IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28632-1-III**
	)	
Respondent and	)	
Cross-Appellant,	)	
	)	
v.	)	**Division Three**
	)	
ALFRED GALINDO JR.	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J**. —** Alfred Galindo challenges his convictions for first degree assault and the State of Washington challenges the court's exceptional sentence on those charges. We reject Mr. Galindo's claims of ineffective assistance and insufficient evidence. We agree that the exceptional sentence is not justified on this record and reverse and remand for resentencing.

FACTS

This case arises from a practical joke gone horribly wrong. Mr. Galindo received text messages and telephone calls from his girl friend, Kimberly Brown, and her friends,

indicating that Ms. Brown had been kidnapped by people to whom Mr. Galindo owed money. Mr. Galindo, driving a large sports utility vehicle (SUV), went looking for Ms. Brown and her alleged captors.

He circled a Safeway parking lot. His driving scared the three occupants of a small compact car—two bible students and a woman they were counseling. The car drove off at the approach of the SUV and Mr. Galindo pursued it in the apparent belief that it might contain Ms. Brown. He repeatedly rammed the vehicle in the rear and also pointed a realistic-looking toy gun out the window and yelled at the driver to stop. The car eventually evaded Mr. Galindo.

Several people, including the driver of the victimized car, identified Mr. Galindo in a photo montage. Mr. Galindo was charged with three counts of first degree assault. He testified at trial that he had been the driver who rammed the car, but did not intend to hurt anyone because he was trying to save his girl friend.

Defense counsel sought and received an instruction on fourth degree assault. The defense also received a defense of others instruction and argued that Mr. Galindo's actions were reasonable and justified. The jury nonetheless convicted Mr. Galindo as charged. At sentencing, Mr. Galindo asserted that he had chemical dependency issues. The court declared an exceptional sentence and scored the three counts as required for

serious violent offenses, but directed the sentences to run concurrently instead of consecutively. The court based the sentence on Mr. Galindo's chemical dependency and the fact that the three convictions arose from a single violent act. No written findings in support of the exceptional sentence were ever entered.

Mr. Galindo appealed from the convictions. The State cross appealed the exceptional sentence.

ANALYSIS

Mr. Galindo argues that his trial counsel was ineffective and that the evidence did not support the verdicts. The State argues that the exceptional sentence is not supported in fact or law. We will address the issues in the order presented by the parties.

Ineffective Assistance. Mr. Galindo complains that his retained counsel was ineffective by failing to seek instructions on the inferior degree offense of second degree assault. In his statement of additional grounds (SAG), Mr. Galindo also complains of other alleged failures of counsel.

Well-settled standards govern our review of this argument. The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by

counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Mr. Galindo's claims fail to satisfy either prong of the *Strickland* standard, let alone both of them. His primary argument is that trial counsel erred in not pursuing an instruction on the inferior offense of second degree assault. As a matter of fact, his argument fails because counsel did not rely upon an all or nothing strategy. While attempting to justify his client's actions, counsel also successfully obtained an instruction of fourth degree assault so that the jury could return a verdict on a lesser offense if it was so inclined. Counsel did not pursue the all or nothing policy that Mr. Galindo now decries.

More fundamentally, Mr. Galindo's legal argument has been overtaken by the

recent decision in *State v. Grier*, 2011 WL 459466 (Wash. Feb. 10, 2011). There the Washington Supreme Court unanimously overturned a Court of Appeals decision relied upon by Mr. Galindo and held that counsel was not ineffective in failing to seek a lesser included offense in a murder prosecution. *Id*. at ¶¶ 1, 69. It was neither unreasonable nor prejudicial to pursue the all or nothing verdict. *Id*. at ¶¶ 65-67.

Thus, even if counsel here had pursued an all or nothing strategy, *Grier* establishes that it was not unreasonable to do so under the facts of this case. The argument that second degree assault was a better factual fit than fourth degree assault fails because the decision to seek an instruction on a different, and far less serious, inferior crime was strategic.

Finally, we note that the alleged failure of counsel in this regard was also nonprejudicial for a second reason. It has long been recognized that the failure to instruct on a lesser included offense is not prejudicial error when the jury has been instructed on a different included offense and still returns a verdict on the greater crime. *See State v. Guilliot*, 106 Wn. App. 355, 368-369, 22 P.3d 1266 (discussing cases), *review denied,* 145 Wn.2d 1004 (2001); *State v. Hansen*, 46 Wn. App. 292, 297-298, 730 P.2d 706, 737 P.2d 670 (1986).

Counsel was not ineffective for failing to seek a second degree assault instruction.

The SAG challenges counsel's decision to seat a juror[1] and to not admit telephone records. These decisions are strategic or tactical decisions left to counsel and will not support a claim of ineffective assistance under *Strickland*.[2] The challenges to trial counsel's performance are without merit.

Sufficiency of the Evidence. Mr. Galindo also challenges the sufficiency of the evidence to support the verdicts, arguing that he did not intend to hurt anyone. Evidence supporting his theory of the case is irrelevant to adjudging the jury's decision.

Review of this issue also is governed by well-settled precedent. Evidence is sufficient to support a verdict if the trier-of-fact has a factual basis for finding each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

As charged and instructed in this case, the prosecution was required to prove that Mr. Galindo assaulted the victims with a deadly weapon and with the intent to inflict

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[1] No record of jury selection was prepared for the appeal and we also are not in a position to consider the merits of this claim.

[2] We have considered the remaining issue in the SAG and determined it is without merit. The fact that not all witnesses identified Mr. Galindo as the driver was put before the jury at trial. Since Mr. Galindo testified that he was the driver, the issue is also of no moment.

great bodily harm. The jury was quite within its rights to conclude that repeatedly driving a large SUV into a compact car constituted assault with a deadly weapon. The carnage caused by unintentional vehicle accidents is well known. The evidence amply supported the deadly weapon element in this case.

Mr. Galindo also argues that he did not intend to inflict great bodily harm because his motive was to recover Ms. Brown. However, the jury rejected his claim that he was acting in defense of others. More importantly, the *Green* test focuses on the evidence supporting the verdict, not the evidence contradicting it. This court does not reweigh evidence and is not in a position to find persuasive that which a jury found unpersuasive. *Quinn v. Cherry Lane Auto Plaza*, *Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). The repeated ramming of a larger vehicle into a smaller one could easily lead jurors to rationally conclude that the attack was motivated by intent to harm. There was evidence to support this element.

The evidence supported the jury's verdicts.

Exceptional Sentence. The State's cross-appeal challenges the factual and legal bases for the exceptional sentence, as well as the trial court's failure to enter written findings. We agree that the record does not support the exceptional sentence and remand for a new sentencing proceeding.

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id*. A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1). However, an exceptional sentence above the standard range must be based on a recognized statutory factor. RCW 9.94A.535(2), (3).

Either party may appeal an exceptional sentence. RCW 9.94A.585(2). The statutory scheme for review of an exceptional sentence has long been in place. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Differing standards of deference or nondeference apply to those three issues. *Id*.

The initial problem with the exceptional sentence is the fact that there are no written findings of fact or conclusions of law that explain the basis for the sentence. It is possible, as Mr. Galindo points out, to review an exceptional sentence in the absence of

required findings if the court's oral pronouncements are clear. *State v. Faagata*, 147 Wn. App. 236, 242 n.4, 193 P.3d 1132 (2008), *rev'd on other grounds sub nom.*, *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010). However, remand for entry of findings normally is required. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

The court's explanation for the exceptional sentence is not as clear as we would prefer. It appears that one factor was the defendant's chemical dependency on methamphetamines. There are several problems with this basis. First, the court itself admitted there was no evidentiary support for its determination, but was largely inferring a problem due to a 2006 conviction for possessing that drug and his erratic actions when he committed the offenses. II Report of Proceedings (II RP) (Oct. 29, 2009) at 247-248.[3] Mr. Galindo testified that he had been using alcohol that night, but made no mention in testimony about using controlled substances. RP (Sept. 2, 2009) at 107. There simply was no factual basis for finding Mr. Galindo had a chemical dependency problem. There also was no factual basis for finding that any chemical dependency problem contributed to this crime.

This factor also fails the legal standard. By statute, the voluntary use of alcohol or

[3] The court recognized that it was "really . . . reaching" on this point and would probably "pull an appeal from the State." II RP (Oct. 29, 2009) at 248.

drugs is not a basis for an exceptional sentence. RCW 9.94A.535(1)(e). Similarly, addiction or chemical dependency is not a basis for an exceptional sentence. *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993) (cocaine dependence); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991) (alcoholism). Factors related to the defendant, as opposed to the offense itself, are not a basis for a mitigated exceptional sentence. *Law*, 154 Wn.2d at 101-104.

For all of these reasons, chemical dependency is not a basis for an exceptional sentence.

The trial court's oral ruling also reflected the fact that the three victims were in one car, and used that as justification for setting the terms at the bottom of the standard range. II RP (Oct. 29, 2009) at 246. It then turned to the effect of consecutive sentences totaling "eleven years plus eight years plus another eight years" and concluded that "all strung together serves very little purpose as community safety." II RP (Oct. 29, 2009) at 247.

To the extent that this statement is a disagreement with the legislatively determined standard range, it is not a basis for an exceptional sentence. Judicial disagreement with presumptive punishment is not a basis for setting aside an exceptional sentence. *Law*, 154 Wn.2d at 95-96; *State v. Pascal*, 108 Wn.2d 125, 137-138, 736 P.2d

1065 (1987). The standard ranges reflect the legislative balancing of the purposes of the Sentencing Reform Act of 1981, chapter 9.94A RCW. *Id*.

Mr. Galindo argues on appeal that this factor reflects the "multiple offense policy" mitigating factor found in RCW 9.94A.535(1)(g): "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." The problem with this argument is that the multiple offense policy is not involved in RCW 9.94A.589(1)(b).

In relevant part, RCW 9.94A.589(1) provides:

> (a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.
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> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed

under (a) of this subsection.

The "multiple offense policy" refers to the trade-off recognized by the Legislature in the first subsection of this statute. *State v. Batista*, 116 Wn.2d 777, 786-787, 808 P.2d 1141 (1991). When dealing with most cases involving multiple crimes, the offenses are counted as if they were prior criminal history when calculating the offender score for each offense. Sentences computed in such a manner are then served concurrently unless a basis for an exceptional sentence exists. RCW 9.94A.589(1)(a).

However, this trade-off is nonexistent when sentencing serious violent offenses under RCW 9.94A.589(1)(b). Instead, multiple serious violent offenses do not count in the offender score for any other serious violent offenses. The most serious crime is sentenced considering the defendant's whole criminal history, excluding other current serious violent offenses, and a standard range computed in the normal manner. For all other serious violent offenses, the crimes are scored with an offender score of zero and are directed to run consecutively to the most serious offense.

As defined in *Batista*, the multiple offense policy refers only to sentencing proceedings under subsection (1)(a); it does not apply to sentencing under subsection (1)(b). Mr. Galindo's attempt to fit this case under the multiple offense mitigating factor fails. The standard range for one count of first degree assault was not influenced by the

other two counts. There was no trade-off that resulted in an overly harsh sentence. It is possible for a mitigated exceptional sentence involving concurrent terms under RCW 9.94A.589(1)(b). *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). However, the multiple offense policy of subsection (1)(a) is not a basis for an exceptional sentence under subsection (1)(b).

The court's oral remarks also reference the fact that "the multiple impact for the three victims, when added together, results in a sanction that is clearly beyond . . . punishment." II RP (Oct. 29, 2009) at 247. We are not exactly sure what the meaning of this remark is, and the parties do not discuss this statement. If the trial court was indicating that this offense resulted in much less harm than typical for a first degree assault case, such a finding might support an exceptional sentence. Again, the lack of written explanation hampers our review and understanding of the court's reasoning.

Because we cannot conclude that it is justified on this record, the exceptional sentence is reversed and the matter remanded for a new sentencing proceeding. In the event that an exceptional sentence is again imposed, written findings must be entered. Any aggrieved party is free to appeal from an exceptional sentence.

CONCLUSION

The convictions are affirmed. The exceptional sentence is reversed and the case

remanded for a new sentencing proceeding.

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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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.