

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY GUY JORDAN,

Appellant.

No. 39402-2-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jeffrey Jordan guilty of second degree assault and found that the assault manifested deliberate cruelty to the victim. Based on the jury’s finding, the trial court imposed an exceptional sentence of 60 months. Jordan appeals his sentence, arguing that (1) the jury’s finding of deliberate cruelty is not supported by substantial evidence and (2) the sentence is clearly excessive. We affirm.¹

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535. We review the trial court’s findings of fact made in support of an exceptional sentence under the clearly erroneous standard. *State v. Branch*, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996). Under that

¹ A commissioner of this court initially considered Jordan’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

standard, reversal is required only if the findings are not supported by substantial evidence. *Branch*, 129 Wn.2d at 646. And that standard remains the correct standard after *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *State v. Kolesnik*, 146 Wn. App. 790, 802, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009).

First, Jordan argues that substantial evidence does not support the jury's finding of deliberate cruelty because his actions inhere in the crime of second degree assault. Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense that were already contemplated by the legislature in establishing the standard range. *Tili*, 148 Wn.2d at 369.

A person is guilty of second degree assault if he intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a). Substantial bodily harm includes a bodily injury that causes a temporary but substantial disfigurement, substantial impairment of the function of any bodily part, or a fracture of any bodily part. RCW 9A.04.110(4)(b); *State v. R.H.S.*, 94 Wn. App. 844, 846, 974 P.2d 1253 (1999).

The State presented the following evidence supporting its allegation that Jordan's cruelty went beyond that normally associated with second degree assault. Alice Pointek, a passerby, observed Jordan standing over the victim, Montgomery Gondolfi, "stepping on him and like punching him and just -- it was really, really brutal." Report of Proceedings (RP) (June 8, 2009) at 16. Pointek did not see Gondolfi defend himself or return any blows. Pointek's boyfriend also observed the attack and observed Gondolfi on the ground, not defending himself. Officer Paul

Evers responded to the 911 call and observed Gondolfi lying face down on the pavement with Jordan on top straddling him. Evers observed that Gondolfi was unconscious and his face was “covered with blood,” he had blood running from his nose, and his left eye was “almost completely swollen.” RP (June 8, 2009) at 33. Officer Jacob Brown observed

[Gondolfi] was absolutely covered in blood, blood everywhere. I couldn't see his face, basically, because there was so much blood. His eyes were already starting to swell shut. . . . There was a pool of blood where his face was on the concrete, you know, probably a foot by foot just of standing blood. . . . I couldn't believe how much blood there was.

RP (June 8, 2009) at 44. Brown further observed tread marks on Gondolfi's forehead and eye, consistent with being kicked while on the ground. Finally, Dr. Christopher Kang treated Gondolfi for multiple bruises, soft tissue swelling around his face, fractures to parts of his skull and face, including two orbital blowout fractures, and a concussion.

Jordan's conduct evinces gratuitous violence to the point that Gondolfi was covered in blood, his eyes swelled shut, and that he lay defenseless in a standing pool of his own blood, suffering from orbital blowout fractures and a concussion. Such cruelty goes beyond that normally inherent in the elements of second degree assault. Thus, Jordan's conduct does not inhere in second degree assault and substantial evidence in the record supports the jury's finding that his conduct manifested deliberate cruelty. The finding is not clearly erroneous.

Second, Jordan argues that his exceptional sentence is clearly excessive because the standard sentence range for his crime was three to nine months. We review whether an exceptional sentence is clearly excessive or too lenient under the abuse of discretion standard. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). A trial court abuses its discretion with regard to sentencing length in two ways: (1) by relying on an impermissible reason; or (2) by

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“impos[ing] a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court.” *State v. Ritchie*, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995) (quoting *State v. Ross*, 71 Wn. App. 556, 571-72, 861 P.2d 473, 883 P.2d 329 (1993), *review denied*, 123 Wn.2d 1019 (1994)). The trial court did not rely on an impermissible reason. And, while lengthy, in light of the evidence that Gondolfi was lying defenseless on the ground during much of the attack, Jordan’s sentence does not shock the conscience of this court. Accordingly, 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.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENYOYAR, A.C.J.