71348-6

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NO. 71342-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRON P. ALEXIS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was there sufficient evidence to convict the defendant of unlawful imprisonment?

2. Does inclusion of an unnecessary element in one jury instruction create error in another otherwise proper instruction?

3. Is abuse of a position of trust inherent in the elements of criminal mistreatment?

4. Did the court have proper grounds for imposing an exceptional sentence?

II. STATEMENT OF THE CASE

The defendant was charged with one count of criminal mistreatment in the first degree, RCW 9A.42.020, and one count of unlawful imprisonment, RCW 9A.40.040; both counts were charged with the aggravating circumstances of particular vulnerability and abuse of a position of trust, RCW 9.94A.535(3)(b)(n). CP 81-82.

The defendant was convicted at jury trial as charged including both aggravating circumstances of particular vulnerability and abuse of a position of trust. CP 59-62.

The defendant challenges the sufficiency of the evidence with regard to his conviction of unlawful imprisonment and the findings with regard to the aggravating circumstances. The

defendant does not challenge his conviction of criminal mistreatment in the first degree.

At trial, the jury heard testimony that N.A. was the defendant's adopted sister. In August of 2010, the defendant's mother brought N.A. to live with the defendant and his partner, Mary Mazalic, with the goal of them adopting N.A. Also in the home was what an officer described as a very well fed dog. Initially, N.A. was a happy, healthy 9 year old. The defendant was a 5 foot 10 inch, approximately 250 lbs., 43 year old man who regularly worked out at Gold's Gym and trained in MMA martial arts. Almost exactly a year later, on August 15, 2011, N.A. was removed from the defendant's home by CPS. She was hospitalized for malnutrition, an untreated urinary tract infection and kidney infection, and signs of physical abuse. Through the ensuing investigation law enforcement discovered that while N.A. was in the defendant's and Ms. Mazalic's care, they each acting alone and in concert, engaged in a pattern or practice of abuse and assault against N.A. that subjected her to being whipped, burned, locked in a dog crate, beaten with a wire or a belt, and starvation, that resulted in CPS removing her from the home and N.A.'s hospitalization for malnutrition, kidney infection and abuse on

August 15, 2011. Two shop clerks called CPS when the co-defendant came into their store with N.A. One clerk described N.A. as being so emaciated; she looked like the children in the old Sally Struthers' infomercials promoting donations to starving children in Africa. They were also alarmed at the verbal abuse N.A. was subjected to in public. 2RP 308, 317-18,326, 330-31, 333, 449; 3RP 481; 6RP 985, 1040, 1048.

When questioned by the police, the defendant said he and the co-defendant shared the responsibility of caring for N.A. He claimed N.A. was always fed, that she didn't miss any meals. The defendant told the police that N.A. was receiving three meals a day plus snacks in the home. He claimed N.A. was eating meals his size and still wanting more. He said they would take her to all-you-can-eat and she would eat herself sick. The defendant said when at home they would all eat together, either at the table or in front of the TV; he stated that N.A. was fed, he always made sure. He also said he and the co-defendant never hit N.A. N.A. had numerous scars, bruises and marks on her body, arms and legs. When asked about the numerous marks on her, the defendant said she had gotten into the plants and bushes in the back of the residence; that she had been scratched by the bushes. The defendant told the

police that he would have known if there was anything medically wrong with N.A. 2 RP 308; 3 RP 483, 485, 488, 490.

The jury heard medical testimony from a forensic nurse and two doctors. They all indicated N.A. was dehydrated and extremely malnourished, noting she appeared cachectic; you could see almost every bone in her body. They also noted significant injuries in various stages of healing all over her body, and ulcerations similar to bed sores you would see on older patients. Some of the injuries were "pattern injuries", scarring and injuries that had a particular shape to them including U-shaped injuries consistent with physical abuse. While in the hospital, N.A. indicated she was hungry and asked for food. She initially asked the nurse to write a note explaining to her mother, the co-defendant, that the nurse had given her something, then changed her mind and indicated the nurse had better not get her the food. N.A. was so malnourished, they were concerned that feeding her too much too quickly could cause serious medical conditions or death. N.A. weighed 51 lbs., the average weight for a 7 year old, that first day in the hospital. She gained 3 lbs. by the next day and had gained a little over 11 lbs by the time she left the hospital 2 weeks later. 3 RP 385, 387-388, 389, 395, 525, 526, 527, 532.

At trial a state social worker testified that the defendant had been the state-funded caregiver for the co-defendant for 10 years. His responsibilities included helping the co-defendant bathe, dress, cooking for her, shopping for her, medication management, transporting her to the doctor and driving for her in general. The social worker became aware N.A. was in the home through other sources but since the defendant was a full-time caregiver to the co-defendant, the social worker was not worried about N.A. being left alone in the care of the co-defendant. 5 RP 768-70, 776.

N.A. testified the defendant had denied her food; told her not to ask for food; and had eaten in front of her while she was being denied food. The defendant had also beaten her with a wire and a belt and that he hit her with the belt "a lot". The defendant used a particular belt, a black belt with a handle that he kept it in a closet. N.A. testified that when she was beaten, she often had a sock or purple ball placed in her mouth that was tied around her head and that as the defendant would beat her, the co-defendant would watch. 4 RP 628; 636-38, 670.

N.A. also testified that although there was food in the house, she didn't open cupboard doors to access it because she was afraid one of them would hear her and she would be in even more

trouble. N.A. described some of the other punishments as being burned by the co-defendant and the co-defendant tying her up and making her stand in the corner all night. The co-defendant also handcuffed N.A. to the couch so she could sleep. 4 RP 630, 676.

The co-defendant locked N.A. in the dog crate before leaving for work. N.A. made a noise. The defendant came downstairs with the belt in his hand. N.A. testified that the defendant "probably was thinking I was getting out". The defendant did not let her out of the crate. 4 RP 627.

In addition to confining N.A. to the dog crate, there was also testimony that the defendant and co-defendant would punish N.A. by giving her "time-outs" in her room for three to four days at a time; N.A. was not allowed to come out of her room and eat until after she completed the multi-day time-out. RP 699.

A forensic nurse examiner testified that in her 12 year career, this was one of the worst cases she had ever seen; there were so many injuries and she was so thin. 3 RP 406.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT THE DEFENDANT OF UNLAWFUL IMPRISONMENT.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of

defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

A person commits unlawful imprisonment if he knowingly restrains another. RCW 9A.40.040(1). To restrain someone is to restrict their movements without consent and without legal authority in a manner that interferes substantially with that person's liberty. RCW 9A.40.010(1). Restraint is without consent if it is accomplished by physical force or intimidation. Parents can be guilty of unlawful imprisonment of their own children in circumstances where the restrictions on the children's movements, viewed objectively, are excessive, immoderate, or unreasonable. State v. Kinchen, 92 Wn. App. 442, 444, 963 P.2d 928 (1998).

In the case at bar, there is sufficient evidence to prove the defendant acted as a principal in restraining N.A. The defendant used the belt to intimidate her, so as to prevent her from attempting to escape from the dog crate. He took these actions when the co-

defendant was away from the home. Although the co-defendant placed N.A. in the dog crate, the defendant acted independently of the co-defendant in his continued restraint of N.A.'s. There was ample evidence the defendant was acting as the principal and as well as an accomplice in unlawfully imprisoning N.A.

Viewed in the light most favorable to the State, there is sufficient evidence the defendant knowingly acted as a principal to physically restrain N.A. by intimidating her to prevent her attempted escape from the dog crate. N.A. was familiar with the belt as she testified the defendant's used it to beat her "a lot". 4RP 637-38.

B. ACCOMPLICE LIABILITY IS NOT AN ELEMENT OF THE PRINCIPAL CHARGE AND THEREFORE DOES NOT NEED TO BE INCLUDED IN THE 'TO CONVICT' INSTRUCTION.

The defendant objects for the first time on appeal to the omission of the phrase, "or an accomplice" from the 'to convict' instruction for unlawful imprisonment; asserting that the omission relieved the state of its burden of proving accomplice liability beyond a reasonable doubt. Appellant's Brief 14-15. The defendant proposed identical instructions at trial. 6RP 1095-1096.

Instructions must be considered as a whole and the reviewing court must assume that the jury followed the instructions. When the trial court gives the standard 'burden of proof' instruction

and the standard accomplice instruction and the elements or 'to convict' instruction, the instructions correctly state the law, are not misleading to the jury and permit the defense counsel to argue his theory of the case. State v. Teaford, 31 Wn. App. 496, 500, 644 P.2d 136, 137 (1982).

Accomplice liability is not an element of the crime, so it does not have to be included in the "to convict" instruction. "Accomplice liability, contrary to [the defendant's] argument is not an element of the crime charged. Nor is it an alternative means of committing a crime." State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402, 407 (2003) aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004). "Including accomplice language—'the defendant or an accomplice'—in the 'to convict' instruction is an approved practice. But it is not a required practice..." Id. "Considered as a whole, the instructions required the jury to determine defendant's liability as an accomplice in light of the elements of the principal crimes ... and under the overall requirement that criminal liability must be proved beyond a reasonable doubt. There was no error." Teaford, 31 Wn. App. at 500.

The jury was properly instructed on the State's burden of proof and the presumption of innocence and accomplice liability.

CP 50-51 (Instructions No. 3 and 4). The jury was properly instructed on the element of unlawful imprisonment in the 'to convict' instruction for that charge. CP 56 (Instruction No. 9). The court included the phrase, "or a person to whom the defendant was an accomplice" in the 'to convict' instruction for criminal mistreatment. CP 52 (Instruction No. 5).

The defendant argues that because the phrase ""or a person to whom the defendant was an accomplice" was included in the criminal mistreatment "to convict" instruction, omitting it in the unlawful imprisonment instruction relieved the State of its burden of proof of accomplice liability as to that charge. However, the jury was accurately instructed as to the state's burden of proof, the elements of the offense and the definition of accomplice liability; the state was not relieved of its burden.

Even if, under these limited circumstances, not including the "or a person to whom the defendant was an accomplice" phrase in the unlawful imprisonment instruction was an omission, it does not follow that the State was relieved is its burden of proof. "[N]ot every omission or misstatement in a jury instruction relieves the State of its burden so as to require reversal. Therefore, a harmless error

analysis is warranted." State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003).

There was ample evidence for the jury to convict the defendant as principal so any alleged error in the accomplice liability instruction or unlawful imprisonment instruction is harmless as it appears beyond reasonable doubt that error did not contribute to ultimate verdict. When it is clear a defendant acted as a principal in the crime, error in the accomplice instruction is harmless beyond a reasonable doubt. "[I]t is clear from the record that [the defendant] was a principal as to both charges. In these instances, the erroneous accomplice instruction is again harmless beyond a reasonable doubt." State v. Brown, 147 Wn.2d 330, 342, 58 P.3d 889, 895 (2002).

C. BEING A PERSON WHO ASSUMES THE RESPONSIBILITY TO PROVIDE THE BASIC NECESSITIES OF LIFE TO THE VICTIM IS AN ELEMENT OF FIRST DEGREE CRIMINAL MISTREATMENT SO IS NOT PROPERLY CONSIDERED AS AN AGGRAVATING FACTOR FOR SENTENCING.

The defendant objects to the finding that the defendant abused a position of trust as applied to count 1 and victim vulnerability as to both counts. Appellant's Brief at 20, 21 and 25. Since a familial, same household relationship or person who assumes the responsibility to provide the basic necessities of life is

an element of first degree criminal mistreatment, and that is the position of trust argued in this case, the state concedes abuse of a position of trust is inherent in the offense and cannot be used as an aggravating circumstance with regard to count 1. However, this does not mean the matter should be remanded for sentencing within the standard range. "[N]ot every aggravating factor must be valid to uphold an exceptional sentence, so long as [the reviewing] court is satisfied that the trial court would have imposed the same sentence based on the factors that are upheld." State v. Ermels, 156 Wn.2d 528, 539, 131 P.3d 299, 303 (2006). Here, the trial court expressly found, it would "impose the same exceptional sentence on each aggravating factor independent of the other." CP 29.

The defendant does not challenge the finding with regard to the charge of unlawful imprisonment. Being a familial or same household relationship is clearly not an element of unlawful imprisonment. Therefore, the defendant's actions amounted to an abuse of his position of trust toward N.A. and can be considered as an aggravating factor by the sentencing court with regard to count 2. Berube, 150 Wn.2d at 513.

D. THE COURT PROPERLY CONSIDERED THE AGGREVATING FACTOR OF VICTIM VULNERABILITY WHEN SENTENCING THE DEFENDANT.

At sentencing, the court authorized to impose an exceptional sentence based on the jury finding the two aggravating factors of victim vulnerability and abuse of position of trust on each count. The sentencing court indicated it would impose the same exceptional sentence on each aggravating factor independent of the other. The court entered written findings of fact and conclusions of law to support the exceptional sentence imposed based on the record. CP 29.

A sentencing court may impose an exceptional sentence for "substantial and compelling reasons." RCW 9.94A.535. An exceptional sentence will only be overturned if the reasons for the sentence are unsupported by the record, the reasons do not justify an exceptional sentence, or the sentence is either clearly excessive or clearly too lenient. RCW 9.94A.585(4). Whether the reasons justify an exceptional sentence is reviewed de novo. The trial court's reasoning will be upheld unless it is clearly erroneous. Berube, 150 Wn.2d at 512.

A criminal defendant has a constitutional right to have a jury determine 'any fact that increases the penalty for a crime beyond

the prescribed statutory maximum,' other than the fact of a prior conviction. State v. Williams, 159 Wn. App. 298, 315, 244 P.3d 1018, 1026 (2011) quoting Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004). A sentencing court is limited to the facts that are reflected in the jury verdict when imposing sentence. "Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely 542 U.S at 303. The relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Williams, 159 Wn. App. at 315. Thus, when an aggravating factor is found by the jury, the trial court is authorized to impose an exceptional sentence. Id. at 316.

However, a statute requires the trial court to set forth the reasons for its decision to impose a sentence outside the standard sentence range. RCW 9.94A.535. These reasons must be set forth in written findings of fact and conclusions of law. RCW 9.94A.535. The reasons set forth in the written findings of fact and conclusions of law are not restricted only to those facts found by the jury. This

is because the trial court may, in determining the appropriate sentence within the authorized range, consider facts beyond those found by the jury. Id.

In the case at bar, the court issued findings of fact that are supported by the record and reflect the jury's verdicts as to the charged offenses and the findings of the aggravating factor. The court's findings support the court's imposition of the exceptional sentence of 120 months on count 1 and 30 months on count 2, to run consecutively. CP 28-29.

The aggravating circumstance of victim vulnerability applies to both counts and is supported by the record. An exceptional sentence in warranted where the facts show conduct more egregious than the typical conduct for the offense. State v. Wilson, 96 Wn. App. 382, 388, 980 P.2d 244, 247 (1999).

In the case at bar neither offense is a crime whose elements require proof of the victim's young age. So N.A.'s age could be considered by the jury as a factor in determining her vulnerability. The Olive court also noted that "[g]iven the evident disparity in size and strength between defendant and the victim, the trial court justifiably relied on the particular vulnerability of the victim." State v. Olive, 47 Wn. App. 147, 153, 734 P.2d 36, 39 (1987). The court

has also found victim vulnerability where "[the defendant] perpetuated the abuse by psychological means designed to keep the victim within the cycle of abuse." State v. Brown, 55 Wn. App. 738, 753-54, 780 P.2d 880, 888 (1989).

Evidence at trial provided the jury with ample bases for finding this aggravating factor. At the time she came to live with the defendant, N.A. was 9 years old. N.A. was an orphan, adopted by the defendant's mother in New York. Any agency monitoring that adoption would be in New York. N.A. was uprooted from her home in New York and brought to live with the defendant. N.A.'s two younger brothers remained in New York. N.A. had no family in this area other than the defendant. At the time her abuse was discovered, N.A. was 10 years old and extremely slight for her age; when seen at the hospital, she weighed 51 lbs., the average size of a 7 year old. The defendant was 250 lbs. and trained as an MMA martial artist.

The defendant argues that the victim's vulnerability was not a factor in these offenses placing the blame on the co-defendant's mental illness. However, the defendants' pattern of abuse and neglect would not have been attempted on an adult or even a physically fit, 16 year old male child with a network of friends and

family in the area to rely upon. The victim's vulnerability was a primary factor giving rise to these offenses; she was selected as the victim because of her particular vulnerability. The sentencing court specifically found it would impose the same exceptional sentence on each aggravating factor independent of the other. There is a legal and factual basis to support the imposition of an exceptional sentence.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 20, 2014.

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