the trial court or it is based upon untenable grounds." *State v. Ferguson*, 142 Wn.2d 631, 651, 15 P.3d 1271 (2001). Unscored misdemeanor history can be a tenable ground for an exceptional sentence if based on the number of prior convictions. *State v. Ratliff*, 46 Wn. App. 325, 332, 730 P.2d 716 (1986), *review denied*, 108 Wn.2d 1002 (1987). Schumacher's numerous prior unscored misdemeanor convictions thus constitute a tenable ground for an exceptional sentence; and, in light of their number, a reasonable person

[3] A commissioner of this court initially considered Schumacher's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

[4] Schumacher also assigned error to Findings of Fact 3 and 4, but he did not support those assignments with argument. Therefore, we do not address them. RAP 10.3(a)(6); *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (assignment of error unsupported by legal argument will not be considered on appeal).

could conclude that a 36-month sentence is appropriate. We hold, therefore, that the trial court did not abuse its discretion. We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, J.

Penoyar, C.J.