NO. 44052-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SHERRY NIELSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01182-6

BRIEF OF RESPONDENT

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Sherry Nielsen (hereafter 'Nielsen') was charged by information with Forgery and Making a False Statement to a Public Servant. CP 1-2; 50-51. In the Amended Information, the State alleged aggravating factors pursuant to RCW 9.94A.535(2)(b), (c), and (d). A jury convicted Nielsen of Forgery and Making a False Statement to a Public Servant. CP 102-03. The trial judge found that Nielsen's standard range was clearly too lenient in light of Nielsen's 28 unscored misdemeanor convictions and imposed an exceptional sentence of 14 months. CP 110, 136; 3 RP at 21.

At trial, evidence was presented that in 2007 Nielsen rented a room in a house in Vancouver, Washington from Michael Miller for $450 per month. 1 RP at 119. Nielsen moved out in June 2009. 1 RP at 120. Mr. Miller moved out of the house and had all utilities shut off. 1 RP at 128. Approximately three years later, Mr. Miller received a water bill charging for recent usage at his home in Vancouver. 1 RP at 128. The water department informed him that Nielsen had requested water service at Mr.

Miller's Vancouver home. 1 RP at 128. Nielsen was not authorized to be at Mr. Miller's home at that time. 1 RP at 128.

Vancouver Police Officer Ed Prentice contacted Nielsen who was at Mr. Miller's Vancouver house on June 11, 2012. 1 RP at 169. Nielsen told Officer Prentice that she had moved back into the home approximately a week prior and was paying rent to the bank. 1 RP at 171. Nielsen showed Officer Prentice a rental agreement dated May 4, 2008 and a print out of a Facebook conversation where she discussed taking over the Vancouver property with Mr. Miller. 1 RP at 172.

Nielsen attempted to set up a water account to obtain water services at Mr. Miller's Vancouver home about 2 weeks after Officer Prentice first contacted her. 1 RP at 77. Nielsen provided the City of Vancouver water department with a rental agreement from 2008, a rental agreement from April 1, 2012 which purported to have Mr. Miller's signature on it, and excerpts from a Facebook conversation. 1 RP at 79, 88. The water department employee believed the documents were false. 1 RP at 90-91. The water department supervisor then called Mr. Miller who told the water department that he had not signed a rental agreement dated April 1, 2012. 1 RP at 129.

Mr. Miller called the Vancouver Police and reported that his house was occupied by a former tenant who had no authority to be there. 1 RP at

138. Police Officer James Watson obtained copies of the documents Nielsen had presented to the water department. 1 RP 94, 138-189. Officer Watson and Officer O'Meara went to Mr. Miller's Vancouver home and contacted Nielsen. Nielsen came to the door after her friend answered it; the officers explained that they were investigating a report that Nielsen was squatting in the home. 1 RP at 144-45. Officer Watson asked if they could speak to Nielsen inside and she agreed and said, "sure, let's go inside and talk." 1 RP at 145. The officers asked Nielsen's friend to leave so the officers could speak to Nielsen alone. 1 RP at 153. The officers and Nielsen stood in the kitchen of Mr. Miller's Vancouver home and spoke.

Nielsen told the officers that she had been living in the home continuously non-stop since 2007. She showed the officers a rental agreement dated 2008. 1 RP at 145. Officer Watson asked to see something more recent, and Nielsen presented a Facebook conversation between herself and Mr. Miller. 1 RP at 146. Officer Watson then read Nielsen the *Miranda* warnings. 1 RP at 147. Nielsen continued to speak with the officers and when the officers asked her about the purported 2012 agreement, Nielsen kept referring to the 2008 rental agreement. 1 RP at 147-48. Nielsen told the officers that she had been living in the home since 2007. 1 RP at 149. The officers confronted her about the differences in her statements and what Mr. Miller had reported. 1 RP at 149. The

conversation continued, and the officers placed Nielsen under arrest for Forgery. 1 RP at 151.

Mr. Miller testified at trial that he never had a written rental agreement with Nielsen, but that they had a verbal agreement she could stay in the house for $450 per month, an agreement which terminated when Mr. Miller moved out of his home in July 2009. 1 RP at 120-21. Mr. Miller testified he never signed the rental agreement that Nielsen presented to the water department. 1 RP at 123-24. A City of Vancouver water department employee testified that water to Mr. Miller's house had been shut off and then restarted by Nielsen at a later time. 2 RP at 194.

The jury convicted Nielsen of Forgery and Making a False or Misleading Statement. CP 102, 103. At sentencing, the Court made a finding that Nielsen's case was deserving of more time than the standard sentencing range based on her 28 prior misdemeanors and four prior felony convictions, and imposed an exceptional sentence of 14 months. CP 136.

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C. ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED NIELSEN'S STATEMENTS TO POLICE BECAUSE SHE WAS NOT IN CUSTODY

Nielsen contends the trial court erroneously admitted statements she made to police while in her home. Nielsen was not in custody at the time the statements were made and the statements were voluntary. The trial court did not err.

Unchallenged findings of fact are verities on appeal. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). An appellate court reviews a trial court's legal conclusions in a suppression hearing de novo. *See State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

Police must advise an individual of the *Miranda* warnings prior to questioning him in a custodial setting. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). To determine if an individual is in custody, the courts question whether "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with formal

arrest." *Heritage*, 152 Wn.2d at 218 (citing *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)); *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1989). Whether a situation is custodial depends upon the determination of how a reasonable person in the same circumstances would have perceived the situation. *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989) (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983))). A person is not placed in the functional equivalent of custody for *Miranda* purposes simply because that person is the focus of a criminal investigation and is being questioned by authorities. *Beckwith v. U.S.*, 425 U.S. 341, 346-48, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976).

The pertinent question to ask is whether a reasonable person in the suspect's circumstances would feel that his or her movements were restricted to a degree associated with formal arrest. *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing *Berkemer*, 468 U.S. at 440). Questioning conducted within a suspect's home is not per se custodial. *U.S. v. Craigshead*, 539 F.3d 1073, 1083 (9th Cir. 2008) (citing to *Beckwith v. U.S.*, 425 U.S. 341, 342-43, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976)). Courts are less likely to find that an interrogation in a defendant's home is custodial. *U.S. v. Ritchie*, 35 F.3d 1477, 1485 (10th

Cir. 1994). A defendant is less likely to feel compelled to speak when the suspect is in familiar surroundings, such as his home. *See Orozco v. Texas*, 394 U.S. 324, 326, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). And even if a suspect is not "free to leave" during the course of a police contact does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

Nielsen argues she was in custody during her conversation with the police. The Court should apply the test set forth in *Heritage:* whether "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *Heritage*, 152 Wn.2d at 218. A reasonable person in Nielsen's position would not have felt her freedom curtailed to the degree associated with formal arrest. Nielsen notes in her brief that questioning during a routine traffic stop is not custodial. See Br. of App. at 10. Yet even during a traffic stop, a suspect is often removed from the passengers (possibly friends or family members) and asked to speak with a police officer outside, or to perform field sobriety tests, etc. This removal of the suspect from the vehicle does not remove the public atmosphere. Such is the case with how Nielsen was questioned by police. Though her friend was asked to give them privacy, she remained in her familiar surroundings, with the exits available to her, and without any coercive tactics. As with an ordinary

traffic stop, the officer inside Nielsen's home did not create a "police-dominated" situation.

Nielsen cites to *U.S. v. Craighead*, 539 F.3d 1073 (9th Cir. 2008) for support in her contention that she was "in custody" while in her home. However, in *Craighead*, 8 armed officers entered the suspect's home, escorted him to a storage room, while one officer leaned with his back against the door, thereby blocking the defendant's exit. This fact pattern is substantially different from the fact pattern involved here. Nielsen was in the home she was currently residing, and one officer came to her door, asked to speak to her, asked her friend to let them speak alone, and spent approximately 15 minutes in the kitchen with Nielsen. The officer did not block her way, did not use any show of force, did not block Nielsen's exit, and did not handcuff or otherwise restraint Nielsen.

The court in *Craigshead, supra* set forth several factors to consider when determining whether the atmosphere was "police-dominated." Those factors are: 1) the number of law enforcement personnel and whether they were armed; 2) whether the suspect was at any point restrained, either by physical force or by threats; 3) whether the suspect was isolated from others; and 4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any statements were made. *Craigshead*, 593 F.3d at 1084. Here, there were only two officers,

who were invited into the residence by Nielsen, and who remained standing, along with Nielsen, in her kitchen for the entire conversation. The *Miranda* warnings were read to Nielsen very early in the conversation. 1RP at 147. Nielsen continued speaking with the officers after the *Miranda* warnings were read to her. 1RP at 147. Nielsen was never physically restrained or threatened during the conversation, prior to her arrest. Though Nielsen's friend was asked to leave so the police could speak to Nielsen privately, Nielsen was never taken to a small, closed room, her freedom of movement and ability to leave was never curtailed. Furthermore, this defendant has had frequent contacts with police, has had the *Miranda* warnings read to her many times, and again continued to speak with the officers after they advised her of the *Miranda* warnings. The totality of the circumstances show that this situation was non-custodial. The trial court made the proper ruling and this Court should affirm its finding that the statements Nielsen made both pre- and post-*Miranda* are admissible.

To determine whether a defendant made statements to police voluntarily, the court looks to all the circumstances surrounding the statements, including the defendant's mental ability and promises or misrepresentations interrogating officers made. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (citing *U.S. v. Springs*, 17 F.3d 192,

194 (7th Cir. 1994). Part of the inquiry is whether any promise or misrepresentation caused the defendant to confess and "whether the defendant's will was overborne." *Broadaway*, 133 Wn.2d at 132 (citing *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Given all the surrounding circumstances, the statements Nielsen made to police were voluntary. Nielsen was not in custody while speaking to police officers in her kitchen, and she voluntarily spoke with them, continued to speak to them post-*Miranda* and after being placed under arrest. She clearly wished to speak to police and continued to speak even after being advised of all her rights. Given all the circumstances it is clear Nielsen's statements were properly admitted at trial.

Even if the pre-*Miranda* statements should not have been admitted, it was harmless beyond a reasonable doubt to have so admitted them. As Officer Watson testified, only a couple of the statements were made prior to *Miranda*. RP at 147. These statements were non-confessional and did not so greatly impact the jury's consideration as to render a guilty verdict when absent those statements it would have acquitted. Any error was harmless beyond a reasonable doubt. a reasonable person in the same circumstances would have perceived the situation. *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989) (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting

California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983))).

II. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS PROPER

The court relied on an aggravating factor pursuant to RCW 9.94A.535(2)(b) to sentence Nielsen to an exceptional sentence. That statute states,

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> ...
>
> (b) The defendant's prior unscored misdemeanor... history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

RCW 9.94A.535(2)(b).

Nielsen argues that case law has held that the unscored misdemeanor aggravator pursuant to RCW 9.94A.535(2)(b) does not allow for imposition of an exceptional sentence without a factual determination by the jury that the standard range sentence would be too lenient. App. Brief at 14. Neilson fails to acknowledge that the statute authorizes the trial court's findings as to this factor, however she argues it is constitutionally impermissible. Nielson's reasoning is incorrect- whether a sentence is "clearly too lenient" is not a fact, but an exercise of sentencing discretion.

A finding of fact is "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). The decision about whether a presumptive sentence is "clearly too lenient" is not a "phenomenon." A finding that a sentence would be clearly too lenient does not reflect a determination that any event did or will happen. Instead, this finding reflect discretion by a judge, as to what sentence is most appropriate for a given case with a given defendant. The only facts necessary to support this decision by the sentencing court are the defendant's prior misdemeanor convictions, and his or her current conviction. As long as a sentence falls within the range determined by the crime committed and the defendant's criminal history, it is the court that is authorized to make a legal judgment of what circumstances warrant an exceptional sentence. *State v. Alvarado*, 164 Wn.2d 556, 567, 192 P.3d 345 (2008).

The Supreme Court has held in a different context that jury findings are required to determine whether a sentence is "clearly too lenient." *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.2d 192 (2005). *Hughes* involved former RCW 9.94A.390(2)(f) which allowed imposition of an exceptional sentence if the "operation of the multiple offense policy of RCW 9.94A.589 would result in a presumptive sentence that is clearly

too lenient..." *Hughes*, 154 Wn.2d at 127. The Court in *Hughes* found that this factor required that the sentence be based on either 1) egregious effects of defendant's multiple offenses or 2) the level of defendant's culpability resulting from the multiple offenses." *Id.* at 137. As the exceptional sentence in *Hughes* required a finding of those factors, it was not merely a legal conclusion, nor did it entail solely the existence of prior convictions. *Id.* The Court therefore held that this particular aggravating factor could not be used to support an exceptional sentence without a jury finding as to these facts.

The phrase "clearly too lenient" does not have the same meaning in the context of the unscored misdemeanor history factor as it did in the context of the former 'free crime' factor in *Hughes, supra.* The unscored misdemeanor factor was enacted in 1995, years before *Hughes* was decided. Laws of 1995, ch. 316, § 2(2)(h). Only two years prior to the enactment of the unscored misdemeanor history factor, the Supreme Court decided *State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993). In *Smith*, the Court discussed that a sentence is considered clearly too lenient "whenever the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free' crimes-crimes for which there is no additional penalty." *Smith*, 123 Wn.2d at 55-56. Under *Smith*, application of this factor depended solely on the

existence of prior offenses and the nature of the current offenses. The legislature is presumed to be familiar with judicial interpretation of statutes. *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010). When a statute codified in 1995 used the phrase "clearly too lenient," it can be presumed that the legislature intended the same meaning that the supreme Court gave that phrase in *Smith, supra*, two years prior. Under that interpretation, the decision of whether a sentence was "clearly too lenient" rested on the nature of the prior convictions and the current offense.

The Supreme Court has still not construed the "unscored misdemeanor history" factor to require any determination of "egregious effects" or "extraordinary culpability." The finding of the unscored misdemeanor history factor can be based solely on the number and nature of the prior convictions, considered in connection with the nature of the current offense. *See State v. Clarke*, 156 Wn.2d 880, 895-96, 134 P.3d 188 (2006). This aggravating factor is "merely a legal conclusion" and does "entail solely the existence of prior convictions." It can therefore be imposed without any jury findings.

Division Three of this Court has held that the "unscored misdemeanor history" aggravating factor requires a jury finding. *State v. Saltz*, 137 Wn. App. 376, 154 P.3d 282 (2007). The court in *Saltz*, stated:

> "The fact of the existence of misdemeanor history is an objective determination. However, the existence of misdemeanor criminal history is subjective in the "too lenient" context because, like in multiple offense policy cases, an additional determination must be made: that a standard range sentence would clearly be too lenient because of the serious harm or culbability given the number or nature of unscored misdemeanors, which would not be accounted for in accounting the sentencing range.

Id. at 582. This reasoning is flawed. The requirement for jury findings does not turn on whether an issue is objective or subjective. Instead, it turns on whether the issue involves a factual determination which must be decided by a jury, or the exercise of sentencing discretion, usually left to the court. This aggravating factor also does not require a factual finding of "serious harm or culpability" in its application. This aggravating factor can be based solely on the elements of the prior misdemeanors and the current offenses. *Clarke*, 156 Wn.2d at 895-96. Division Three was mistaken in concluding that this aggravating factor requires specific jury findings.

This factor is no different from the aggravating factor under subsection c of the same statute- simply because a judge finds that a defendant committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished does not mean that the judge *must* sentence the defendant to an exceptional sentence. A court may; a court has the discretion to determine,

whether in that court's opinion, this crime and this defendant is deserving of an exceptional sentence based on the fact that the defendant has a high offender score so one or more of his offenses goes unpunished. The court could determine that the State overcharged the case which resulted in a high offender score and a high number of other current offenses, and the judge, disagreeing with the charging decision, could choose not to impose an exceptional sentence, though that judge finds that some of the convictions will go unpunished. Under the unscored misdemeanor history factor, the trial court is simply left with the same discretion it has under subsection c. A judge could determine that a defendant with significant misdemeanor history which does not count in his offender score deserves a higher sentence than the standard range because of the current offense and the unscored misdemeanors. A judge could also determine such a defendant does not deserve a higher sentence. This is simply allowing a judge the discretion the legislature intended he have in sentencing an offender who is before him on a specific case with a specific history. No additional fact-finding is done by this court other than weighing its own conscience about whether a case is deserving of an exceptional sentence. That is precisely what Judge Collier did in Nielsen's case.

Nielsen is a defendant with 28 misdemeanor convictions, and four prior felony convictions, the majority of which involved fraud. The trial

court reviewed Nielsen's extensive unscored criminal history, and considered the facts of the case that led to the conviction. This trial court's exercise of its discretion pursuant to RCW 9.94A.535(2)(b) should not be disturbed. This Court should reject Division Three's holding in *Saltz, supra*. The State urges this court to uphold the constitutional validity of RCW 9.94A.535(2)(b). A sentencing judge has the discretion to determine whether a particular defendant, based on his or her criminal history, and a particular crime, when coupled together, deserve a harsher sentence.

D. CONCLUSION

Nielsen was not in custody while she spoke with two police officers while standing inside a residence that she occupied. As Nielsen was not in custody, all the statements she made to police were properly admitted into evidence. The trial court properly admitted the statements, and properly exercised its discretion in sentencing Nielsen to an exceptional sentence. The trial court should be affirmed in all respects.

DATED this _____ day of July, 2013.

Respectfully submitted:

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