No. 44726-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Weller,

Appellant.

Clark County Superior Court Cause No. 11-1-01678-1

The Honorable Judge Barbara Johnson

Appellant's Reply Brief

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I. THE INFORMATION ALLEGING UNLAWFUL IMPRISONMENT DID NOT CHARGE A CRIME.

A charging document must allege all essential elements. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). An element qualifies as essential if required to establish the very illegality of the behavior. *Id.*

It is legal to knowingly restrain another person: parents, health care professionals, police officers, and others do so regularly. Accordingly, the Information (alleging that Mr. Weller "did knowingly restrain [C. L. W.]")[1] does not charge a crime. *State v. Johnson*, 172 Wn. App. 112, 138, 297 P.3d 710 (2012), as modified on denial of reconsideration (Feb. 13, 2013), *review granted in part,* 178 Wn.2d 1001, 308 P.3d 642 (2013).

The Information in this case suffered the same defect outlined in *Johnson.* Respondent suggests that *Johnson* should not control. Brief of Respondent, pp. 51-53 (citing *State v. Phuong*, 174 Wn. App. 494, 299 P.3d 37 (2013)). In *Phuong,* the Court of Appeals decided that a charging document such as the one in this case need not include any additional elements. *Phuong,* 174 Wn. App. at 545 (citing *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), as amended (Feb. 8, 2013)). The conflict between *Phuong* and *Johnson* will be resolved when the Supreme Court

addresses the issue. Accordingly, Mr. Weller provides no additional argument.

II. THE OFFICERS UNREASONABLY SEARCHED MR. WELLER'S GARAGE, AND DISTURBED HIS PRIVATE AFFAIRS WITHOUT AUTHORITY OF LAW.

A. The trial court failed to enter findings of fact; accordingly, no findings are verities on appeal.

Respondent acknowledges that the trial court did not enter the written findings and conclusions required by CrR 3.6.[2] Brief of Respondent, p. 28. Despite this, Respondent argues that Mr. Weller failed to assign error to the court's findings.[3] Brief of Respondent, p. 33.

Respondent does not cite any authority suggesting that an appellant must assign error to "findings" or "conclusions" from a court's oral ruling. Brief of Respondent, pp. 27-44. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

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[1] CP 3.

[2] In his oral ruling, the judge indicated that he planned to provide a brief summary, which would need to be supplemented. RP 285-286.

[3] In its brief, Respondent adds numbers to the court's oral ruling and separates it into findings and conclusions. Brief of Respondent, pp. 24- 27.

B. 'Community caretaking' does not justify the warrantless search.

A community caretaking search requires proof of the officers' reasonable belief that a specific person facing an imminent threat of substantial injury needs immediate help for health or safety reasons. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011). The officers must have a reasonable basis to associate the need for assistance with the place being searched. The claimed emergency may not be a pretext for an evidentiary search. *Id.* Courts have upheld community caretaking searches justified by evidence of a true emergency, such as a domestic violence assault in progress. *See, e.g.,* Brief of Respondent, pp. 40-41 (summarizing cases).

Here, Officers Aldridge and Jensen searched Mr. Weller's garage without a warrant. RP 165-167, 169-170. They did not believe anyone in the house or garage was in imminent danger. Any such belief would have been unreasonable and unfounded under the circumstances. RP 165-170. Accordingly, the warrantless search of the garage and the seizure of the stick cannot be upheld under the community caretaking function. *Schultz*, 170 Wn.2d at 760.

This case presents none of the factors required to uphold a search under the community caretaking function. *Id.* Despite this, Respondent seeks to justify the search under that exception. Brief of Respondent, pp.

32-44. Respondent implicitly asks the court to expand the community caretaking exception far beyond its current reach. Brief of Respondent, pp. 27-44. But community caretaking cannot justify the search and seizure here.

Officers Aldridge and Jensen saw C.G. and C.W. when they arrived at the home. Having encountered them, the officers had no reason to believe the two children faced an imminent threat of substantial injury, or that they needed immediate help for health or safety reasons. *Schultz*, 170 Wn.2d at 754. Nor could the officers reasonably believe that a search of the garage would enable them to provide needed emergency assistance. *Id.* Instead, the officers' sole reason to search the garage was to find the stick allegedly used to beat the children. They did not even claim an emergency, and thus had no pretext: instead, they conducted an evidentiary search.

The state failed in its "heavy burden" to establish the community caretaking exception. *Id.* The convictions must be reversed and the stick suppressed. *Id.*

C. 'Plain view' does not justify the seizure.

An officer may seize an item in plain view if she or he immediately recognizes its evidentiary value. *State v. Link*, 136 Wn. App. 685, 696-97, 150 P.3d 610 (2007) (*citing State v. Kull*, 155 Wn.2d 80, 85,

118 P.3d 307 (2005)). An officer may not move an item in order to determine its significance. *Arizona v. Hicks*, 480 U.S. 321, 328, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

Here, Aldridge saw a piece of "debris wood" leaning against a wall. RP 170-171. Jensen moved the stick and saw that it had blood on it. RP 95. Prior to that point, the children had not clearly identified the stick. After Jensen moved it, the children affirmed that it was the stick. RP 170-173. Before that, the children provided only ambiguous responses to the officers' inquiries. RP 170-173.

Under these circumstances, the seizure was illegal. *Hicks,* 480 U.S. at 328.

III. THE ACCOMPLICE LIABILITY STATUTE CRIMINALIZES PROTECTED SPEECH; *COLEMAN*, *FERGUSON,* AND *HOLCOMB* WERE WRONGLY DECIDED.

Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). This standard requires proof of intent; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). The state cannot criminalize mere advocacy. *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

The First Amendment protects the speech advocating the commission of a crime unless the state also proves that it is (1) made with intent to incite or produce "imminent lawless action" and (2) "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447. The Washington accomplice liability statute is unconstitutionally overbroad because it requires neither. RCW 9A.08.020.

The Court of Appeals has erroneously reached the opposite conclusion. *See* Appellant's Opening Brief, pp. 24-27 (discussing *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011) and *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011)). Division III recently released a published decision, relying on *Ferguson* and *Coleman,* to reject a First Amendment challenge to the accomplice liability statute. *State v. Holcomb*, No. 32155-0-III, --- Wn. App. ---, --- P.3d --- (April 10, 2014). The *Holcomb* court makes the same mistake as *Ferguson* and *Coleman,* holding that the statute does not reach protected speech – despite the omission of an intent element -- because it requires knowledge of the crime and that the speech be "directed to inciting or producing imminent lawless action." (Slip Op. at 6). As noted, this is incorrect – mere knowledge is insufficient, and neither the statute nor the instruction includes an imminence requirement. Like *Ferguson* and *Coleman*, the *Holcomb* court ignores the plain

language of the statute and associated instruction, which do not require that speech be directed at and likely to produce imminent lawless action for conviction. RCW 9A.08.020.

The accomplice liability statute is overbroad. *Brandenburg* 395 U.S. at 447. Mr. Weller's conviction must be reversed. *Id.*

IV. THE EXCEPTIONAL SENTENCE INFRINGED MR. WELLER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION OF ALL FACTS USED TO INCREASE THE PENALTY FOR AN OFFENSE.

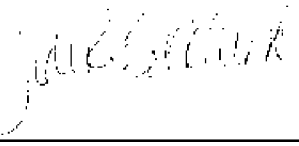
Mr. Weller rests on the argument set forth in his Opening Brief.

CONCLUSION

For the foregoing reasons, Mr. Weller's convictions must be reversed. Alternatively, his exceptional sentence must be vacated.

Respectfully submitted on April 23, 2014,

BACKLUND AND MISTRY



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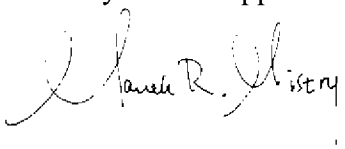

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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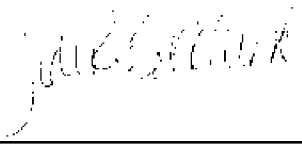
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 23, 2014.



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