IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27266-4-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
COLE L. MOORE,	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

Schultheis, C.J. — Cole Moore punched Lee Wheeler, a player from an opposing team, during an aggressive, trash-talking game of three-on-three basketball during the 2007 Hoopfest tournament. He was convicted of assault in the second degree. The trial court ordered an exceptional sentence below the standard range. The State appeals, claiming that the trial court erred by ordering the exceptional sentence sua sponte, that the exceptional sentence is not supported by a mitigating factor set forth in the statute, and that the exceptional sentence is clearly too lenient. We disagree and affirm.

FACTS

Mr. Moore and Mr. Wheeler played on different three-on-three basketball teams in

the family bracket of Spokane's annual Hoopfest tournament. When the teams met in the third game, it escalated into a very heated and rough game. There was plenty of pushing off and trash-talking among the opposing teams' players. Mr. Wheeler and Mr. Moore covered each other through play, which resulted in some scuffles and chesting up during the game.

While some of the facts are disputed, it is clear that Mr. Moore fell to the ground as a result of being fouled by Mr. Wheeler.[1] Mr. Moore testified that Mr. Wheeler "[k]ind of had a smile on his face," after the incident, leading Mr. Moore to believe that Mr. Wheeler did it on purpose. 1 Report of Proceedings (RP) at 137.

Shortly thereafter, an agitated and frustrated Mr. Wheeler challenged members of Mr. Moore's team to "'Hit me. Go ahead and hit me.'"[2] 1 RP at 99, 117-18, 126, 137-38. Mr. Wheeler's outburst caused a delay in the game, which involved the court monitor calling a marshal to the court. Mr. Wheeler initially directed this challenge toward Mr. Moore's father, and Mr. Moore was afraid his father was going to be assaulted by Mr. Wheeler. Mr. Moore's team scored in the next few plays and Mr. Wheeler's team was losing the game.

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[1] While Mr. Wheeler acknowledged that someone on the opposing team was knocked to the ground, he did not believe it was Mr. Moore. Other witnesses recalled Mr. Wheeler knocking Mr. Moore to the ground, and Mr. Moore had a bloody lip.

[2] Mr. Wheeler denied having made the statement, but Mr. Wheeler's own brother as well as other witnesses testified Mr. Wheeler made the statement more than once.

Mr. Wheeler claims that then, a few plays after the outburst, he was punched in the stomach and then in the face by Mr. Moore. Mr. Moore claims that he was shoved by Mr. Wheeler, whose team was on the offense, who then quickly approached again with a raised, half-closed fist. Mr. Moore stated that he thought he was about to be assaulted and hit Mr. Wheeler in the face out of reflex. He denies hitting Mr. Wheeler in the stomach. Both teams were ejected from the tournament.

Mr. Wheeler suffered a fractured jaw, which required surgery to repair and having his jaw wired shut for six weeks to mend.

Mr. Moore was charged with and convicted of second degree assault. With no felony history, the sentencing range was three to nine months. The trial judge ordered a mitigated exceptional sentence of 45 days. The State appeals.

DISCUSSION

A trial court is authorized to impose an exceptional sentence if it finds substantial and compelling reasons to justify departure from the standard range and if those reasons are consistent with the purposes of the Sentencing Reform Act of 1981 (SRA). RCW 9.94A.535. The statute does not prohibit the sua sponte imposition of an exceptional sentence.

The review of an exceptional sentence is governed by a three-part test. (1) Are the reasons supported by the record? (2) Do those reasons justify a departure from the

standard range as a matter of law? (3) Was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard? RCW 9.94A.585(4); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991).

The first part of the test involves a factual inquiry—whether the reasons the trial court departed from the standard range are supported by the record. *Allert*, 117 Wn.2d at 163-64. We uphold the trial court's findings unless they are not supported by substantial evidence. *Id*. at 164.

In this case, the trial court's reason for departing from the standard range was that Mr. Moore had no prior convictions for assaultive behavior, that he had been playing an "aggressive basketball game," and that he expressed concerns about his father's safety during the game. Clerk's Papers at 37.

The record shows that Mr. Moore has no assaultive history. It also shows that Mr. Moore was pushed, charged, taunted, challenged, and physically threatened by Mr. Wheeler. Finally, the record shows that Mr. Moore was concerned that Mr. Wheeler intended to start a fight with or harm Mr. Moore's father. The record supports the findings of fact.

In the second part of the test the reviewing court determines whether, as a matter of law, the reason for the exceptional sentence justifies a departure from the standard range. *Allert*, 117 Wn.2d at 163. The legislature, through the SRA, has provided a

nonexclusive list of mitigating factors that justify a departure from the standard range.

The State argues that RCW 9.94A.535(1)(a) is the only statutory factor "that even arguably applies to this case." Appellant's Br. at 8. Under that provision, a mitigated sentence is justified when, "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). As the State notes, however, the sentencing court did not expressly identify that factor. But because the list of mitigating circumstances is illustrative and not exclusive, the sentencing court was not obligated to identify a factor set forth in the statute. The sentencing court may consider other factors so long as they are consistent with the purposes of the SRA and are supported by the evidence. RCW 9.94A.535(1).

The SRA's exceptional sentence provision was enacted "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." *In re Postsentence Review of Smith*, 139 Wn. App. 600, 603, 161 P.3d 483 (2007) (citing *State v. Bernhard*, 108 Wn.2d 527, 741 P.2d 1 (1987), *overruled in part on other grounds by State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989)).

Here, the trial court obviously believed and considered the assault as Mr. Moore's reaction to Mr. Wheeler's provocative conduct. This includes Mr. Wheeler taunting Mr. Moore and others to hit him, Mr. Wheeler's intentional physical conduct during the

game, Mr. Moore's belief that his father was in danger, and Mr. Moore's lack of predisposition toward assaultive behavior until he was confronted with these circumstances.

As the sentencing judge stated when he denied the motion to dismiss:

> It's easy, in that environment, to have things escalate. It can happen. And particularly I think the more so, as you go up the ladder. . . .
>
> It's real easy to have a fairly low ignition point. And it's sad to see what happened here. I don't know how the jury is going to react to this. They may give weight that we don't even think about to the actions of Mr. Wheeler. For example, you know, this "hit me" business. I'm not exactly sure what that was supposed to elicit. I'm sure he never thought he would receive a blow that broke his jaw.
>
> . . . .
>
> I'm convinced that there is sufficient evidence to go forward. Certainly there are some strong points from the defendant's standpoint. I trust this group of 12, which is what it will be when we get all done, can sort through that and come up with a logical proper verdict consistent with the evidence and with the applicable law. So, I'm denying the motion, and we are going to proceed.

1 RP at 132-33.

Further, the same judge at sentencing explained:

> This isn't an example of somebody laying in wait for somebody to assault them for whatever reasons. It wasn't a gang-type thing. It arose out of an athletic scenario[.] . . .
>
> And the last day [of Hoopfest] I did watch the under six-foot and the over six-foot championship games. And there's a lot of physical contact. . . . And it's not a no-contact sport the way they play it. I guess it's that way in college and the pros, too, I suppose; but it seems like it's a little more here.
>
> I'm taking into consideration that -- first of all, I recall the testimony about what Mr. Moore thought. Well, he saw something. And he, in his mind, equated that to some danger to his father. I'm aware of that.

> What happened after that, certainly, was not appropriate. I mean, it could have been a shove or a grab or something like that.
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> What occurred here was, obviously, much more violent. The blow was struck with enough force to, in effect, shatter the victim's jaw. . . .
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> . . . .
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> The question is what do we do today? I would be surprised to see Mr. Moore in any courtroom again. Certainly, there's nothing in his history that we know of, any problems of any kind, physical or otherwise. . . .
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> But because of the severity of the injury, there has to be some consequences; and I believe what I propose is appropriate.
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> . . . .
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> . . . Forty-five days of confinement, Work Release. . . .
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> . . . .
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> . . . I [previously] alluded to [the mitigating factors] that it arises out of a game that all parties involved were participating. It was not a planned assault. It wasn't something that had been in Mr. Moore's mind to do. He thought his father was in danger; and he was hoping that he could, in his mind, stop that before it reached that stage.
>
> And those were the reasons why I thought he deserved -- he deserved that type of a sentence.

RP (July 11, 2008) at 13-18.

The stated reasons are consistent with the purposes of the SRA and are legally sufficient to justify a mitigated sentence.

Finally, a sentence is clearly too lenient "only if the trial court's action was one that no reasonable person would have taken." *State v. Jeannotte*, 133 Wn.2d 847, 858, 947 P.2d 1192 (1997). The low end of the standard range of the sentence was 90 days. The sentencing judge ordered a sentence that is half of the low end of the standard range. It was not clearly too lenient.

CONCLUSION

We conclude that the sentencing court's findings of fact are supported by the record. We further conclude that the findings of fact support the sentencing court's legal conclusions that the standard range was excessive and that substantial and compelling reasons supported an exceptional sentence. Finally, we conclude that the sentencing term of 45 days was not an abuse of discretion. We therefore affirm.

A majority of the panel has determined that 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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Schultheis, C.J.

WE CONCUR:

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Sweeney, J.

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Kulik, J.