71342-6 71342-6

No. 71342-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DERRON P. ALEXIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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A. SUMMARY OF ARGUMENT

Derron P. Alexis appeals his conviction for unlawful imprisonment. The evidence established that Mr. Alexis's housemate placed the victim in a dog crate and Mr. Alexis did not release her. Because there was no evidence Mr. Alexis acted as a principal and accomplice liability does not attach for mere failure to act, the evidence was insufficient to support the conviction. Further, the "to convict" instruction for criminal mistreatment specifically instructed the jury to determine whether Mr. Alexis committed criminal mistreatment beyond a reasonable doubt, either as a principal or as an accomplice but the "to convict" instruction for unlawful imprisonment did not include any parallel language. Therefore, the instructions did not make clear the applicable law and the State's burden of proof. The conviction for unlawful imprisonment based on insufficient evidence and instructional error must be reversed.

Mr. Alexis also appeals the exceptional sentence above the standard range based on abuse of a position of trust and particular vulnerability. The exceptional sentence for criminal mistreatment based on abuse of a position of trust was erroneous as a matter of law because abuse of a position of trust inheres in the offense. The exceptional sentence based on particular vulnerability was clearly erroneous because it was

imposed in the absence of proof beyond a reasonable doubt the victim was particularly vulnerable and that her particular vulnerability was a substantial factor in the commission of the crimes. The exceptional sentence above the standard range was must be reversed.

B. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to support Mr. Alexis's conviction for unlawful imprisonment, in violation of the Sixth and Fourteenth Amendments and Article I, section 3.

2. "I. Findings of Fact" must be stricken because they are judicial findings of fact, entered in violation of the Sixth and Fourteenth Amendments and Article I, sections 3, 21, and 22.

3. "II. Conclusions of Law" must be stricken because the conclusions are based on the judicial findings of fact, entered in violation of the Sixth and Fourteenth Amendments and Article I, sections 3, 21, 22.

4. Because abuse of a position of trust inheres in the offense of criminal mistreatment in the first degree, imposition of an exceptional sentence above the standard range on the charge of criminal mistreatment based on "abuse of a position of trust" was erroneous as a matter of law.

5. In the absence of substantial evidence the victim had a particular vulnerability, imposition of an exceptional sentence above the

standard range on both charges based on "particular vulnerability" was clearly erroneous.

6. In the absence of any finding or substantial evidence that the victim's particular vulnerability was a substantial factor in the commission of the offenses, imposition of an exceptional sentence above the standard range on both charges based on "particular vulnerability" was clearly erroneous.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutional right to due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of unlawful imprisonment is restraint of a person. Where the evidence established that Mr. Alexis's housemate restrained the victim and Mr. Alexis merely knew of the restraint and failed to act, was Mr. Alexis's right to due process violated when he was convicted of unlawful imprisonment? (Assignment of Error 1)

2. The federal and state constitutional rights to trial by jury and to due process prohibit imposition of an exceptional sentence above the standard range based on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt. The jury returned special verdicts that the victim was particularly vulnerable and Mr. Alexis abused a position of

trust. The court, however, entered additional factual findings which were neither admitted by Mr. Alexis nor proven to the jury. Must this Court strike the trial court's findings of fact and the conclusions of law based on those findings, and remand for sentencing within the standard range? (Assignment of Error 2, 3)

3. A factor inherent in the offense cannot be used to justify an exceptional sentence above the standard range because the Legislature necessarily considered that factor in establishing the standard range. The court imposed an exceptional sentence above the standard range for criminal mistreatment based on "abuse of a position of trust." By statute, however, criminal mistreatment can only be committed by a person who occupies a position of trust and abuses that trust. Did the trial court err as a matter of law when it imposed an exceptional sentence on the offense of criminal mistreatment based on abuse of a position of trust, when that factor inheres in the offense? (Assignment of Error 4)

4. An exceptional sentence above the standard range may be based on the victim's "particular vulnerability" only when the defendant knew or should have known of the victim's particular vulnerability and the particular vulnerability was a substantial factor in the commission of the offense. In the absence of proof beyond a reasonable doubt that the victim was particularly vulnerable and in the absence of any proof or finding that

the alleged particular vulnerability was a substantial factor in the commission of the offense, was the trial court clearly erroneous when it imposed an exceptional sentence based on this aggravating circumstance? (Assignment of Error 5, 6)

D. STATEMENT OF THE CASE

In November 2008, 67-year-old Genevieve Alexis adopted 8-year-old N.A., and they lived in New York with N.A.'s two biological brothers and two adoptive brothers. RP 614, 617, 925. N.A. attended an elementary school that recommended placement in a full-time special education program. RP 931-32. Ms. Alexis disagreed with the recommendation, so, in August 2009, she sent N.A. to Seattle to live for one year with her adult son, Derron Alexis, and his housemate, Mary Mazalic, with the hope that the Seattle school district would better meet N.A.'s educational needs. RP 932-33.

One year later, in August 2010, when Ms. Mazalic and N.A. were at women's clothing store, two employees became concerned that Ms. Mazalic was verbally abusive to N.A., and N.A. was trembling, she had a "gash" on her wrist, and she appeared sick and very undernourished. RP 317-18, 326, 329, 331. The employees obtained Ms. Mazalic's name from her credit card receipt and called Child Protective Services (CPS). RP 319, 329. Later that day, two officers went to Mr. Alexis's home to conduct a

child welfare check. RP 309, 335. They removed N.A. and she was hospitalized that evening. RP 313, 341, 383.

The following day, forensic nurse Lori Moore examined N.A. and observed significant injuries in various stages of healing, ulcerations, and extreme malnourishment. RP 380, 382-83, 387, 395, 399, 423. N.A. complained of nausea, constipation, pain when urinating, and back pain. RP 391, 396. N.A. was weak, shaky, slow moving, underweight, her stomach was slightly distended, and her body temperature was below normal, all symptoms consistent with malnutrition. RP 394-97.

Dr. Carlos Villavicencio and Dr. James Feldman also examined N.A. Dr. Villavicencio diagnosed N.A. as suffering from extreme malnourishment, a urinary tract infection, and muscle wasting, and she had marks consistent with abuse. RP 524-26. Dr. Feldman similarly diagnosed N.A. as suffering from extreme malnourishment and muscle wasting, as well as a kidney infection, dry and cracked skin, sunken cheeks, prominent ribs, and fine body fuzz, all consistent with malnutrition, and scarring consistent with whipping and cigarette burns. RP 569-70, 575-76, 579.

At first, N.A. reported that Ms. Mazalic was solely responsible for her injuries and malnourishment. RP 688. Several months later, N.A.

reported that Mr. Alexis participated in the abuse, although to a much lesser extent. RP 689, 691.

In 2013, Mr. Alexis was charged with criminal mistreatment in the first degree, in violation of RCW 9A.42, 020, and unlawful imprisonment, in violation of RCW 9A.40.040, in addition to the aggravating circumstances on each count of abuse of a position of trust and particular vulnerability, as provided by RCW 9.94A.535(3)(b), (n). CP 81-82.[1]

At trial, N.A. testified that Mr. Alexis and Ms. Mazalic were very nice when she first arrived at their home and she liked living with them. RP 619, 621. Ms. Mazalic took care of her, while Mr. Alexis worked nights, slept during the daytime, and spent most of his time in his bedroom. RP 647, 650. As the school year progressed, however, N.A. testified that Ms. Mazalic became "meaner and meaner." RP 647. She started beating N.A. with a belt, wire, and extension cords, and burned her wrist and ankle with cigarettes, sometimes securing a ball in N.A.'s mouth so she could not scream. RP 622, 628, 630, 670. N.A. testified that Mr. Alexis never hit her, although she acknowledged that she told Ms. Brady otherwise. RP 622, 636-38. One time, Ms. Mazalic locked N.A. in a metal dog crate and Mr. Alexis did not release her. RP 626-27. N.A. developed

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[1] In 2012, at a separate trial, Ms. Mazalic was convicted of assault of a child in the first degree, criminal mistreatment in the first degree, and tampering with a witness.

problems with continence and Ms. Mazalic made her wear diapers. RP 631, 664. Ms. Mazalic was in charge of the household food and N.A.'s meal portions became increasingly smaller, and sometimes she was not fed at all. RP 624, 670. Even when Mr. Alexis suggested Ms. Mazalic feed N.A. or offered to provide N.A. food, Ms. Mazalic instructed him to not feed N.A., and he complied. RP 634, 640, 647, 650.

Following a jury trial, Mr. Alexis was convicted as charged. CP 59, 60. The jury also returned special verdicts on each count finding Mr. Alexis used his position of trust to facilitate the crimes and he knew or should have known N.A. was particularly vulnerable or incapable of resistance. CP 61, 62. Based on his offender score of '1,' Mr. Alexis faced a standard range concurrent sentence of 57-75 months for criminal mistreatment in the first degree and 3-8 months for unlawful imprisonment, to be served concurrently. CP 19. The court, however, imposed an exceptional sentence of 120 months for criminal mistreatment and 30 months for unlawful imprisonment, to be served consecutively. CP 20.

E. ARGUMENT

1. The insufficiency of evidence and instructional error on the charge of unlawful imprisonment requires reversal.

a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of unlawful imprisonment.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); U.S. Const. amend. VI, XIV; Const. art. I, § 3. Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *accord State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

b. The State presented insufficient evidence to establish Mr. Alexis "restrained" N.A., an essential element of the offense of unlawful imprisonment.

RCW 9A.40.040 provides, "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." To prove this count, the State relied upon N.A.'s testimony that Ms. Mazalic locked N.A. in a dog crate and that Mr. Alexis did not release her. N.A. testified:

> Q. Did Derron and Mary have a dog crate?
> A. Yes.
> Q. Do you know what that was made out of?
> A. Metal.
> Q. Metal?
> A. Yes.
> Q. Did you ever have to stay in that?
> A. Yes.
> Q. Can you tell the jury about that?
> A. One day when Mary went to work, she put me in the crate, and I would have to stay in there locked up with a lock the piece that locks it.
> Q. Did Derron ever come downstairs when that was happening?
> A. Yes.
> Q. Tell the jury what happened with that.
> A. Well, I was making some noise in the crate, and he heard me, probably thinking that I was getting out, and came downstairs with a belt.
> Q. What did he say to you?
> A. I forgot.
> Q. Did he tell you he was going to do anything with the belt?
> A. No.
> Q. I notice you are looking over at him before you are answering. Are you worrying about saying anything?
> A. No.
> Q. Did he let you out of the crate?
> A. No.

RP 626-27. Noticeably missing was testimony that Mr. Alexis personally placed N.A. in the crate, or that he assisted Ms. Mazalic in doing so.[2]

The State urged the jury to consider Mr. Alexis's liability as an accomplice. In closing argument, the prosecutor stated:

> [N.A.] talked about Derron and Mary and the dog crate incident. That is the Unlawful Imprisonment, but it's also important to the overall scheme in the house, and it shows you Derron's complicity, because Mary places [N.A.] in the dog crate and locks it, and then she leaves. Derron is trying to sleep upstairs. He comes downstairs with a belt in his hand when [N.A.] is making noise. He knows it. He doesn't let her out because, of course, it's easier to go to sleep if your child is locked up downstairs.

RP 1128-29.

Accomplice liability, however, does not extend to mere presence or failure to act. *State v. Jackson*, 137 Wn.2d 712, 722, 976 P.2d 1229 (1999). In *Jackson*, the defendants, husband and wife foster parents, were convicted of felony murder of their foster child, following a jury trial where the jury was instructed that accomplice liability could attach where a parent was present and failed to come to the aid of his or her child. 137 Wn.2d at 720-21. On appeal, their convictions were reversed on the grounds, *inter alia*, that the accomplice liability statute, unlike the Model

[2] The lack of evidence is reflected in the jury inquiry, "Can the court provide a diffanition [sic] of restrained the movement in a matter that substantially interfered with her liberty? CP 44.

Penal Code upon which the state statue was modeled, does not extend liability to a person who fails to come to the aid of another. *Id.* at 722.

RCW 9A.08.020(3) provides:

> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it; or
> (b) His or her conduct is expressly declared by law to establish his or her complicity.

In contrast, Model Penal Code § 2.06(3)(a)(iii) provides:

> (3) A person is an accomplice of another person in the commission of an offense if:
> (a) with the purpose of promoting or facilitating the commission of the offense, he ....
> (iii*) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.*

(Emphasis added).

After comparing the two statutes, the *Jackson* Court ruled:

> [W]e are bound to conclude that the Legislature's failure to include the language of MPC § 2.06(3)(a)(iii) in Washington's accomplice liability statute was purposeful and evidenced its intent to reject the concept of extending accomplice liability for omissions to act. Significantly, the Legislature has imposed liability in other criminal statutes for omission to act. For example, it has done so in RCW 9A.42.020, the first degree criminal mistreatment statute, and in RCW 9A.42.030, the second degree criminal mistreatment statute.

Id. at 723.

Similarly here, Mr. Alexis's mere knowledge of N.A.'s restraint and failure to act cannot support his conviction for unlawful imprisonment, either as a principal or as an accomplice.

c. The jury was not instructed to consider accomplice liability for the offense of unlawful imprisonment.

i. Jury instructions must clearly set forth the applicable law and the State's burden of proof.

When read as a whole, instructions must clearly inform the jury of the applicable law and the allocation of the burden of proof, and not be misleading. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions that fail to make clear the applicable law or that reduce the State's burden of proof violate a defendant's right to due process. *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007). "[T]he test is whether the jury is informed of the State's burden in an understandable way." *State v. Teal*, 117 Wn. App. 831, 839, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004) (citing *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988)).

The State must prove accomplice liability beyond a reasonable doubt. *State v. Cronin*, 142 Wn.2d 568, 579-82, 14 P.3d 752 (2000); *Teal*, 117 Wn. App. at 839. Therefore, the jury must be clearly instructed that

the State bears the burden of proving accomplice liability beyond a reasonable doubt.

> *ii. The jury was not instructed to consider accomplice liability on the charge of unlawful imprisonment or that the State bore the burden of proving accomplice liability beyond a reasonable doubt.*

The jury was instructed in relevant part:

> To convict the defendant of the crime of unlawful imprisonment ...the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during the time period beginning on or about the 7th day of September, 2010 and concluding on or about the 15th day of August, 2011 the defendant restrained the movements of N.A., in a manner that substantially interfered with her liberty....

CP 56 (Instruction No. 9). Significantly, in contrast, the jury was specifically instructed to consider Mr. Alexis's liability either as a principal or as an accomplice on the charge of criminal mistreatment:

> To convict the defendant of the crime of criminal mistreatment in the first degree ... each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That during the time period beginning on or about the 7th day of September, 2010 and concluding on or about [sic] 15th day of August, 2011 *the defendant, or a person to whom the defendant was an accomplice*, withheld any of the basic necessities of life from N.A.

CP 52 (Instruction No. 5) (emphasis added). In this context, the instruction defining accomplice liability was insufficient to direct the jury to consider

accomplice liability for the charge of unlawful imprisonment. *See* CP 51 (Instruction No. 4).

Moreover, the "reasonable doubt" instruction and the "to convict" instruction clearly set forth the State's burden as to the elements of the offense, but the definitional instruction on the accomplice liability was completely silent as to the State's burden of proof. Because accomplice liability and the State's burden of proof were included in the "to convict" instruction for criminal mistreatment, but not included in the "to convict' instruction for unlawful imprisonment, the instructions were misleading and improperly relieved the State of its burden as to accomplice liability, in violation of Mr. Alexis's right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt.

c. The proper remedy is reversal of Mr. Alexis's conviction for unlawful imprisonment.

Mr. Alexis's conviction for unlawful imprisonment was based on insufficient evidence that he restrained N.A., either as a principal or as an accomplice. A conviction based on insufficient evidence cannot stand. *State v. Veliz*, 176 Wn. App. 849, 865, 298 P.3d 75 (2013). To retry Mr. Alexis for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900

(1998). Mr. Alexis's conviction for unlawful imprisonment must be reversed and the charge dismissed with prejudice.

In addition, instructions that do not make clear the applicable law, are misleading, or that relieve the State of its burden of proof are errors of constitutional magnitude that may be raised for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); *State v. Atkinson*, 113 Wn. App. 661, 665, 54 P.3d 702 (2002); RAP 2.5(a). A challenge to jury instructions is reviewed *de novo*. *State v. Yates,* 161 Wn.2d 714, 749, 168 P.3d 359 (2007).

Instructions may be both accurate and misleading. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160 (2001). Here, the jury was provided an accurate definition of accomplice liability, immediately followed by a "to convict" instruction for criminal mistreatment that referred to accomplice liability and the State's burden to prove liability as either a principal or an accomplice beyond a reasonable doubt. CP 51, 51. On the other hand, the omission of any parallel language in the "to convict" instruction for unlawful imprisonment was improperly confusing and misleading, requiring reversal of Mr. Alexis's conviction for unlawful imprisonment.

Further, instructions that relieve the State of its burden of create structural error that is not subject to a harmless error analysis. "[W]here

the instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis in original); *accord State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013) (defective reasonable doubt instruction is structural error, is presumed prejudicial, and is not subject to harmless error analysis). Here, because the instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt for the charge of unlawful imprisonment, reversal is automatically required.

Even under a harmless error analysis, reversal is required. A constitutional error is presumed prejudicial unless the State can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instructional error on accomplice liability is not harmless beyond a reasonable doubt, unless uncontroverted evidence established the defendant acted as a principal. *State v. Brown*, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). There was no such evidence here. Rather, the uncontroverted evidence established that Mr. Alexis was merely aware of the restraint and failed to act. Under the circumstances, the State cannot establish that failure to properly and clearly instruct the

jury on accomplice liability and its burden of proof on the charge of unlawful imprisonment was harmless beyond a reasonable doubt.

Reversal of Mr. Alexis's conviction for unlawful imprisonment is required.

2. The trial court erroneously imposed an exceptional sentence above the standard range based on facts found by the court, and not limited to the facts found by the jury, in violation of Mr. Alexis's right to jury trial and due process.

It is axiomatic that a criminal defendant has the constitutional right to a jury trial and to proof beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 21, 22. Thus, an exceptional sentence above the standard range may be based only on facts either admitted by the defendant or found by a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 304; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Here, on each count, the jury returned a special verdict that Mr. Alexis knew or should have known N.A. was particularly vulnerable or incapable of resistance and that he used his position of trust to facilitate the commission of the crimes. CP 40, 41. At sentencing, however, the

court did not limit itself to the jury's findings but, rather, entered the following findings and conclusions:

> I. FINDINGS OF FACT
>
> The defendant was responsible for Mary Mazalic as her caregiver and was responsible for N.A. The defendant was N.A.'s adoptive brother. She was sent to his home. She was particularly vulnerable and the defendant knew it. The defendant was not merely a person with his "head in the sand." He acted alone and as an accomplice, causing N.A.'s severely starved & emaciated condition. Based on the jury's finding that N.A. was a particularly vulnerable victim, and that he abused a position of trust which facilitated the commission of these crimes, the Court finds substantial & compelling reasons to impose an exceptional sentence.
>
> II. CONCLUSIONS OF LAW
>
> The Court finds substantial & compelling reasons to impose an exceptional sentence of 120 months on Count I & 30 months on Count II, to run consecutively to each other. The Court would impose the same exceptional sentence on each aggravating factor independent of the other.

CP 28-28. These factual findings far exceeded the jury's special verdicts in violation of Mr. Alexis's right to jury trial and proof beyond a reasonable doubt.

A violation of the constitutional right to a jury finding beyond a reasonable doubt of facts necessary to increase the penalty for an offense above the standard range requires reversal unless the error was harmless beyond a reasonable doubt. *Washington v. Recuenco*, 548 U.S. 212, 218-220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *Chapman*, 386 U.S. at 24.

The State bears the burden of proving harmlessness. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). The State cannot meet its burden here. It is implausible that the extensive litany of judicially-found facts did not factor into the conclusions of law. The findings and the conclusion based upon those findings must be stricken.

3. The trial court erroneously imposed an exceptional sentence above the standard range based on "abuse of trust," which inheres in the offense of criminal mistreatment, and "particular vulnerability," which was unsupported by the court's reasons.

A court may impose an exceptional sentence above the standard range only if it finds substantial and compelling reasons to do so. RCW 9.94A.535. When a court imposes an exceptional sentence outside the standard range, the court must set forth the reasons for the sentence in written findings of fact and conclusions of law. RCW 9.94A.535.

A challenge to an exceptional sentence is governed by RCW 9.94A.585(4), which provides in relevant part:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find ... that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense....

Whether the record supports the court's reasons is a factual question reviewed under the "clearly erroneous" standard. *State v. Law*, 154 Wn.2d

85, 93, 110 P.3d 717 (2005); *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). Whether the court's reasons justify the exceptional sentence is a question of law reviewed *de novo*. *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001); *Nordby*, 106 Wn.2d at 518.

a. The exceptional sentence for criminal mistreatment based on "abuse of a position of trust" was erroneous as a matter of law because abuse of a position of trust inheres in the offense.

RCW 9.94A.535(3)(n) authorizes imposition of an exceptional sentence above the standard range if the trier of fact finds beyond a reasonable doubt "[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." However, a factor inherent in the offense cannot be used as an aggravating circumstance. *Ferguson*, 142 Wn.2d at 647-48; *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992). A factor inheres in the offense when it was necessarily considered by the Legislature in establishing the standard sentencing range for that offense. *Ferguson*, 142 Wn.2d at 647-48. For example,

> conviction of the offense *of exposing another person to HIV with intent to do bodily harm* leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence. A finding by the trial court that Petitioner's act constituted deliberate cruelty cannot be used to elevate the sentence to an aggravated exceptional sentence because *intent to do bodily harm* is an element of the offense charged under former RCW 9A.36.021(1)(e),

> and was already considered by the Legislature in establishing the standard sentence range.

Id. at 648 (emphasis in original). *See also State v. Stubbs*, 170 Wn.2d 117, 127-29, 240 P.3d 143 (2010) (severity of injury already considered by Legislature in setting standard range for assault in the first degree and cannot support exceptional sentence based on the injury, even when injury much worse than necessary to establish the offense); *State v. Dunaway*, 109 Wn.2d 207, 218, 743 P.2d 1237 (1987) (planning already included in premeditation element and cannot justify exceptional sentence); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 519 (2003) (injuries caused by choking inhere in assault in the second degree and cannot support manifest injustice disposition).

Abuse of a position of trust inheres in the offense of criminal mistreatment in the first degree. Criminal mistreatment in the first degree can by committed only by "[a] parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide a dependent person the basic necessities of life, or a person employed to provide the child or dependent person the basic necessities of life." RCW 9A.42.020. Such persons necessarily occupy a position of trust and any person who commits criminal mistreatment necessarily abuses that trust. *See State v.*

Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989), *abrogated on other grounds by In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) (exceptional sentence based on abuse of trust following conviction for felony-murder based on assault and criminal mistreatment upheld as to predicate offense of assault only because criminal mistreatment "presumes a breach of parental or custodial trust.").

By contrast, in *State v. Grewe*, the defendant was convicted of indecent liberties while he was employed as a bus driver and the victims were either waiting for or riding on his bus and the court imposed an exceptional sentence based on abuse of a position of trust. 117 Wn.2d 211, 213, 813 P.2d 1238 (1991). The indecent liberties statute, former RCW 9A.44.100(1) provided four distinct means by which a person could commit the crime, including when the victim was less that fourteen years of age or when the victim was less that sixteen years of age and the defendant was "in a position of authority of the person." *Id.* at 215. The defendant was charged and convicted based on the means that the victims were less than fourteen years of age. *Id.* On appeal, the defendant argued that abuse of a position of trust was not an appropriate aggravating circumstance because one of the alternative means of committing the offense included a position of trust as an element. *Id.* at 216. The Court disagreed, and ruled the Legislature specifically did not require proof of a

position of trust when the victim was less than fourteen years of age and, therefore, did not consider abuse of a position of trust in establishing the standard range sentence for that specific means of committing indecent liberties. *Id.* at 217-18.

> Where a single criminal act includes all of the elements of one form of the crime as well as additional discrete elements from an alternative form the crime exceeds that contemplated by the Legislature. In drafting former RCW 9A.44.100(1), the Legislature viewed a position of authority as a necessary element only where the victim is between then ages of 14 and 16. Where a position of trust is abused when a child is under 14, a crime exceeding the Legislature's contemplation has been committed meriting an exceptional sentence.

Id. at 217-18.

Because criminal mistreatment in the first degree can be committed only by a person who abuses a position of trust, that factor was necessarily considered by the Legislature when it established the standard sentence range for criminal mistreatment in the first degree. The court's reason for an exceptional sentence above the standard range for criminal mistreatment based on abuse of a position of trust cannot justify the sentence as a matter of law.

b. The exceptional sentence based on "particular vulnerability" was clearly erroneous.

i. An exceptional sentence based on the aggravating factor of "particular vulnerability" requires proof beyond a reasonable doubt the victim had a particular vulnerability and that vulnerability was a substantial factor in the commission of the offense.

RCW 9.94A.535(3)(b) authorizes imposition of an exceptional sentence above the standard range if the trier of fact finds beyond a reasonable doubt "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." To justify an exceptional sentence based on particular vulnerability, the State must prove "(1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (emphasis in original). *See also State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001) ("In order for the victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability and the vulnerability must be a substantial factor in the commission of the crime."); *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989) ("We ... limit the application of this aggravating factor to cases where the defendant not only knew or should have known of the

victim's disability at the time of the offense, but also the victim's disability must have rendered the victim more vulnerable to the particular offense than a nondisabled victim would have been.").

ii. The exceptional sentence based on particular vulnerability was unsupported by the record and imposed in the absence of any finding that the alleged particular vulnerability was a substantial factor in the commission of the crimes.

The State argued in closing that N.A. was particularly vulnerable because "[s]he was 3,000 miles from her home with nobody to advocate for her, nobody to listen to her, nobody to help her. She became increasingly weakened over time that she was there." RP 1140. The jury returned a special verdict by answering "Yes" to the question, "did the defendant know, or should the defendant have known, that the victim was particularly vulnerable or incapable of resistance." CP 40. However, the jury was not asked whether the particular vulnerability was a substantial factor in the commission of the crimes, nor did the court make such a finding. Therefore, the finding of vulnerability, without more, was insufficient to support the aggravating circumstance.

Moreover, there was no evidence that any alleged vulnerability was a substantial factor in the commission of the crimes. Rather, the evidence overwhelmingly established that the crimes were the direct result

of Ms. Mazalic's untreated mental illness and Mr. Alexis's compliance with Ms. Mazalic's dictates. *See, e.g.*, RP 647, 650.

In *State v. Barnett*, the defendant was convicted of multiple offenses against his girlfriend committed over a two-week period of time. 104 Wn. App. 191, 202, 16 P.3d 74 (2001), *abrogated on other grounds in State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). At sentencing, the trial court found the victim was particularly vulnerable because she was seventeen years old and the defendant waited until she was alone before he broke into her home. *Id.* The appellate court disagreed that those facts constituted particular vulnerability, and stated:

> Ms. M was home alone. But that was not the reason he chose her as a victim. Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime. The evidence does not support a finding of particular vulnerability.

Id. at 205 (internal citation omitted).

Similarly, in *State v. Serrano*, the defendant was convicted of murder of a co-worker who was allegedly having an affair with his wife. 95 Wn. App. 700, 702-03, 977 P.2d 47 (1999). The trial court found the co-worker was particularly vulnerable because he was shot while he was in the air in an "orchard ape," a caged platform on a hydraulic lift where he could not run or otherwise protect himself. 95 Wn. App. at 710-11.

Again the appellate court disagreed that those facts constituted particular vulnerability, and stated:

> Whatever the nature of the victim's vulnerability, the vulnerability must be "a substantial factor in the accomplishment of the crime." *State v. Jackmon*, 55 Wn. App. 562, 566-67, 778 P.2d 1079 (1989). Here, although it may be true that Mr. Gutierrez was vulnerable because he was above the ground in an "orchard ape," the record does not suggest this vulnerability was a substantial factor in the shooting. The sentencing court's reliance on this factor was clearly erroneous.

Id. at 712. *See also State v. Hooper*, 100 Wn. App. 179, 187, 997 P.2d 936 (2000) ("particularly vulnerable" finding not justified when victim assaulted while using the telephone because victim "equally vulnerable" regardless of using the telephone); *Jackmon*, 55 Wn. App. at 564-65, 567 ("particularly vulnerable" finding not justified when victim had broken ankle because he was just as vulnerable to assault from behind as an able-bodied person).

So too, here, there was no evidence Mr. Alexis mistreated or restrained N.A. because of any particular vulnerability or that the perceived vulnerability was a substantial factor in the offenses. Rather, N.A. was "equally vulnerable" to mistreatment and imprisonment by a severely mentally ill person and her caregiver.

Because N.A. was not a *particularly* vulnerable victim, and in the absence of a finding that her alleged particular vulnerability was a

substantial factor in the commission of the offenses, the trial court's finding and conclusion to the contrary were clearly erroneous.

c. The proper remedy is reversal of the exceptional sentences and remand for sentencing within the standard range.

Where a court imposes an exceptional sentence based on insufficient evidence or incorrect reasons, that sentence is not authorized by law and the matter must be remanded for sentencing within the standard range. *Ferguson*, 142 Wn.2d at 649.

The aggravating circumstance of "abuse of a position of trust" inhered in the offense of criminal mistreatment in the first degree. Therefore, the court's sentence on based on that circumstance was erroneous as a matter of law as to the criminal mistreatment conviction.

The aggravating circumstance of "particular vulnerability" was not supported by proof beyond a reasonable doubt and there was no finding at all that the alleged particular vulnerability was a substantial factor in the commission of the offenses. Therefore, the court's sentence based on that circumstance was clearly erroneous.

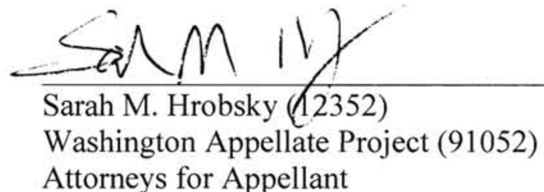
The exceptional sentence on both counts must be reversed.

F. CONCLUSION

Mr. Alexis's conviction for unlawful imprisonment was based on insufficient evidence and instructional error and must be reversed. The aggravating circumstance of "particular vulnerability" was clearly erroneous because it also was based on insufficient evidence N.A. had a particular vulnerability and absent any finding that the alleged vulnerability was a substantial factor in the commission of the offenses. The aggravating circumstance of "abuse of a position of trust" for the offense of criminal mistreatment was erroneous as a matter of law because abuse of a position of trust inheres in the offense. For the foregoing reasons, Mr. Alexis requests this Court reverse his conviction for unlawful imprisonment and remand for dismissal. He further requests this Court reverse his exceptional sentence and remand for sentencing within the standard range.

DATED this 2nd day of July 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71342-6-I
	)	
	)	
DERRON ALEXIS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 2ND DAY OF JULY, 2014.

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