NO. 43207-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY HAYES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Eric Schmidt (Pro Tem)

No. 07-1-05967-1

BRIEF OF RESPONDENT

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2. Did the court properly impose an exceptional sentence?

3. Should the criminal history listed on the judgment and sentence be corrected to delete the "current offenses" that were reversed in the prior appeal?

B. STATEMENT OF THE CASE.

This appeal is the second time this case has been before the Court. CP 112-124. The facts of this case can be found in the Court of Appeals decision that was published on October 24, 2011. CP 129-145.

In 2009, the State charged Larry A. Hayes ("defendant") under one cause number with one count of leading organized crime, six counts of identity theft, six counts of possession of a stolen vehicle, and one count of possession of methamphetamine. CP 129-145. Under a separate cause number, the State charged defendant with another count of possession of a stolen vehicle. CP 129-145. The two actions were consolidated for trial. CP 129-145. The State argued that each count, except for the drug charge, was aggravated by virtue of being a major economic offense. CP 129-145. The jury found that the crimes were committed with major economic

offenses, except for the consolidated stolen vehicle count. 3/16/2012 RP 5; CP 25-38, CP 129-145.

On September 11, 2009, the first sentencing hearing was held. 9/11/2009 RP1. The trial court imposed an exceptional sentence of 180 months on the count of leading organized crime and concurrent sentences within the standard range on the other 14 counts. CP 129-145.

On March 16, 2012, re-sentencing was held for Larry A. Hayes ("defendant") following the Court of Appeals' decision of reversing the conviction of leading organized crime, and also reversing the two convictions of unlawful possession of a stolen vehicle. 3/16/12 RP 6; CP 129-145. During the re-sentencing hearing, the State announced that it did not plan on retrying the defendant on the count of leading organized crime, and entered an order of dismissal for one count of unlawful possession of a stolen vehicle. 3/16/12 RP 6. The State also requested the court to dismiss one count of possessing stolen property in the second degree. 3/16/12 RP 7.

The defendant's offender score is 9+. CP 98-111. The court imposed an exceptional sentence of 96 months for the count of identity theft in the first degree, and 9 to 18 months of community custody. CP 98-111; RP 16. The court sentenced the other counts to the high-end of the standard range to run concurrent with the count of identity theft in the first degree.

C. ARGUMENT.

1. DEFENDANT WAS PROPERLY SENTENCED WITH AN EXCEPTIONAL SENTENCE BECAUSE A PARTICIPANT IN COMMITTING A MAJOR ECONOMIC OFFENSE CAN BE HELD ACCOUNTABLE.

Generally under Washington law, penalty enhancement provisions must depend on the accused's own misconduct rather than an accomplice's because the complicity statute found in RCW 9A.08.020(1) is "limited to accountability for crimes." ***State v. McKim***, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982).

The court in ***McKim*** determined that under the accomplice liability statute an accomplice is "equally liable only for the substantive crime." ***McKim***, 98 Wn.2d at 117. The court's analysis was based on the fact that under RCW 9A.08.020, there is no strict liability for the conduct of another in regard to a sentence enhancement provision whereas the prior accomplice liability statute had imposed liability for punishment as well. ***McKim*** stands for the proposition that in any given case, the question is whether the Legislature in enacting a penalty provision intended to impose strict liability for all participants of a crime.

In a later case, the Supreme Court of Washington held that the school zone enhancement for drug crimes applied to accomplices who were themselves within 1,000 feet of a school bus stop, regardless of

whether the participant knew he was in a school zone or not. ***State v. Silva-Baltazar***, 125 Wn.2d 472, 482, 886 P.2d 138 (1994). ***Silva-Baltazar***, involved two defendants who were convicted of possession of cocaine with intent to deliver. *Id.* at 474. The defendants attempted to deliver cocaine to the informant's house, who lived near a school bus stop. *Id.* at 475.

The Court distinguished ***Silva-Baltazar*** from its previous holding in ***McKim***, 98 Wn.2d 111, 653 P.2d 1040 (1982), because unlike the deadly weapon enhancement statute, it found the school zone enhancement statute to be a strict liability statute. ***Silva-Baltazar***, 125 Wn.2d at 482. Unlike the deadly weapon enhancement, the school zone enhancement provision does not require knowledge on the part of any of the participants. *Id.* at 482. The Court explicitly stated that it was irrelevant to whether a person was aware that he or she was carrying on the prohibited drug activity in a school zone. *Id.* at 482. Given the Legislature's intent to apply strict liability to the school zone enhancement, the Legislature may not have viewed it as necessary to include the term "accomplice" within the enhancement. *Id.* at 483.

As noted above, some sentencing enhancements specifically allow for punishment premised on accomplice liability. For instance, the firearm enhancement statute, RCW 9.94A.533, contains language demonstrating the legislature's intent to extend accomplice liability into the sentencing

realm. RCW 9.94A.533(3) reads, "The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender *or an accomplice* was armed with a firearm as defined in RCW 9.41.010." (Emphasis added).

Division I of the Court of Appeals was required to examine the nature of the aggravating circumstances in RCW 10.95.020 and determine how a jury should assess liability for these circumstances when there was more than one participant in the underlying premeditated murder. *See* ***In re Personal Restraint of Howerton***, 109 Wn. App. 494, 36 P.3d 565 (2001). The court in ***Howerton*** phrased the issue in this manner: "[D]id the Legislature intend to hold accomplices to murder strictly liable for the existence of aggravating factors or must the State prove the applicability of the factors to the individual defendant?" ***Howerton***, 109 Wn. App. at 500. Division I answered its question by holding that an aggravating factor must be applicable to the individual defendant.

Defendant now raises a similar claim to that in ***Howerton*** with respect to the aggravating circumstances contained in RCW 9.94A.535. He argues that because he was convicted of the substantive crime of identity theft in the first degree upon instruction that allowed for consideration of accomplice liability, that he cannot be subject to an exceptional sentence unless the jury specifically found the aggravating

circumstance solely based on his actions. Or, to rephrase the question raised in ***Howerton*** to the case at hand: Did the Legislature intend to hold accomplices to (or participants in) identity theft in the first degree strictly liable for the existence of aggravating circumstances in RCW 9.94A.535 or must the State prove the applicability of the circumstances to the individual defendant?

The State contends that the correct answer to this question (or the one posed in ***Howerton***) cannot be answered with a "yes" or a "no." The answer depends on which aggravating circumstance in RCW 9.94A.535 is being considered and the wording of that provision.

The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant's actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant's actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim's pregnancy, RCW 9.94A.535(3)(i), or the victim's

injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some aspect of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p).

Close examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributable to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals its intent that the circumstance be assessed against the individualized defendant while use of the term "the current offense" signals its intent that the aggravating circumstance can be applied to any participant in the crime.

At issue in this case is a portion of the aggravating circumstance found in RCW 9.94A.535(3)(d). That provision reads in its entirety:

> (d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
>
> > (i) The current offense involved multiple victims or multiple incidents per victim;
> >
> > (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

> (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
>
> (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(d). This provision focuses generally on the nature of the offense as only one of the factors brings into consideration a particular characteristic of the defendant. In the case at bar, defendant might have an argument were subsection (iv) at issue in his case, but it is not.

The jury was instructed that if it were to find defendant guilty of any offense that it must also determine whether the crime was a major economic offense. CP 146-195 (Instruction No. 44). The jury was further instructed that:

> To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:
>
> (1) The crime involved multiple victims or multiple incidents per victim; or
>
> (2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.
>
> ...

CP 146-195 (Instruction No. 45). This instruction as to an aggravating factor pertains to the nature of the offense committed. There is no reference at all to "the defendant" or even an indirect reference to the

entity committing the crime. These factors do not change from one participant to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a crime regardless of whether they are a minor or major participant.

The defendant cites to ***State v. Pineda-Pineda,*** 154 Wn. App. 653, 226 P.3d 164 (2010), arguing that Division I's Court of Appeals holding that Pineda-Pineda could not be held strictly liable under the school zone enhancement statute (RCW 69.50.435) applies to this case. ***Pineda-Pineda*** involves two drug sales. *Id.* at 658. During the first drug sale, Pineda-Pineda sold cocaine directly to an informant. *Id.* The second drug sale was arranged by Pineda-Pineda, but he was not with the two women who delivered the cocaine to the same informant near a school bus stop. *Id.* at 658. Pineda-Pineda challenged the school zone enhancement on appeal because there was no evidence to show that he determined the precise location of the delivery, or that he was physically present in the school zone when the delivery occurred. *Id.* at 660.

The court held that because the accomplice liability statute (RCW 9A.08.020) did not contain a triggering device for penalty enhancement, the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statue. *Id.*

at 661. Therefore, since there was no statutory authorization for imposition of a sentence enhancement on an accomplice, the defendant's own acts must form the basis for the enhancement. *Id.* at 664.

The State believes that Division I has misconstrued the Washington State Supreme Court's holding in ***Silva-Baltazar***, ***McKim***, and the specific language of the enhancement statutes when it decided ***Pineda-Pineda***, and ***Howerton***. Although in ***Silva-Baltazar***, the Supreme Court stated that it reserved the issue of whether the school zone enhancement applied to accomplices who are not themselves within the drug free zone, the Court laid out its analysis for an accomplice who was present within the school zone. The Court explicitly stated that the school zone enhancement was a strict liability statute and that knowledge of distributing drugs in a school zone was not a requirement. ***Silva-Baltazar***, 125 Wn.2d at 482. In addition, the Washington State Supreme Court pointed out that not all enhancements are meant to be interpreted the same, and distinguished its holding from ***McKim***. ***Silva-Baltazar,*** 125 Wn.2d at 482-483. Division I made a sweepingly broad ruling by treating all enhancement statutes the same when it has not been the Legislature's intent, or the Washington State Supreme Court's interpretation of enhancement statutes. Division I based its decision purely on whether or not the word "accomplice" is included in an enhancement statute. Instead, Division I should have read the particular enhancement statute as a whole to determine the Legislature's intent of applying the sentencing

enhancement to a particular individual, or to committing a particular offense.

Defendant has failed to show that the Legislature did not intend for the jury's determination that identity theft in the first degree was a major economic offense to be applicable to all participants involved in the crime. This claim must be dismissed.

2. THE COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON THE JURY'S FINDINGS.

In ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court applied the rule from ***Apprendi***, that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. ***Blakely***, 542 U.S. at 301 (citing ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). 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. ***Blakely***, 542 U.S. at 303-04. When a judge imposes punishment that the jury's verdict alone does not allow, the jury has not found all the facts that the law makes essential to the punishment, and the judge exceeds his proper authority. ***Blakely***, 542 U.S. at 304.

In the case now before the court, a jury was impaneled and instructed that the State had the burden of proving the aggravating circumstance(s) beyond a reasonable doubt. CP 146-195 (Instruction No. 44). The special verdict forms also indicated this burden:

> We the jury, have found the defendant guilty of (crime) as defined in these instructions return a special verdict by answering as follows:
>
> Was the crime a major economic offense or series of offenses?
>
> ***ANSWER:_____(Yes or No).***

CP 25-38. The jury answered each of these questions "yes." The jury has found beyond a reasonable doubt the facts which increase the punishment. The requirements of ***Blakely/Apprendi*** are satisfied and the court is authorized to increase the punishment imposed.

Moreover, the defendant is challenging some of the prosecutor's arguments during the re-sentencing hearing which were not objected to during the hearing. The court should dismiss the defendant's challenge because arguments not raised in the trial court are generally not considered on appeal. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); RAP 2.5(a).

Therefore, the court properly imposed an exceptional sentence based on the jury's findings that the defendant's crimes were committed with major economic offenses. 3/16/2012 RP 16.

3. AS THE JUDGMENT AND SENTENCE DOES NOT CORRECTLY REFLECT THE DEFENDANT'S CRIMINAL HISTORY, AN ORDER CORRECTING JUDGMENT SHOULD BE FILED TO CORRECT THE SCRIVENER'S ERROR.

A written judgment is the final judgment in a case. *See generally*, ***State v. Davis***, 125 Wn. App. 59, 64-65, 104 P.3d 11 (2004). Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

> Clerical mistakes, in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time of its own initiative or on the motion of any party after such notice, if any, as the court orders. Such mistakes may be corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

CrR 7.8(a), *see* ***State v. Davis***, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

A clerical error is one that, when amended, would correctly convey the intention of the court based on other evidence. ***State v. Davis***, 160 Wn. App 471, 478, 248 P.3d 121 (2011). Courts will apply the same test used to determine a clerical error under CR 60(a), civil rule governing amendment of judgments when determining whether a clerical error exists

under CrR 7.8. ***State v. Snapp,*** 119 Wn. App. 614, 627, 82 P.3d 252 (2004).

In determining whether an error is clerical or judicial, the court will "look to whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Id., citing* ***Presidential Estates Apartment Assocs. v. Barret***, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the judgment does embody the court's intention, then the amended judgment should either correct the language to reflect the court's intention or add the language the court inadvertently omitted. ***Snapp***, 119 Wn. App at 627, *citing* ***Presidential***, 129 Wn.2d at 326. However, if the judgment does not, then the error is judicial and the court cannot amend the judgment and sentence. ***Snapp***, 119 Wn. App at 627, *citing* ***Presidential***, 129 Wn.2d at 326.

The defendant's criminal history listed in the judgment and sentence includes: unlawful possession of a stolen vehicle (9), leading organized crime (21), unlawful possession of a stolen vehicle (22), and possessing stolen property in the second degree (20). CP 101-102. These crimes were either reversed by the prior appeal or dismissed by the State. 3/16/2012 RP 7. These convictions should be deleted from the defendant's criminal history. It also appears that the conviction of identity

theft in the first degree was inadvertently omitted in defendant's criminal history. CP 101-102.

Defendant had an offender score of 8 prior to being re-sentenced. CP 101-102. Errors in the defendant's criminal history had no effect on defendant's standard range because the highest offender score that the defendant could have is a 9+. After the first appeal, defendant's offender score is at least an 18. CP 101-102; 3/16/12 RP 8. These errors were harmless and can be corrected by an order correcting judgment.

D. CONCLUSION.

The State respectfully requests the court to affirm defendant's exceptional sentence and order a correcting judgment.

DATED: September 24, 2012

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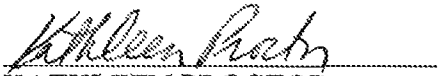

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