IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ORLEN WILLIAM PAGEL, Appellant.	No. 41409-1-II UNPUBLISHED OPINION

Hunt, J. — Orlen William Pagel appeals his jury-trial convictions and sentences for two counts of second degree burglary and one count of second degree theft. He argues that (1) the information was constitutionally defective because it did not list sufficient facts to support each of the alleged crimes; (2) his trial counsel provided ineffective assistance by failing to argue that his burglary and theft offenses constituted the same criminal conduct for sentencing purposes, and the trial court abused its discretion in failing to so consider these offenses; and (3) the trial court violated his Sixth and Fourteenth Amendment right to a jury trial by imposing an exceptional sentence under former RCW 9.94A.535(2)(c) (2009) without having a jury determine the existence of his prior convictions beyond a reasonable doubt. We affirm.

FACTS

I. Burglary and Theft

On Saturday morning, October 31, 2009, teacher Michelle Whitaker and family members went to her Olympia school classroom to catch up on some work. Entering the Olympia Regional Learning Academy (formerly the John Rogers School), they saw a pile of computers, cameras, and two speakers that had not been there the preceding evening stacked in the hallway outside one of the classrooms. Whitaker's usually locked classroom door was unlocked. Stepping inside, she smelled cigarette smoke and noticed that some of the school's science equipment was missing, that someone had taken money from her desk drawer, and that someone had pulled the classroom's emergency backpack off the wall, emptied its contents onto a table, and refilled it with other items. Telling her daughter she believed the school had been burglarized, Whitaker reached down to pick up a garbage can that had been moved, saw a person with a hood over his face crouched in the corner, grabbed her daughter and grandson, ran out of the building, and called 911.

The police noticed the large amount of computer equipment, projectors, and emergency backpacks with electronic equipment stashed outside a classroom near the building's entrance, which looked to Officer Jason Winner like someone had spent a considerable amount of time "staging the scene." 1 Verbatim Report of Proceedings (VRP) at 45. The police also found a broken window, smelled fresh cigarette smoke as they approached Whitaker's classroom 7, found cigarette ash on her floor, and retrieved a cigarette butt from her otherwise empty garbage can. The police did not find the intruder, but the emergency backpack was gone from Whitaker's

classroom.

Principal Joy Walton-Kawasaki informed police that a spare set of keys to the school was missing and expressed concern about the intruder's having access to the school's new computer equipment in portable classrooms 11 and 12. The police inspected the classrooms, but they saw nothing out of place.

The next morning, the police returned to the school to make sure that the intruder had not returned. They found a cell phone on top of a heating exchange box outside classroom 11, which had not been there the day before. The police had a custodian unlock classroom 11; inside, they noticed that someone had removed a ceiling tile to gain access to classroom 12 and had taken a $700 Hitachi projector, a $500 document camera, a $35 set of computer speakers, and a $20 red and black emergency backpack. After the assigned teacher unlocked classroom 12, the police entered and noticed that all of the computers had been unplugged and that someone had taken a $500 Dell laptop computer from the teacher's desk, a $1,000 I-Mac computer from one of the student's desks, a $700 Hitachi projector, an $85 Motorola walkie-talkie set, a small Nikon camera, and the classroom's red and black emergency backpack. According to Walton-Kawasaki, the items taken from both portable classrooms cost over $3,600.

That afternoon, a person reported seeing computer equipment and a couple backpacks stashed at Friendly Grove Park, 200 or 300 yards from the school. When the police arrived at the park, they located the equipment and photographed it.

The police procured a search warrant for the cell phone. When they searched the phone, they discovered the phone's number, the moniker "Home Grown Oly Boy," photographs of Orlen

William Pagel, an entry under the "home" contact for Pagel's mother, recent text messages and phone calls sent from the cell phone to a "Steph" and a "J Beans," which they later traced to Jill Kimbler and Stephanie Helland, whom the police contacted. 1 VRP at 186-87. Kimbler, who was Pagel's cousin, and Helland both confirmed that Pagel called himself "Home Grown Oly Boy." 1 VRP at 165. Kimbler also confirmed that her nickname was "J Beans"[1]; she said that Pagel had called her several times and texted her on October 31, and told her that (1) he was at John Rogers Elementary School filling up backpacks with "goods"[2] when three people walked in and smelled cigarette smoke; and (2) he had "stashed"[3] a couple of the backpacks. Helland also confirmed that her nickname was "Steph,"[4]; that Pagel had called her to ask for a ride to Friendly Grove Park to get a "backpack," and that he said he had lost his cell phone. 1 VRP at 176.

After obtaining a court order, the police took three buccal[5] samples from inside Pagel's cheek.[6] His buccal samples matched the DNA on the cigarette butt that police had found in Whitaker's classroom garbage can.

II. Procedure

The State charged Pagel with two counts of second degree burglary and one count of

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[1] 1 VRP at 164.

[2] 1 VRP at 167.

[3] 1 VRP at 167.

[4] 1 VRP at 174.

[5] A buccal test involves collecting DNA from the inside of a person's cheek.

[6] Pagel was not in custody at the time.

second degree theft. The State's third amended information alleged the following:

> In that the defendant, ORLEN WILLIAM PAGEL, in the State of Washington, on or about October 31, 2009, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building. . . .
>
> In that the defendant, ORLEN WILLIAM PAGEL, in the State of Washington, on or about November 1, 2009, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building. . . .
>
> In that the defendant, ORLEN WILLIAM PAGEL, in the State of Washington, on or about November 1, 2009, did wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds seven hundred and fifty dollars ($750.00).

Clerk's Papers (CP) at 2-3. Each count also included an aggravating factor under former RCW 9.94A.535(2)(c), alleging that Pagel had committed "multiple current offenses" and that his "high offender score" would result in some of his offenses going unpunished if he did not receive an exceptional sentence. CP at 2-3. The State also filed a Certification of Probable Cause on March 4, 2010, stating the facts upon which it based its burglary and theft charges.[7] Pagel never challenged the amended information as insufficient, asked for a bill of particulars, or objected that he had not been adequately informed of the charges against him.

A jury found Pagel guilty on all counts. At sentencing, he had six prior felony convictions,

[7] The State's certification of probable cause alleged that the Olympia Regional Academy of Learning had been burgled on October 31, 2009; that a teacher at the school saw a male intruder and a number of backpacks and computer equipment stacked in the hallway; that the school's spare keys were missing; and that the police had found a cigarette butt in the teacher's garbage can. It further alleged that, on November 1, 2009, the school had been burgled again; that $3,045 worth of computer equipment and supplies had been stolen; that the police had discovered Pagel's cell phone at the school; and that Pagel had texted photographs of the school's printer and scanner to two people from the phone.

including one second degree burglary conviction. Based on this criminal history, the State claimed Pagel's offender score was 10 points for his current burglary convictions and 8 points for his current theft conviction. The State argued that this presented a "substantial and compelling" reason for the trial court to impose an exceptional sentence under former RCW 9.94A.535(2)(c) because, given Pagel's multiple current offenses and high offender score, one or more of his current offenses would go unpunished. VRP (October 28, 2010) at 12. The State submitted certified copies of Pagel's prior judgment and sentences to prove his criminal history. The State also called Walton-Kawasaki to testify about how Pagel's crimes had disrupted the school's operations and had traumatized Whitaker and her family. The State requested a maximum exceptional sentence of 120 months of incarceration, arguing that without an exceptional sentence, some of Pagel's crimes would go unpunished. At the time of sentencing, Pagel neither asserted nor requested that a jury, not the sentencing court, should decide the aggravating factors underlying the State's recommended exceptional sentence.

Pagel's counsel agreed that the State had properly calculated Pagel's offender score as 10 points for each burglary and 8 points for the theft.[8] Counsel then argued that the trial court should not impose an exceptional sentence because (1) Pagel's offender score was over 9 only as a result of his burglary convictions each having "multipliers"[9] with the other burglaries, which made them count double; (2) Pagel had no violent crimes in his criminal history and had made an

[8] Pagel's counsel did not, however, stipulate to Pagel's prior convictions or argue that his November 1, 2009 burglary and theft constituted the same criminal conduct warranting a lower offender score.

[9] VRP (October 28, 2010) at 7.

effort to "turn his life around" since his last incarceration; and (3) standard-range sentences would still be a "substantial penalty" for him. VRP (October 28, 2010) at 17. Pagel's counsel requested a low-end standard-range sentence of 51 months.

The trial court independently calculated Pagel's offender score and concluded that his offender score was 10 for his current burglaries and 8 for the theft, without analyzing whether Pagel's November 1, 2009 burglary and theft constituted the same criminal conduct for sentencing purposes. The trial court determined that the standard-range sentence for each of Pagel's burglary convictions was 51 to 68 months and that the standard-range sentence for his theft conviction was 17 to 22 months. For each of Pagel's current convictions, the trial court found that, given his high offender score, one or more of his current offenses would go unpunished, an aggravating factor under former RCW 9.94A.535(2)(c).[10] Based on this aggravating factor, the trial court imposed an exceptional sentence of 85 months for each of the burglaries and 22 months for the theft, all to run concurrently. Pagel appeals his convictions and sentences.

ANALYSIS

I. Sufficiency of Information

Pagel first argues that we should reverse his convictions because the information was constitutionally insufficient to notify him about the charges against him. Specifically, he argues that the information used only the "bare, abstract language of the statute[s]" and did not allege

[10] The trial court also entered findings of fact and conclusions of law, citing the language of former RCW 9.94A.535(2)(c) as the basis for its exceptional sentence.

"specific facts other than the date of each offense." Br. of Appellant at 7-8. The State responds that Pagel's argument fails because (1) Pagel's information met the constitutional requirements because it included all of the essential elements of his offenses and implied the existence of necessary facts; (2) if Pagel believed his information was vague on some other matter, he could have requested a bill of particulars; and (3) Pagel did not demonstrate actual prejudice. We agree with the State.

A. Standard of Review

We review a challenge to the sufficiency of a charging document de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise" to provide a defendant with sufficient notice of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). To satisfy this requirement, the information must allege (1) "every element of the charged offense" and (2) "particular facts supporting them." *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) and *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)).[11] The primary purpose of the rule is to give the defendant sufficient notice of his charges so he can prepare an adequate defense. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

We also distinguish between charging documents that are constitutionally deficient and those that are merely "vague." *Leach*, 113 Wn.2d at 686-87. A constitutionally deficient

[11] *See also State v. Simms*, 171 Wn.2d 244, 250, 250 P.3d 107 (2011).

information is subject to dismissal for failure to state an offense on the face of the charging document by omitting allegations of the essential elements constituting the offense charged.[12] *Leach*, 113 Wn.2d at 686-87. An information that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. *Leach*, 113 Wn.2d at 687. A defendant may not challenge an information for vagueness on appeal if he did not request a bill of particulars at trial.[13] *Leach*, 113 Wn.2d at 687.

Where, as here, the defendant has failed to challenge an information's sufficiency at trial and instead raises his challenge for the first time on appeal, we construe the document liberally in favor of validity. *State v. Brown*, 169 Wn.2d 195, 197, 234 P.3d 212 (2010) (citing *Kjorsvik*, 117 Wn.2d at 102). The test is (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) if so, whether the defendant nonetheless was actually prejudiced by the inartful language used. *Brown*, 169 Wn.2d at 197-98 (citing *Kjorsvik*, 117 Wn.2d at 105-06).

Analyzing the first prong of this test, we read the information "as a whole, according to the common sense and including facts that are implied" to see if the information reasonably

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[12] *Accord Nonog*, 169 Wn.2d at 226 ("Failure to allege each element means that the information is insufficient to charge a crime, and so must be dismissed.").

[13] If Pagel believed that the information was "vague" or if he wanted greater factual specificity about another matter relevant to his defense, he should have requested a bill of particulars at trial. *Leach*, 113 Wn.2d at 687; *State v. Noltie*, 116 Wn.2d 831, 843-44, 809 P.2d 190 (1991) (defendant should have requested a bill of particulars if he wanted specificity about the "when, where or how" of his charged crime) (internal quotation marks omitted). Having failed to seek a bill of particulars at the time of trial, he has waived this challenge on appeal. *Leach*, 113 Wn.2d at 687; *Noltie*, 116 Wn.2d at 843-44. Therefore, we do not further consider this argument.

apprised the defendant of the elements of the crime charged. *Nonog*, 169 Wn.2d at 227. If it did, the defendant may prevail only if he can show that the inartful charging language actually prejudiced him. *Nonog*, 169 Wn.2d at 227. Under this test's second prong, we may look beyond the face of the information to determine if the defendant received *actual notice* of his charges through "other circumstances of the charging process," such as the State's assertions in its certificate of probable cause. *See Kjorsvik*, 117 Wn.2d at 106, 111; *Williams*, 162 Wn.2d at 186; *State v. Phillips*, 98 Wn App. 936, 944, 991 P.2d 1195 (2000).

B. Information Not Constitutionally Deficient

The State charged Pagel with two counts of second degree burglary and one count of second degree theft:

> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030(1).[14]

> A person is guilty of theft in the second degree if he or she commits theft of . . . [p]roperty or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle.

RCW 9A.56.040(1)(a). RCW 9A.56.020(1)(a) further defines theft as:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

On appeal, Pagel does not contend that the information failed to include all of the legal

[14] Although the legislature has amended this statutory provision since the date of Pagel's crimes, this change does not affect our analysis here.

elements of his offenses as defined in these statutes. Nor does he assert that he was unaware of the nature of the charges against him or that he was actually prejudiced. Instead, he relies primarily on *Leach* and argues that his information was "factually deficient" because it referred to the "bare, abstract language" of the second degree burglary and second degree theft statutes and it did not allege any specific facts other than the dates for each offense. Br. of Appellant at 8. Pagel's reliance on *Leach* is misplaced, and his argument fails to meet his burden for challenging the sufficiency of the information for the first time on appeal.

As Pagel asserts, *Leach* states that the "'essential elements'" rule requires a charging document to "allege facts supporting every element of [an] offense, in addition to adequately identifying the crime charged." *Leach*, 113 Wn.2d at 689 (emphasis omitted). But the opinion also reaffirms a longstanding rule that an information may rely on the language of a statute if the statute defines the offense with certainty:

> In an information . . . for a statutory offense, it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation.

Leach, 113 Wn.2d at 686 (citing *State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978)).[15] And as we have previously explained, *Leach* "does not impose any additional requirement that the State allege facts beyond those that sufficiently support the elements of the crime charged or that the State describe the facts with great specificity." *State v. Winings*, 126 Wn. App. 75, 85, 107 P.3d 141 (2005) (citing *Leach*, 113 Wn.2d at 688); s*ee also Nonog*, 169 Wn.2d at 226 (quoting

[15] *See also Noltie*, 116 Wn.2d at 840; *State v. Elliott*, 114 Wn.2d 6, 13, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990); *Kjorsvik*, 117 Wn.2d at 99.

Leach, 113 Wn.2d at 686) (Our Supreme Court's similar recent explanation of the purpose of this requirement: "to charge in language that will 'apprise an accused person with reasonable certainty of the nature of the accusation.'").

Pagel, however, does not contend that the statutory elements of RCW 9A.52.030(1), RCW 9A.56.040(1)(a), and RCW 9A.56.020(1)(a) inadequately defined his charges or that he lacked notice of a common-law or implied element of his offenses such that his information required greater factual detail to enable him to adequately prepare a defense. Nor does he allege any specific "facts" that the information lacked. He fails to show us how the information was deficient, especially under the liberal standard that we apply when he has failed to raise this challenge below.

Construed liberally, according to common sense, and in favor of validity, Pagel's information sufficiently informed him about the essential elements of his charges. Specifically, the information alleged that on October 31 and November 1, 2009, Pagel (1) entered or remained in a building, (2) unlawfully, and (3) with intent to commit a crime against a person or property. It further alleged that on November 1, 2009, Pagel (1) wrongfully obtained or exerted control over property or services of another or value thereof, (2) without authorization, (3) intending to deprive another person of those property or services, (4) the value of which exceeded $750.00. Pagel's information, thus, included all essential elements and factual allegations of his offenses that the State needed to prove to convict him of second degree burglary and second degree theft. Accordingly, we hold that the information adequately apprised Pagel about the nature of his charges and that it was, therefore, constitutionally sufficient. Because Pagel neither argues nor

shows that the allegedly defective information prejudiced him, we do not address the second prong of the test.

II. Same Criminal Conduct

Pagel next contends that the trial court erred by failing sua sponte to consider whether his November 1, 2009 burglary and theft offenses constituted the "same criminal conduct" under RCW 9.94A.589(1)(a) for offender score calculation purposes. Br. of Appellant at 8. He argues that, had the trial court determined that these crimes counted as one offense under RCW 9.94A.589(1)(a), he would have had an offender score of "nine" and the trial court would have lacked authority to impose an exceptional sentence under former RCW 9.94A.535(2)(c)[16] based on his having one or more current offenses going unpunished. Br. of Appellant at 12. The State argues that the trial court did not need to make a same criminal conduct finding because it was authorized to punish Pagel's burglary and theft offenses separately under the burglary anti-merger statute.[17] We agree with the State.

A. Standard of Review

When reviewing a sentence under the Sentencing Reform Act of 1981, chapter 9.94A RCW, we generally defer to the trial court's discretion, and we will reverse a trial court's determination of "'same criminal conduct'" only on a "'clear abuse of discretion or misapplication of the law.'" *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990)). We find no such abuse of discretion here.

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[16] Although the legislature has amended this statutory provision since the date of Pagel's crimes, this change does not affect our analysis here.

[17] RCW 9A.52.050.

B. Failure To Preserve Alleged Error

At the outset, we note that Pagel failed to preserve this issue for appeal because he did not ask the trial court to enter a finding that his burglary and theft offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a). Although

> waiver does not apply where the alleged sentencing error is a *legal error*[18] leading to an excessive sentence, waiver can be found where the alleged error involves an *agreement to facts*, later disputed, or where the alleged error *involves a matter of trial court discretion*.

In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (second and third emphases added). Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion; a defendant may waive such challenges to his offender score by failing to raise them below. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000); *Goodwin*, 146 Wn.2d at 875. Because Pagel did not argue during the sentencing hearing that his burglary and theft offenses constituted the same criminal conduct, he cannot raise this issue for the first time on appeal.

III. Ineffective Assistance of Counsel

Pagel also argues that he received ineffective assistance because (1) his trial counsel did not argue at sentencing that his November 1, 2009 burglary and theft offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a); and (2) had the trial court counted the two

[18] *See, e.g.*, *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (prior conviction classifications are legal questions and erroneously scored prior convictions are a legal error, not a factual error, for which the remedy is resentencing). Here, in contrast, the issue does not involve an allegedly misscored *prior* conviction. Rather it involves only a potential factual issue of whether two offenses constitute the same criminal conduct for offender score calculation purposes.

offenses as one, it would have lacked authority to impose his exceptional sentence under former RCW 9.94A.535(2)(c). The State responds that Pagel's ineffective assistance claim fails because he has not shown deficiency or prejudice in light of the burglary anti-merger statute. Again, we agree with the State.

Pagel's argument for "same-criminal-conduct" treatment for the first time on appeal ignores the trial court's *independent* authority to punish both the theft and the burglary separately under the burglary anti-merger statute, which provides:

> Every person who, in the commission of a burglary shall commit any other crime, *may be punished therefor[e] as well as for the burglary, and may be prosecuted for each crime separately.*

RCW 9A.52.050 (emphasis added). The Washington Supreme Court has held that this statute gives a trial judge discretion to punish burglary, even if the burglary and another crime encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992). The trial court had authority to sentence Pagel's November 1, 2009 burglary and theft offenses separately under the burglary anti-merger statute, regardless of whether the offenses constituted the same criminal conduct RCW 9.94A.589(1)(a). Therefore, Pagel can meet neither the deficient performance prong nor prejudice prong of the ineffective assistance of counsel test.[19] Because Pagel fails to provide any argument that the trial court would have declined to exercise its discretion under the burglary anti-merger statute if counsel had raised and the trial court had

[19] To prevail on an ineffective assistance of counsel claim, a defendant must prove both (1) that his counsel's performance was deficient and (2) that the deficiency prejudiced him. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

treated the offenses as the same criminal conduct, his ineffective assistance of counsel claim fails.

IV. Right to Jury Trial

Last, Pagel contends that the trial court violated his right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution because the trial judge imposed his exceptional sentence under former RCW 9.94A.535(2)(c) without having a jury determine the existence of his prior convictions beyond a reasonable doubt. Specifically, Pagel argues that his exceptional sentence violates his right to a jury trial because (1) *Blakely v. Washington*[20] requires that a *jury* (not a judge) determine beyond a reasonable doubt "[a]ny fact which increases the penalty for a crime"[21]; (2) his prior convictions were factual issues that increased the penalty of his crimes because they formed the basis for his exceptional sentence; and (3) therefore, a jury needed to determine his prior convictions, not the trial judge..

Our Supreme Court has recently addressed this issue twice and twice decided it adversely to Pagel's argument: in *State v. Mutch*, 171 Wn.2d 646, 656-57, 254 P.3d 803 (2011); and *State v. Alvarado*, 164 Wn.2d 556, 567-59, 192 P.3d 345 (2008). These cases control here, and Pagel's argument fails.

The trial courts in *Alvarado* and *Mutch* determined the defendants' respective prior convictions and offender scores and imposed exceptional sentences under former RCW 9.94A.535(2)(c), the statute at issue here. Also like Pagel, Alvarado and Mutch argued for the first time on appeal that this process violated their Sixth Amendment right to a jury trial under

[20] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[21] Br. of Appellant at 16.

Blakely and other recent United States Supreme Court decisions. *Alvarado*, 164 Wn.2d at 559; *Mutch*, 171 Wn.2d at 652, 656. The Washington Supreme Court rejected this argument, citing the express holding of *Blakely* as:

> *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Mutch, 171 Wn.2d at 657 n.2 (internal quotation marks omitted) (quoting *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000))). Our Washington Supreme Court has interpreted *Blakely*'s inclusion of the phrase "other than the fact of a prior conviction" as creating a "prior convictions exception" to the general rule that the Sixth Amendment requires a jury to determine beyond reasonable doubt any fact that increases the penalty of a crime.[22] *See Alvarado*, 164 Wn.2d at 567. And our Supreme Court has specifically held that having a judge determine prior convictions under RCW 9.94A.535(2)(c) does not violate a defendant's Sixth Amendment right to a jury trial. *Mutch*, 171 Wn.2d at 657-58; *Alvarado*, 164 Wn.2d at 569.

Pagel's argument is virtually indistinguishable from those that our Supreme Court rejected in *Alvarado* and *Mutch*. Accordingly, we hold that the trial court did not violate Pagel's Sixth Amendment right to a jury trial when it determined the existence of his prior convictions

[22] Our Legislature has also amended chapter 9.94A RCW to conform to *Blakely*'s holding.

and imposed his exceptional sentence under former RCW 9.94A.535(2)(c).

We affirm Pagel's convictions and sentences.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Johanson, J.