No. 41689-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

EDDIE LEE DAVIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-05374-1
The Honorable Stephanie Arend, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE COURTS

OTHER STATE AND FEDERAL COURTS

OTHER AUTHORITIES

I. SUMMARY OF THE CASE

On the morning of November 29, 2009, Maurice Clemmons shot and killed four police officers as they sat in a booth at the Forza Coffee Sop in Parkland, Washington. This event triggered a massive regional manhunt, as well as a nationwide media frenzy. Police were unable to apprehend Maurice Clemmons for several days, and believed that his friends and family were helping him evade capture. Then, in the early morning hours of December 1, a Seattle Police Officer shot and killed Maurice Clemmons.

The Pierce County Prosecutor subsequently brought charges against one individual suspected of having driven Maurice Clemmons to and from the Forza Coffee Shop, and against six other individuals suspected of assisting Clemmons after the shootings. Four of those individuals, Eddie Davis, Douglas Davis, Letrecia Nelson, and Rickey Hinton, were tried together on charges of rendering criminal assistance and possession of a firearm that Maurice Clemmons had taken from one of the officers during the Forza shooting. The jury acquitted Hinton, but found Eddie, Douglas and Letrecia guilty. These three are now appealing.[1]

[1] Several parties in this share the same last name. To avoid confusion, those individuals will be referred to by their first name throughout this brief.

II. ASSIGNMENTS OF ERROR

1. The State failed to prove every essential element of the crime of unlawful possession of a firearm.
2. The State failed to prove every essential element of the crime of possession of a stolen firearm.
3. The trial court erred when it entered Finding of Fact for Exceptional Sentence Number 1.
4. The trial court erred when it imposed an exceptional sentence because the aggravating factors the court relied on for Eddie Davis' convictions for rendering criminal assistance and unlawful possession of a firearm are legally inapplicable.
5. The trial court erred when it imposed an exceptional sentence because the aggravating factors the court relied on for Eddie Davis' convictions for rendering criminal assistance, unlawful possession of a firearm, and possession of a stolen firearm are not supported by sufficient evidence in the trial record.
6. The trial court erred when it failed to enter an order or notation dismissing three of the four charged counts of rendering criminal assistance.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to present sufficient evidence that Eddie Davis actually or constructively possessed the stolen firearm, where the evidence showed at most a proximity to and momentary handling of the firearm? (Assignments or Error 1 & 2)

2. Where the victim of the crimes of rendering criminal assistance and unlawful possession of a firearm is the general public, should this court reverse the sentencing aggravators for (a) destructive and foreseeable impact on someone *other than* the victim and (b) a police officer victim? (Assignments of Error 3 & 4)

3. Was there sufficient evidence to establish (a) that the victims of Eddie Davis' offenses were individual police officers or (b) that Eddie Davis' actions had a foreseeable impact on people other than the alleged victims? (Assignments of Error 3 & 5)

4. Should the judgment and sentence be corrected to reflect the court's dismissal of three counts of rendering criminal assistance? (Assignment of Error 6)

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Eddie Lee Davis with four counts of rendering criminal assistance committed by three different means: (1) by providing Maurice Clemmons with money, transportation, disguise or other means of avoiding discovery or apprehension (counts 1 and 3); (2) by harboring or concealing Maurice (count 2); and (3) by preventing or obstructing the discovery or apprehension of Maurice (count 4).[2] The state also charged Eddie with two counts of unlawful possession of a firearm relating to firearms Maurice allegedly showed him the night before the shootings (counts 6 and 7); and with separate counts of unlawful possession of a firearm (count 5) and possession of a stolen firearm (count 8) relating to the firearm Maurice took from one of the officers during the shooting.[3] (CP 13-18)

The State further alleged that the crimes were aggravated for sentencing purposes because: (1) Eddie was on community custody at the time of the offense; (2) the offenses were committed against a law enforcement officer who was performing official duties

[2] Pursuant to RCW 9A.76.050 and RCW 9A.76.070.
[3] Pursuant to RCW 9.41.010, .040 and RCW 9A.56.140, .310.

at the time of the offense; (3) the offenses involved a destructive and foreseeable impact on persons other than the victim; and (4) Eddie committed the current offense shortly after being released from incarceration.[4] (CP 13-18)

The trial court ruled that the State could only convict Eddie on one charge of rendering, and that the different acts of alleged assistance to Maurice were alternative means of committing a single unit of the crime. (04/20/10 RP 74-75; CP 41-42)[5] The court also dismissed the two firearm charges pertaining to weapons allegedly shown to Eddie the night before the shootings (counts 6 and 7. (10/12/10 RP 14-52; CP 393) But Eddie's multiple motions to dismiss the aggravating factors and the remaining firearm charges for lack of proof were denied. (RP 04/20/10 RP 179; 09/07/10 RP 71-102; 10/12/10 RP 52-63; TRP12 1314-28, 1339-42)

The jury found Eddie guilty of rendering, answering by special verdict that he provided transportation or aid to Clemmons and obstructed his capture by use of deception. (TRP 17 1918-21;

---

[4] Pursuant to RCW 9.94A.525(17) and RCW 9.94A.535(3).

[5] The consecutively paginated trial transcripts labeled Volumes 1-17 will be referred to as "TRP" followed by the volume number. The remaining pre- and post-trial transcripts will be referred to by the date of the proceeding.

CP 450, 456) The jury also found Eddie guilty of unlawful possession of a firearm and possession of a stolen firearm. (TRP17 1918-19; CP 451-52) The jury found that all three crimes were aggravated because they involved a destructive and foreseeable impact on persons other than the victim, and they were committed against a law enforcement officer who was performing official duties at the time of the crime. (TRP17 1919-20; CP 453-55)

The trial court imposed an exceptional sentence based on the jury's special verdicts. (CP 465-67, 471) The trial court imposed 60 months of confinement for the rendering assistance conviction, which exceeded Eddie's standard range on that count, and 43 months and 22 months of confinement on the two firearm convictions, which is the top of Eddie's standard range for those counts. (CP 471, 474; 01/14/11 RP 38) The trial court then ordered that the sentences be served consecutive to each other, for a term of confinement totaling 125 months. (CP 474; 01/14/11 RP 38) This appeal timely follows. (CP 485)

B. SUBSTANTIVE FACTS

Maurice Clemmons' family is originally from Little Rock, Arkansas. Maurice came to Washington in 2000, and eventually

started a landscaping business and purchased property in Parkland. (TRP6 278, 281; TRP12 1421) Maurice' cousin, Eddie Davis eventually followed Maurice to Washington. (TRP6 276, 281, TRP12 1431) Eddie viewed Maurice as a father figure. (TRP12 RP 1451) Eddie was also financially reliant on Maurice, as Eddie worked for Maurice and lived in a studio unit on Maurice's property. (TRP6 281; TRP12 1450)

Douglas Davis also came to Washington to work for Maurice and lived with Eddie in the studio unit. (TRP6 281; TRP12 1439) Maurice's brother, Rickey Hinton, lived in the main house on the same property. (TRP6 280, 281)

Maurice's friends and family remembered Maurice as a generous and good person, but also one who was controlling and quick to anger. (TRP6 372; TRP12 1396, 1400, 1405-06, 1440, 1424-25) Maurice was intimidating and could be vindictive if he did not get what he wanted. (TRP6 372-74; TRP12 1396-97, 1402, 1423-24, 1444) In the months before the shooting, Maurice's behavior turned bizarre. He began telling people that he was touched by God or that he was Jesus Christ. (TRP6 329, 374; TRP12 1402, 1423, 1441, 1444)

On Thanksgiving Day in 2009, Maurice came to a family

gathering at his Aunt Letrecia Nelson's house in Pacific, Washington. (TRP6 295) Maurice had recently been released on bail, and was extremely angry about his treatment while in jail. (TRP6 296) He expressed hatred towards police, and described how he would kill any police officers who came to his house. (TRP6 297-98) Maurice had a gun in his pocket, which he pulled out and waved around, and he said he had a second gun in his car. (TRP6 300) During his rant, Maurice also said he would go to a school and "kill white kids." (TRP6 302)

Letrecia, Eddie, and Douglas were present at the time, as were Maurice's friend, Darcus Allen, and Letrecia's daughter, Cicely Clemmons. (TRP6 275, 280, 296, 298) No one but Cicely seemed particularly concerned that Maurice would carry through on his threats. (TRP6 300, 301-02, 303)

The following Sunday, November 29, 2009, at about 8 o'clock in the morning, Maurice entered the Forza Coffee Shop in Parkland, Washington, armed with his two firearms. (TRP5 226-27, 230, 231) He opened fire at four Lakewood Police Officers as they sat together at a table. (TRP5 230, 232) Three officers were immediately shot and killed but a fourth, Greg Richards, was able to discharge his service pistol and wound Clemmons. (TRP5 232-33)

Maurice and Richards struggled, but Maurice wrestled Richards' service pistol from him and used it to fatally shoot Richards. (TRP5 233) Maurice then fled the coffee shop with Richards' pistol. (TRP5 233)

Forza employees who fled the coffee shop saw a man run from the scene and then speed away in a white truck driven by a second man. (TRP5 251, 252-53) Registration records listed Maurice Clemmons as the owner of the truck, so law enforcement immediately focused on Maurice as the prime suspect. (TRP5 257, 258) They went to Maurice's Parkland property, but he was not there. (TRP6 422-25)

Investigators learned of a second possible residence where Maurice could be staying, so they went there next. (TRP6 428) As they conducted surveillance on the house, police saw Hinton leaving on foot. (TRP6 433-34, 435) Hinton claimed he did not know where Maurice was, though cellular phone records indicated he received a call from Maurice shortly after the shootings. (TRP6 469-70, 474; TRP8 692, 802-03, 855, 856-57)

Investigators also interviewed other friends and family members in their attempt to locate Maurice. Letrecia and Cicely were interviewed at their Pacific home on November 30. (TRP6

487, 491) They initially denied seeing Maurice since the shooting, and claimed he had not been to the house since Thanksgiving. (TRP6 285, 288, 345, 348, 359)

However, after she learned that Maurice was dead, Cecily changed her story. (TRP6 345, 348, 359) At trial she testified that she was asleep in her mother's house on the morning of November 29, but was awakened by the sound of someone knocking on the door and window. (TRP6 304-06) She heard the sound of Maurice's voice, and heard him say that he had shot four police officers. (TRP6 307) Maurice said he had been shot too, and asked for a shirt and a plastic bag to tie over his wound. (TRP6 307, 308-09)

Cecily came out of her bedroom and saw Maurice with Letrecia, Eddie, and Douglas. (TRP6 308, 309) Maurice asked to use Cicely's car and gestured for her to give her keys to Eddie, and Cicely complied. (TRP6 310, 313) He also asked for money, so Cicely gave Maurice about $60.00. (TRP6 313) Maurice then ordered Eddie to call "Quiana" and tell her to meet Maurice at the Auburn Super Mall. (TRP6 310-11)

Maurice remarked that he had taken one of the officer's guns and shot him with it, then asked where the gun was. (TRP3 312,

316) Cicely did not tell detectives who gave Maurice the gun, and initially testified at trial that "someone" said it was in a bag on the counter and gave it to Maurice. (TRP6 316; TRP14 1150) But when Cicely was pressed on that point by the prosecutor, she adjusted her testimony and said that Eddie told Maurice it was in a bag on the counter, and that Eddie handed the bag to Maurice.[6] (TRP6 216, 320) However, Letrecia told investigators that she put the gun into the bag and gave it to Maurice. (TRP10 1175-76)

Cecily testified that Maurice, Eddie, and Douglas left in two cars; one of the cars belonged to her and the other was a white Bonneville that the three men had arrived in. (TRP6 322) Eddie and Douglas returned a short time later, returned Cicely's car and keys, and left again. (TRP6 322, 323-24)[7]

Investigators also received information that Maurice may be staying with friends or family in Renton, so they began surveillance at a residence there. (TRP7 543, 544, 545) Investigators observed four people leave the house and drive away in a black BMW. (TRP7 545) The officers believed one of the men in the car was

---

[6] In her statement to investigators, Letrecia said she retrieved a bag for Maurice and placed the gun inside. (TRP10 1175-76)

[7] Cecily was never charged with any crimes relating to her actions on November 29 or relating to her false statements to police during their search for Maurice. (TRP6 348, 359, 370)

Eddie Davis, but could not positively identify the two other men in the car. (TRP7 568) Because Eddie had an outstanding arrest warrant on an unrelated matter, the officers conducted a traffic stop on the car in order to investigate its occupants. (TRP7 548, 572) Maurice was not in the car, but Douglas was. (TRP7 559TRP8 791) He and Eddie were transported to the South Hill Precinct station and questioned. (TRP7 570, 575; TRP8 791-92)

Eddie initially denied contact with Maurice the morning of November 29. (TRP9 910, 912; Exh. 66) Eddie eventually admitted to police that he had seen Maurice after the shooting. Eddie told detectives that Maurice came to the Parkland property and insisted that Eddie drive him to Auburn. (TRP9 957-58; Exh. 66) Eddie complied, and they left in a white Bonneville with Eddie driving and Maurice in the back seat. (TRP9 965; Exh. 66)

While they were on the road, Maurice told Eddie that he had been shot by a police officer, but that he shot four officers himself. (TRP9 965, 968, 969; TRP10 995-96; Exh. 67) When they arrived at Letrecia and Cicely's house, Maurice' wound was cleaned with peroxide and he was given a change of clothes. (TRP9 967; Exh. 66) Then Eddie drove Maurice to meet a woman at the Super Mall. (TRP9 971-73, 998; TRP10 998, 1015; Exh. 66, 67)

Eddie told the detective that he did not see the officer's gun at Letrecia's house, but assumed Maurice was armed and that he took the gun with him when he left. (TRP10 1015, 1016; Exh. 67) Eddie also said that he was not sure what Maurice would do next, but that he was afraid that Maurice would come looking for him if he cooperated with the police. (TRP10 1022)

During questioning, Douglas admitted that he was with Maurice and Eddie on the morning of November 29. (TRP10 1081) Douglass told detectives that he cleaned Maurice' wound, and that he saw the gun and believed Maurice took it with him when he went to the Super Mall. (TRP10 1087, 1088, 1110-11)

A Seattle Police Officer shot and killed Maurice in the early morning hours of December 1, 2009. Maurice was carrying Officer Richards' gun at the time of his death. (TRP10 1132-33)

V. ARGUMENT & AUTHORITIES

A. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT EDDIE'S FIREARM CONVICTIONS BECAUSE THE STATE DID NOT PROVE HE ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARM

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826,

849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State alleged that Eddie possessed Officer Richards' firearm, which Maurice had taken from Richards during their struggle at the coffee shop. (CP 17-18; 10/12/10 RP 52-54) As a result, the State charged Eddie with unlawful possession of a firearm and possession of a stolen firearm. (CP 17-18) Under RCW 9A.56.310(1): "A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm." Under RCW 9.41.040, a person is guilty of unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense[.]"

Possession of property may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); State v. Ibarra-Raya, 145 Wn. App. 516, 524, 187 P.3d 301 (2008). Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. Callahan, 77 Wn.2d at 29 (citing State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967)).

In this case, the prosecution argued that Eddie had actual possession of the gun because: "When Maurice Clemmons asked where the gun was, it was Eddie Davis who retrieved the bag that contained the gun and brought it to him." (TRP15 1710) This fact, if true, is insufficient to establish actual possession. As stated in Callahan,

> In order for the jury to find the defendant guilty of actual possession of the drugs, they must find that the drugs were in the personal custody of the defendant. There was no evidence introduced that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that he had handled the drugs earlier. Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the

> drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

77 Wn.2d at 29 (emphasis added) (citing United States v. Landry, 257 F.2d 425, 431 (7th Cir.1958)).[8]

Like Callahan, Richards' gun was not found on Eddie's person at the time of his arrest. So the only basis on which the jury could find that Eddie had actual possession of the gun is that he may have briefly handled the bag containing the gun as he passed the bag to Maurice while at Letrecia's house on November 29. (TRP6 316, 320) This passing control and momentary handling does not establish actual possession. Callahan, 77 Wn.2d at 29.

The State's evidence is also insufficient to show constructive possession of the gun. Constructive possession can be established by showing the defendant had dominion and control over the item or the premises where the item was found. See Ibarra-Raya, 145 Wn. App. at 524; State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000).

The Pacific home where Maurice received medical treatment

[8] The same definition of "possession" governs drug and firearm cases in Washington. See Comment, WPIC 133.52 ("WPIC 133.52 parallels the instruction used for drug offenses"); WPIC 50.03.

and a change of clothes belonged to Letrecia, and only she and Cecily lived there. (TRP6 275, 395-96) Eddie did not have dominion and control over the premises. (TRP6 275, 395-96) And the State presented no evidence that Eddie owned the car that transported Maurice from the Parkland residence to Letrecia's house and to the Super Mall.

It is well established that, "where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990); Callahan, 77 Wn.2d at 29; State v. Echeverria, 85 Wn. App. 777, 784, 934 P.2d 1214 (1997).

For example, in Callahan, the defendant was a guest on a houseboat where drugs were found, and he was seen near drugs and admitted handling the drugs earlier that day. 77 Wn.2d at 28-31. The Court found this was insufficient to establish that Callahan constructively possessed the illegal drugs because "possession entails actual control, not a passing control which is only a momentary handling." Callahan, 77 Wn.2d at 29.

In Spruell, police raided the defendant's home and observed Luther Hill, a guest, stand up from a table where there were drugs

and drug paraphernalia. 57 Wn. App. at 384. The court found no constructive possession even though Hill's fingerprints were on a plate containing cocaine residue. 57 Wn. App. at 388-89.

In State v. Cote, the evidence showed that the defendant arrived at a residence as a passenger in a stolen truck and his fingerprints were on mason jars containing precursor chemicals, found in the back of the truck. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Relying on Callahan and Spruell this Court held: "The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it . . . this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." 123 Wn. App. at 550.

Other factors that may be considered in determining whether a defendant had dominion and control over contraband include: (1) whether the defendant had the immediate ability to take actual possession of the item; and (2) whether the defendant had the capacity to exclude others from possession of the item. See WPIC 133.52. No one factor is dispositive, and the totality of the circumstances must be considered. Portrey, 102 Wn. App. at 904.

Although Eddie was in proximity to the gun and may have had the ability, for a brief moment, to handle the gun, there is no

evidence that he had the ability to maintain control of the gun. Similarly, there is no evidence that Eddie had the capacity to exclude others, especially Maurice, from possessing the gun. Maurice brought the gun with him to Letrecia's home, demanded its return when he did not know where it was, took it with him when he left for the Super Mall, and had it on his person when he was killed in Seattle. (TRP6 316, 320; TRP10 1021, 1015, 1016, 1081, 1110, 1111, 1133-34)

Maurice Clemmons possessed and maintained control over the gun from the moment he wrestled it away from Officer Richards. Eddie was not exercising or asserting dominion and control over the weapon when he merely responded to Maurice's demand to give him the gun by picking up the bag and handing it to Maurice.

The State did not establish that Eddie had dominion and control over the premises where the gun was briefly located, or over the gun itself. The State's evidence showed nothing more than mere proximity to and a momentary handling of the gun. But it is well established that such evidence is not enough to support a finding of either actual or constructive possession. Spruell, 57 Wn. App. at 388; Callahan, 77 Wn.2d at 29; Cote, 123 Wn. App. at 550; Echeverria, 85 Wn. App. at 784.

The State failed to present sufficient evidence to support Eddie's unlawful possession of a firearm and possession of a stolen firearm convictions. These two convictions must be reversed and dismissed. See State v. Smith, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005) State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

B. EDDIE'S EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE THE AGGRAVATORS ARE LEGALLY AND FACTUALLY INAPPLICABLE

1. Law regarding imposition and review of an exceptional sentence.

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a court may impose a sentence that exceeds that sentence range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); State v. Hyder, 159 Wn. App. 234, 259-60, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011). But an exceptional sentence is only appropriate where the circumstances of the crime distinguish it from others of

the same category. State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

An exceptional sentence is reviewed to see if either (1) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (2) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, appellate courts review an exceptional sentence to insure there is both a factual basis in the record and a legally justified reason, and that the length is not too excessive or too lenient. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

The appellate court reviews a jury's special verdict finding the existence of an aggravating circumstance using the sufficiency of the evidence standard. State v. Chanthabouly, __ Wn. App. __, __ P.3d __, 2011 WL 4447863 at 21 (2011) (citing RCW 9.94A.585(4)); State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (stating that this court may reverse a sentence outside of the standard range if "the reasons supplied by the sentencing court are not supported by the record"). Under this standard, the court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable

doubt. Chanthabouly, 2011 WL 4447863 at 21 (citing State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

In this case, each charge against Eddie alleged the following aggravating factors: (1) a "destructive and foreseeable impact on persons other than the victim" (RCW 9.94A.535(3)(r)), and (2) that the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense (RCW 9.94A.535(3)(v)). (CP 13-18) The jury found that these aggravators applied to each crime. (CP 453-55) Relying on the jury's findings, the trial court entered the following finding of fact:

> The aggravating factors of "destructive and foreseeable impact" ... and "law enforcement victim" ... are applicable to all counts, I, V, and VIII. The evidence of these aggravating factors was presented to the jury who found these aggravating factors to exist beyond a reasonable doubt. The legislature did not consider these factors in determining the standard range.

(CP 465) The trial court should not have relied on the jury's findings, and should not have imposed an exceptional sentence, because the aggravators are legally and factually inapplicable.[9]

[9] The challenge to the application of the aggravating factors to the firearm convictions is presented in the event that this court affirms Eddie's convictions for those two offenses.

2. Destructive and Foreseeable Impact on Persons Other than the Victim

A trial court may impose an exceptional sentence if the offense involves a "destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r). To establish this aggravator, the State must show "that [the] defendant's actions impact[ed] others in a distinctive manner not usually associated with the commission of the offense in question, and that this impact [was] foreseeable to the defendant." State v. Way, 88 Wn. App. 830, 834, 946 P.2d 1209 (1997); State v. Johnson, 124 Wn.2d 57, 63–64, 873 P.2d 514 (1994); State v. Mulligan, 87 Wn. App. 261, 263, 941 P.2d 694 (1997).

a. *Eddie's acts of rendering criminal assistance and unlawful possession of a firearm did not impact anyone other than the "victim" of the crimes because the "victim" was the public at large.*

For this first aggravator to apply, the plain language of the statute required the jury to find that the offense involved a destructive and foreseeable impact on persons other than the victim.[10] RCW 9.94A.535(3)(r); Instruction 36 (CP 448). However,

[10] Where a statute is clear on its face, its meaning must derive from the plain language of the statute alone. Absent a specialized statutory definition, this Court will give a term its plain and ordinary meaning ascertained from a standard dictionary. State v. Webb, 162 Wn. App. 195, 252 P.3d 424 (2011 (citing State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002)).

Eddie's actions of rendering criminal assistance and unlawfully possessing a firearm did not impact anyone other than the "victim" of the crimes because the "victim" was society or the public at large.

First, unlike Maurice's crime of murder, the crime of rendering criminal assistance to a suspected murderer is a crime against society as a whole, not an individual person. While no Washington cases directly address this point, other jurisdictions have. For example, in People v. Perry, the Michigan Court of Appeals discussed the purpose of that state's "accessory after the fact" crime:

> An accessory after the fact is a person who with knowledge of another's guilt gives assistance to that felon in an effort to hinder the felon's detection, arrest, trial, or punishment. An accessory after the fact aids a perpetrator in the concealment of evidence of the crime, or in the flight or concealment of the perpetrator(s). The purpose of making accessory after the fact a criminal offense is not primarily to deter the commission of the principal offense. Rather, the gravamen of accessory after the fact is that it is an interference with society's effort to bring a perpetrator to justice. By punishing those who are accessories after the fact the law serves to deter others from hindering the justice process after the fact of the principal crime. Thus, the purpose of making accessory after the fact a crime is to assist society in apprehending those who have committed crimes and to assist in preserving evidence of crimes so that perpetrators of crimes can be brought to society's

> justice. Such a purpose, while very important and worthwhile to the welfare of society, is not at all the same deterrence-punishment purpose served by making murder a crime.

218 Mich. App. 520, 534-35, 554 N.W.2d 362 (Mich. App. 1996) (emphasis added) (internal citations omitted).

The Eleventh Circuit has also noted that "[t]he gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime." United States v. Brenson, 104 F.3d 1267, 1286 (11th Cir. 1997) (emphasis added) (citing United States v. Huppert, 917 F.2d 507, 510 (11th Cir. 1990)).

Furthermore, the crime of rendering criminal assistance is codified in Chapter 9A.76 of the Revised Code of Washington, which is titled "Obstructing Governmental Operation." The codification of this crime in this chapter by the Washington legislature indicates the legislature's intent that rendering criminal assistance is a crime against the citizens of the State, rather than against a particular individual, since a crime against an individual would not obstruct governmental operation.

Thus, it is clear that the "victim" of the crime of rendering criminal assistance (or "accessory after the fact") is society as a

whole, since the crime of rendering criminal assistance punishes the interference with society's effort to apprehend criminals and prosecute crimes rather than punishing an act aimed at a specific individual.

Likewise, "the victim of the offense of unlawful possession of a firearm is the general public." State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). "Public" is defined as the people as a whole. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1836 (1993). Because the "public" is all encompassing, there can be no persons "other than" the victim.

Thus, as a matter of law, the "victims" of Eddie's acts of rendering criminal assistance and unlawful possession of a firearm were the public, which necessarily includes the citizens of Pierce County, local law enforcement officers, and the officers' family members. By its plain language, the aggravator cannot apply to these two offenses.

b. *Eddie's actions did not impact others in a distinctive manner not usually associated with the commission of the offenses.*

Even if this court finds that Eddie's actions did impact persons other than the "victim," this aggravating factor is still factually insufficient in this case. To establish the destructive and

foreseeable impact factor, the State called witnesses from various law enforcement agencies and the City of Lakewood to testify that the search for Maurice Clemmons required a massive amount of manpower and overtime, and that the officers were particularly concerned and on heightened alert while searching for Maurice because he had killed four police officers and was considered armed and extremely dangerous. (TRP8 635-36; TRP9 881-82; TRP11 1236-37, 1241, 1256-57) The witnesses also testified that the community was impacted because they had to close down certain streets and redirect traffic at various times during the manhunt. (TRP8 632, 681-82) And family members of the officers testified that they were afraid for their safety while Maurice was at large because they did not know if the choice of victims was random or whether Maurice had specifically targeted those officers. (TRP5 241-42, 246)

Thus, the State's justification for charging this aggravating factor was the assumption that Eddie's acts prolonged the search for Maurice and therefore amplified the impact of the shootings on the community as a whole, and on the families and colleagues of the victims. (TRP15 1711-13)

But this assumption was not proved. The State did not

establish that they would have found Maurice sooner if Eddie had simply closed the door and ignored Maurice's demands for help, or if Eddie had told them that Maurice was left at the Super Mall. We cannot know, beyond a reasonable doubt, that the police would have definitely located Maurice sooner than the morning of December 1 if Eddie had acted differently. Therefore, though the State can punish Eddie for helping Maurice after the shootings, it cannot punish Eddie for the impact of the two-day manhunt without proof that he caused that impact.

Furthermore, the State must show that the impact of Eddie's actions is of such a distinctive nature that it is not normally associated with the commission of the offense. Johnson, 124 Wn.2d at 63-64; Way, 88 Wn. App. at 834; Mulligan, 87 Wn. App. at 263.

For example, in Johnson, the defendant was involved in a gang-related drive-by shooting immediately next to a public elementary school that was in session. Testimony was presented showing that witnesses to the shooting included children about to be released from school and their parents, and the trial court found that after the shooting children were afraid to attend school and parents feared for the safety of their children while at school. 124

Wn.2d at 75. The Court concluded that it was reasonably foreseeable to the defendant that children and their parents—who were not the intended victims—would be traumatized by witnessing a shooting incident in the immediate vicinity of a public elementary school, and that this resulting trauma distinguished the case from other assaults. 124 Wn.2d at 75-76.

In State v. Crutchfield, the defendant watched and did nothing while his friend killed the victim, then assisted his friend with the disposal of the victim's body. 53 Wn. App. 916, 919-20, 771 P.2d 746 (1989).[11] For the next 16 months, the defendant failed to reveal his knowledge about the victim's fate, and instead told police and the victim's family that she had left his apartment with an unknown person on the day of her disappearance. The victim's body was eventually found and the defendant was convicted of manslaughter. 53 Wn. App. at 919-20. The court upheld an exceptional sentence based in part on the impact on the victim's family, finding:

> [The victim's] parents did not know the fate of their daughter for 16 months. This is an emotional trauma not normally associated with manslaughter. The defendant knew that [the victim] lived with her parents, and he was acquainted with them prior to

[11] Overruled on other grounds by State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992)

> [the victim's] death. [His] lies regarding [the victim's] disappearance added to her parent's anguish.

53 Wn. App. at 928.

On the other hand, in Way, the court rejected the impact on the community aggravator, where the defendant shot his estranged wife on a community college campus and also shot at a student arriving in a car, and where many other students on campus heard or saw the shooting while taking cover. The court reasoned that while the record showed psychological impact on students, and this was foreseeable to the defendant, the circumstances of the crime did not set it apart from any other murder committed in a public place where adults might witness it. 88 Wn. App. at 834.

The usual and predictable impact of the crime of first degree rendering criminal assistance is that the capture of a murder suspect is delayed, which necessarily results in additional law enforcement efforts and stress on the community and family as they await capture.[12] These facts alone do not distinguish this case from other rendering cases.

What made this rendering case unusual, and what caused the significant and destructive impact, was not that Eddie assisted a

[12] The crime of rendering criminal assistance is elevated to first degree if the person assisted is wanted for murder or for a class A felony. RCW 9A.76.070(1).

suspected murderer in evading capture for two days. Rather, it was the actions of Maurice Clemmons before Eddie assisted him. Maurice's actions caused the deaths of four police officers, which shocked and saddened family, law enforcement colleagues, and the community. Maurice's actions caused a national media frenzy. And Maurice's continuing refusal to turn himself into the police was the primary reason his capture was delayed. The anguish felt by the families, officers and community was caused by Maurice, not Eddie.

Furthermore, it is unclear how Eddie's proximity to and momentary handling of the gun at Letrecia's house impacted anyone in the community in an unusual way. The State argued that the fact that this gun was taken from Officer Richards and used to shoot him was shocking and "victimized the law enforcement community in general." (TRP15 1717) But again, Maurice wrestled the gun away from Officer Richards and used it to end the officer's life. Maurice kept the gun with him and had it in his possession when he was killed in Seattle. If there was any unusually negative and foreseeable impact resulting from the theft and possession of the gun, it was caused by Maurice, not Eddie.

The State cannot attribute the impact of Maurice Clemmons'

actions to Eddie, because Eddie was merely an accessory after the fact, not an accomplice.[13] The State cannot punish Eddie for Maurice's terrible acts, it can only punish Eddie for his own acts and for the impact that his acts, and his alone, had on the community. But the State failed to present sufficient evidence to prove that Eddie's actions in rendering criminal assistance, unlawful possession of a firearm, or possession of a stolen firearm "impact[ed] others in a distinctive manner not usually associated with the commission of" those offenses. Way, 88 Wn. App. at 834; Johnson, 124 Wn.2d at 63–64; Mulligan, 87 Wn. App. at 263.

This aggravator fails both legally and factually, and should be stricken.

3. The "victim" of the crimes of rendering criminal assistance, unlawful possession of a firearm, and possession of a stolen firearm, was not an individual officer or officers.

A trial court may impose an exceptional sentence if the offense "was committed against a law enforcement officer who was performing his or her official duties at the time of the offense[.]"

[13] An accessory after the fact has no causal role in the principal offense. Cathron v. Jones, 190 F. Supp. 2d 990, 1000 (E.D. Mich. 2002); see also State v. Anderson, 63 Wn. App. 257, 261, 818 P.2d 40 (1991) (rendering criminal assistance is an offense that can only occur after the fact because otherwise it constitutes accomplice liability).

RCW 9.94A.535(3)(v). For this aggravator to apply, however, the statute's plain language requires that the "victim" of the charged crime be a law enforcement officer. See also Instruction 36 (CP 448).

As argued in detail above, the victim of the crimes of rendering criminal assistance and unlawful possession of a firearm is the general public. Thus the evidence that the victim was a particular law enforcement officer was necessarily insufficient as to these counts.

Nevertheless, any time an individual renders criminal assistance to a wanted suspect, law enforcement agencies and officers are impacted in some way because additional time and resources might be needed to apprehend the suspect. Thus, the crime of rendering criminal assistance already assumes some impact upon law enforcement officers, and this fact cannot be used to enhance a sentence for this crime. State v. Barnes, 117 Wn.2d 701, 706, 818 P.2d 1088 (1991); State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986) (a trial court may not base an exceptional sentence on factors that the legislature necessarily considered when setting the standard range for that type of offense).

Regarding the possession of a stolen firearm conviction, the State argued that Officer Richards' gun belonged to the Lakewood Police Department. (TRP15 1714, 1707-08; 01/14/11 RP 33-34) The Lakewood Police Department is a government agency, not an individual law enforcement officer. Accordingly, the victim of Eddie's momentary handling of the stolen gun was not "a law enforcement officer." But even if Officer Richards was the true owner of the gun, he was sadly deceased and no longer "performing his official duties" at the time that Eddie allegedly possessed the gun. This aggravator also fails both legally and factually, and should be stricken.

Because there was insufficient evidence to support the aggravators, this court should remand for entry of a standard range sentence on any remaining counts. State v. Webb, 162 Wn. App. 195, 211-12, 252 P.3d 424 (2011) (remedy where insufficient evidence of aggravating factor is resentencing based on the standard range for the crime).

C. THE TRIAL COURT PROPERLY RULED THAT THE STATE COULD ONLY GO FORWARD ON ONE COUNT OF RENDERING, BUT FAILED TO SET FORTH ITS RULING IN THE JUDGMENT AND SENTENCE

Pursuant to RAP 10.1(g)(2), Eddie hereby incorporates by

reference the arguments and authorities in Section C-3 of co-appellant Douglas Davis' opening brief.[14] The claimed error and prejudice discussed in co-appellant Douglas Davis' brief applies equally to Eddie in his case.

The trial court ruled that the four rendering counts charged in the Information were a single unit of prosecution, and ruled that only one count could go to the jury. (03/31/10 143-45; TRP14 1606). However, the court did not enter an order dismissing the other counts. (10/26/10 RP 65-66, 81, 95; TRP14 1606-08) And Eddie's judgment and sentence, which contains a blank space for the court to list dismissed charges, does not mention the charges. CP 472.

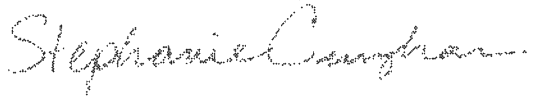
VI. CONCLUSION

Because the evidence of possession is insufficient, this Court should vacate both of Eddie's firearm convictions, and remand to the trial court with instructions to dismiss the charges with prejudice. Alternatively, because there was insufficient evidence of each aggravator, this Court should remand for resentencing on any remaining counts based on the standard range

[14] RAP 10.1(g)(2) allows a party in a consolidated case to "adopt by reference any part of the brief of another" party.

for the crime. At the same time, this Court should remand for a written order dismissing three rendering counts to reflect the trial court's oral ruling dismissing the charges.

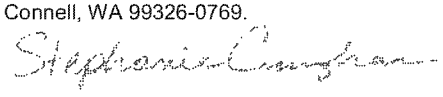
DATED: November 7, 2011



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Eddie Lee Davis

CERTIFICATE OF MAILING

I certify that on 11/07/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Eddie L. Davis, DOC# 334053, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

November 07, 2011 - 1:58 PM

Transmittal Letter

Document Uploaded: 416891-Appellant's Brief~2.pdf

Case Name: State v. Eddie Lee Davis

Court of Appeals Case Number: 41689-1

Designation of Clerk's Papers ✔ Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: S C Cunningham - Email: **sccattorney@yahoo.com**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us

karecrire@aol.com

winklerj@nwattorney.net