IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28431-0-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
KRISTIN N. BELL,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

Kulik, C.J. — On June 2, 2008, Kristin N. Bell shoplifted $163 worth of merchandise from the Ben Franklin store in Cheney, Washington. She left the store without paying for the merchandise, she was confronted by Stephen Nation, the manager and co-owner of the store, and Donna Yates, a sales clerk at the store. Mr. Nation attempted to prevent Ms. Bell from leaving by continuing to step in front of her. The combination of Mr. Nation stepping in front of Ms. Bell, and Ms. Bell attempting to get around Mr. Nation to leave the scene of the crime caused Ms. Bell to repeatedly bump into Mr. Nation. Eventually, Ms. Bell was able to get around Mr. Nation and leave the store parking lot. Later that day, Ms. Bell was arrested for second degree robbery. A

jury found Ms. Bell guilty of second degree robbery. The court imposed an exceptional sentence of one day in jail with credit for time served and 30 hours' community service despite the sentencing guidelines standard range of three to nine months. The court premised its exceptional sentence on the fact that Ms. Bell's case could be factually distinguished from other second degree robberies; that sentencing Ms. Bell within the standard range would not support the goals of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW; that the jails are overcrowded and imprisoning Ms. Bell would be an irresponsible use of the State's resources; and in consideration of RCW 9.94A.535(1)(a). The State appealed, arguing that none of the reasons given by the court for the exceptional sentence are valid mitigating factors and, consequently, the sentence should be reversed and remanded. We reverse and remand for resentencing and clarification of what valid factors the trial court relied on for the exceptional sentence.

FACTS

On June 2, 2008, Kristin Bell walked into a Ben Franklin store, picked up a number of items and placed them in a canvas bag she carried. She left the store without paying for approximately $163 worth of merchandise and was confronted by Mr. Nation, the store manager, and Ms. Yates, a sales clerk. Ms. Bell attempted to get around Mr. Nation, who had positioned himself between Ms. Bell and her car. Mr. Nation did not

want Ms. Bell to get away, so he repeatedly stepped in front of Ms. Bell to prevent her movement. As Mr. Nation stepped in front of Ms. Bell while she attempted to get around him, the two made some contact with each other. Eventually, Ms. Bell did make it around Mr. Nation, and Mr. Nation grabbed the bag, causing the handle to snap and Ms. Bell to fall to the ground. Ms. Bell quickly got up, went to her car, and drove away. Later that day, she was arrested and charged with one count of second degree robbery.

At trial, Ms. Yates testified that she had previously seen Ms. Bell at the store and thought she may be stealing items from the store. Ms. Yates stated that she did not confront Ms. Bell because she did not actually see Ms. Bell take anything. On June 2, Ms. Yates did not see Ms. Bell take anything but it was apparent to Ms. Yates that Ms. Bell had stolen items because Ms. Bell entered the store with a flat canvas bag and later attempted to leave with a bulging bag. Also, Ms. Bell immediately stopped when Ms. Yates and Mr. Nation confronted her in the parking lot. Ms. Yates testified that Ms. Bell shoved Mr. Nation a couple of times, but Ms. Yates was not certain whether Ms. Bell used her arms or her body. Ms. Yates said that the force was enough that Mr. Nation had to step back so as not to lose his balance. On cross-examination, Ms. Yates conceded that the contact may have been the result of Mr. Nation repeatedly stepping sideways in an attempt to keep Ms. Bell from leaving.

Mr. Nation also testified. He stated that he followed Ms. Bell around the store and witnessed her moving items from the shopping basket into her canvas bag. Mr. Nation said that he watched Ms. Bell leave the store without paying for the items. After Ms. Bell left, Mr. Nation positioned himself between Ms. Bell and what he thought was her vehicle. Mr. Nation testified that he kept stepping in front of Ms. Bell as she tried to get around him to leave and then Ms. Bell began pushing to get around him. Mr. Nation testified that as he moved in front of Ms. Bell, they would bump into each other. Mr. Nation stated that when Ms. Bell moved around him, he grabbed the bag she was carrying and, when she pulled away, the bag handle broke and Ms. Bell fell to the ground.

Ms. Bell also testified. Ms. Bell admitted that on June 2, she shoplifted items from the Ben Franklin store in Cheney. According to Ms. Bell, when she left the Ben Franklin store, she attempted to go straight to her car to leave, but she stopped when Ms. Yates and Mr. Nation came between her and her car. She testified that Mr. Nation did not identify himself as a Ben Franklin manager or employee and that she tried to get around him to leave. As she was attempting to get around Mr. Nation, they may have made contact with each other because he kept stepping in front of her. According to Ms. Bell, she never pushed Mr. Nation and, in fact, her hands never left the center pocket of her hooded sweatshirt until she braced herself during the fall.

The jury found Ms. Bell guilty of second degree robbery. The State requested a standard range sentence of three to nine months based on an offender score of zero. Additionally, the State requested 12 months' community custody on the condition that Ms. Bell commit no new violations; attend a class on the impact of theft; and pay fines and fees that included $500 victim assessment, $200 court costs, and $100 DNA (deoxyribonucleic acid) fee. The court further imposed a 10-year prohibition on Ms. Bell entering any Ben Franklin store or having contact with the victims and witnesses.

The State responded to Ms. Bell's request for an exceptional sentence, stating that there was no statutory or legal basis submitted for a substantially compelling reason below the standard range.

The court granted an exceptional sentence downward to 30 hours' community service and 12 months' community custody that would end upon completion of community service; a 10-year no-contact order with the victims and witnesses; a 10-year prohibition from entering Ben Franklin stores; and the requested fees, fines, and costs. The State appeals.

ANALYSIS

Ordinarily, a court must impose a sentence within the standard sentence range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). A court may, however,

impose a sentence above or below the guidelines if it finds "substantial and compelling reasons" for doing so and those reasons support the purposes behind the SRA. *State v. Davis*, 146 Wn. App. 714, 719, 192 P.3d 29 (2008) (citing RCW 9.94A.535), *review denied*, 166 Wn.2d 1033 (2009). The SRA provides a nonexclusive list of aggravating and mitigating factors for the court to consider in RCW 9.94A.535(1) and (2). Any reasons cited by the court outside of these factors must relate to the crime and make the crime more or less egregious. *Fowler*, 145 Wn.2d at 404. "An exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category." *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

This court reviews exceptional sentences under a three-part test considering: (1) whether the reasons for departure are supported by the record under a clearly erroneous standard, (2) whether those reasons justify the departure as a matter of law, and (3) whether the exceptional sentence imposed was clearly too excessive or lenient under an abuse of discretion standard of review. *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991). Only the second and third parts of the test are implicated by the State's appeal.

Here, the court found the following mitigating circumstances justified an

exceptional sentence below the standard range:

> 14. [T]he SRA did not contemplate this particular set of facts to be [second degree] robbery.
> 15. The Court also believes that sentencing Ms. Bell [within] the standard range would not promote or preserve any of the goals that the SRA intended.
> 16. [T]he jails in the area are overcrowded and should be utilized for higher priority criminals than Defendant, in a responsible stewardship of the State's frugal resources.

Clerk's Papers (CP) at 63.

The court's first reason for granting the exceptional sentence was that it did not believe that the SRA considered the particular facts of Ms. Bell's case in the standard range for second degree robbery. In drafting the SRA,

> the Legislature also recognized that "not all exceptional fact patterns can be anticipated," Washington Sentencing Guidelines Comm'n, *Sentencing Guidelines Implementation Manual*, § 9.94A.390, comment (1984), and that the sentencing court must be permitted to tailor the sentence to the facts of each particular case.

State v. Pascal, 108 Wn.2d 125, 139, 736 P.2d 1065 (1987).

This finding is essentially a general statement that the circumstances of Ms. Bell's case are unlike those of other second degree robberies. The court said as much by stating that this case was "so far below the bottom range of any other robbery I've seen" and that this was essentially a shoplifting that went awry. Report of Proceedings (RP) at 254.

Ms. Bell was charged with, and convicted of, second degree robbery under

RCW 9A.56.210. "Robbery" is defined as:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the *degree of force is immaterial*. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). Mr. Nation testified that Ms. Bell pushed him. Ms. Yates testified that Ms. Bell shoved Mr. Nation to prevent Mr. Nation's resistance to her taking the items from the store. However, the fact that neither could clearly remember whether Ms. Bell used her arms to shove Mr. Nation, or if the contact happened incidentally as she was attempting to get around him, indicates that the force used by Ms. Bell was minor.

Because the charge of robbery makes the amount of force immaterial, the degree of force is not considered by the court when determining the presumptive range of the sentence. Therefore, the amount of force used could be a valid consideration potentially justifying a departure from the sentencing guidelines. *See State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). However, neither the court's written findings of fact nor its oral ruling on the record indicate that the court relied upon the minimal amount of

force when granting the exceptional sentence and this court does not have the discretion to sustain an exceptional sentence based upon facts not relied upon by the trial court. *State v. Hobbs*, 60 Wn. App. 19, 26, 801 P.2d 1028 (1990).

Although the court's written findings of fact do not clearly articulate how Ms. Bell's case is distinguishable from other second degree robberies, the court's oral ruling does attempt to show why Ms. Bell's case is a "square peg that doesn't fit into a round hole." RP at 252. By granting the exceptional sentence, the court stated:

> [I]n this case, I think had not the store manager affirmatively reached out, there would have been no contact. I'm not saying that was wrong for him to do that because I think you have to be really, really, careful and not put blame on victims. But my memory of the testimony is you actually didn't even take your hands out of your pockets; that if there was any physical contact at all, it was not initiated by you. The only thing you did was hold onto the bag. So I think the facts distinguish this case.

RP at 255. While the court's written findings of fact do not explicitly maintain this reason,[1] the court's written findings of fact do sufficiently show that

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[1] Ms. Bell's proposed findings of fact included:

> 18. The Court, in specifically addressing RCW 9.94A.535(1)(a), reasons that the victim, Mr. Nation, may have in fact been the initiator and/or aggressor during the confrontation with Defendant, believing that if Mr. Nation had not affirmatively stepped in front of Ms. Bell or reached out for Ms. Bell's bag during the confrontation, there would have been no contact between the two.

CP at 63. This finding, however, was crossed out by the court in the amended findings of fact and conclusions of law regarding the sentencing hearing. Finding of fact 20 states:

> Relying upon the consideration of RCW 9.94A.535(1)(a), and after

RCW 9.94A.535(1)(a) was considered by the court in making its decision.

"Even if inadequate, written findings may be supplemented by the trial court's oral decision or statements in the record." *In re Det. of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986). While it appears that the court may have had a change of heart regarding the application of RCW 9.94A.535(1)(a), it is important to consider the court's statement and emphasis that it must "be really, really, careful and not put blame on victims." RP at 255. Because of the apparent conflict between the court's written findings of fact and its oral ruling, we cannot conclude that RCW 9.94A.535(1)(a) is applicable.

Here, the court stated that it did not believe that a standard range sentence would promote or preserve the goals of the SRA. The goals are:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;

> considering all other facts before the Court, including the fact that Defendant will now have a serious felony on her record, and that there is no purpose for incarcerating her, the Court grants Defendant's request for an exceptional sentence per RCW 9.94A.535 and sentences her to a sentence below the mandatory guidelines of the SRA. Any further incarceration would be clearly excessive, given the totality of the circumstances.

CP at 63-64.

(4) Protect the public;
(5) Offer the offender an opportunity to improve him or herself;
(6) Make frugal use of the state's and local governments' resources; and
(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. Even if a departure from a standard range sentence may promote or preserve one or more of these goals, "[t]he trial court's subjective determination that these ranges are unwise, or that they do not adequately advance the above goals, is not a substantial and compelling reason justifying a departure." *Pascal*, 108 Wn.2d at 137-38; *see also Allert*, 117 Wn.2d at 169; *State v. Murray*, 128 Wn. App. 718, 724-25, 116 P.3d 1072 (2005). The court does not offer any nonsubjective reasons for its conclusion that the sentence mandated by the guidelines would conflict with the goals of the SRA. Therefore, the trial court was not entitled to rely upon this factor to justify its exceptional sentence.

Another factor the court referenced was that sentencing Ms. Bell to a standard sentence was inappropriate because "the jails in the area are overcrowded and should be utilized for higher priority criminals than Defendant, in a responsible stewardship of the State's frugal resources." CP at 63. However, the need to conserve the State's resources, standing alone, does not justify an exceptional sentence downward. *Pascal*, 108 Wn.2d at 137-38.

Finally, the State claims that the exceptional sentence imposed is clearly too lenient. In order for this court to find an exceptional sentence is clearly too lenient under an abuse of discretion standard, the sentence must be one which no reasonable person would impose. *State v. Jeannotte*, 133 Wn.2d 847, 858, 947 P.2d 1192 (1997). The minimum sentence of the standard range was 90 days; the court here sentenced Ms. Bell to one day, with credit for time served and 30 hours' community service. Because Ms. Bell's case may have been sufficiently distinguishable from other second degree robberies, the sentence imposed was not clearly too lenient.

Because the court relied upon multiple invalid mitigating factors—and only one possible mitigating factor—we must remand for clarification of what valid factors the court relied on for the exceptional sentence. Where a court grants an exceptional sentence based upon an invalid factor, remand is necessary unless the record clearly shows that the court would have imposed the same sentence absent the invalid factor. *State v. Hooper*, 100 Wn. App. 179, 188, 997 P.2d 936 (2000). The court's findings of fact make clear that the court based Ms. Bell's exceptional sentence upon the totality of the circumstances, which no doubt included the invalid factors listed in the findings of fact. Since it is impossible to determine the weight afforded the possibly valid mitigating factor, remand is necessary to determine if an exceptional sentence is justified without

consideration of the invalid factors.

While there may have been other mitigating facts in the record that would support an exceptional sentence, this court does not have discretion to sustain an exceptional sentence based upon facts which are in the record but which have not been relied upon by the trial court in making its decision. *Hobbs*, 60 Wn. App. at 26.

We, therefore, reverse and remand for the determination of whether an exceptional sentence is warranted based on valid mitigating factors.

A majority of the panel has determined 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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Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, J.