COA No. 44726-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SANDRA WELLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Barbara Johnson

REPLY BRIEF

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A. REPLY ARGUMENT

1. The exceptional sentences were improperly imposed – Respondent's argument to the contrary disregards the standard rule that sentencing authority is solely statutory. In the absence of a special verdict stating the jury relied on principal liability so as to premise the jury's findings on the co-defendant's own acts, aggravating factors can only apply to an accomplice if the factor explicitly authorizes its application to accomplices. AOB, at pp. 10-18.

It is true that a defendant may be convicted of a *substantive* criminal offense as an accomplice – irrespective of what the offense's statutory language might be -- if the jury is also instructed on "accomplice liability" pursuant to the applicable statute that establishes the requirements of complicity. See RCW 9A.28.020(1) (providing that a person is "guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable" pursuant to the criteria set forth therein) *et seq.*; State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); but see, e.g., State v. Montejano, 147 Wn. App. 696, 703, 196 P.3d 1083 (2008) (riot statute itself defines sole contours of any participants' liability).

However, statutory aggravating factors for *sentencing* purposes – such as the "deliberate cruelty" and 'ongoing pattern of domestic abuse' -- are not crimes, nor are they elements of any substantive criminal offense. State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); see RCW 9.94A.535(3) *et seq.*

Therefore, aggravating factors do not apply to accomplices unless they so state, unambiguously. It has long been the rule that the sentencing court only has the sentencing power granted to it by the language of the Sentencing Reform Act. See generally, In re Postsentence Review of Leach, 161 Wn.2d 180,184, 163 P.3d. 782 (2007); State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). This means that a court may impose only a sentence that is clearly and expressly authorized by the *unambiguous* language of a sentencing statute. See, e.g., State v. Rice, ___ Wn. App. ___, 320 P.3d 723 (Wash.App. Div. 2, March 25, 2014) (NO. 43449-1-II) (citing State v. Snedden, 149 Wn.2d 914, 922, 73 P.3d 995 (2003) (rule of lenity applies to situations where more than one interpretation can be drawn from the wording of a statute); State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993) ("Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant.")).

Thus Sandra Weller has noted that, in the absence of a special verdict stating the jury relied on principal liability for the person's *own* acts, sentence enhancements, and the statutory aggravating factors contained in RCW 9.94A.535(3), can only apply to a person whose jury was instructed it could find underlying guilt on the crime by complicity, if the particular statutory factor explicitly authorizes accomplice liability for that aggravator. AOB, at pp. 12-18; see, e.g., State v. Pineda-Pineda, 154 Wn. App. 653, 226 P.3d 164 (2010) (agreeing "no school zone sentence enhancement can be applied under accomplice liability theory without express authorization in the law") (citing and comparing State v. McKim, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982), which applied the rule to the firearm enhancement statute, prompting the Legislature to add the language "or an accomplice" to the statute).

Where the jury is given an RCW 9A.28.020 accomplice liability instruction, and the State chose to not seek a special verdict as to the co-defendant specifying accomplice liability as the jury's basis for finding her guilty, the co-defendant hasn't been proved to be anything more than an accomplice, and an aggravating factor cannot apply to her, unless the Legislature explicitly authorized that

factor's application to accomplices to the underlying crime. AOB, at pp. 12-18

For example, among the aggravating factors set out by subsection (3) of RCW 9.94A.535 are these [the two factors at issue in the present case are italicized]:

> *(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.*
>
> * * *
>
> (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.
>
> * * *
>
> *(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:*

> *(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;*
>
> (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or
>
> (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

RCW 9.94A.535(3)(a), (b), and (d). As an example of the accepted rule requiring statutory authorization for all criminal sentencing, the "major economic offense" aggravator listed above at subsection (c) contains no language regarding accomplices or complicity. Therefore the Court of Appeals has accordingly stated that the factor cannot be applied to a person whose verdict of guilt emanated from a jury to whom instructions were given that included an accomplice liability instruction, because the conduct has not been specifically proved to be the person's own acts. State v. Hayes, 177 Wn. App. 801, 811, 312 P.3d 784 (2013).

(i). The courts have already rejected the Respondent's arguments offered in its brief.

Contrary to the Respondent's contention (BOR at pp. 56-57), it does not matter that there was a "separate special verdict form for each defendant" stating the jury found the aggravator as to the particular person. As the Hayes Court stated:

> Here, the sentencing court based the exceptional sentence on the jury's special verdict that Hayes's crime was a major economic offense. But because Hayes's conviction was based on accomplice liability and the major economic offense sentence enhancement statute contains no triggering language for accomplice liability, the exceptional sentence was improper. We vacate the major economic offense sentence enhancement and remand for resentencing.

(Emphasis added.) Hayes, 177 Wn. App. at 811.

The courts have rejected the State's overall argument based on the general rule that sentencing authority is derived solely from statute. See Mckim, 98 Wn.2d at 114-17 (giving effect to the Legislature's intent as set forth in the statute) (sentencing statute must say 'or an accomplice' or like language); cf. State v. Darcus Allen, ___ Wn. App. ___, 317 P.3d 494 (Wash.App. Div. 2; January 14, 2014) (NO. 42257-3-II) (where aggravating factor was premised not on acts or conduct but instead on the uncontested status of the *victims* as police officers, aggravator applied to all defendants).

Neither of the statutory factors used for Ms. Weller's exceptional sentences -- the deliberate cruelty aggravator statute, nor the ongoing pattern of domestic violence aggravator statute -- contain the explicit authorizing language regarding application to accomplices or application by complicity that is required for an exceptional sentence to be imposed on a person whose jury was given an accomplice liability instruction as to the underlying crime.

Respondent next contends, perhaps in the alternative, that one of the two aggravating factors -- "deliberate cruelty" -- can apply to Ms. Weller, despite the lack of any explicit authority in that factor, because that factor and the special verdict says "the defendant" was deliberately cruel, rather than referring to "the offense" like the major economic offense aggravator did in Hayes, and the domestic violence factor did here. BOR, at pp. 57-58.[1]

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[1] As part of this alternative argument, the Respondent states it concedes that under the reasoning of Hayes, Sandra Weller's ongoing domestic violence factor, which like the major economic offense factor in Hayes refers to "the offense" rather than "the defendant," does not authorize application to accomplices. BOR at 57-58, 62-63. This concession is a distinction without a difference because neither factor applies to accomplices. See infra, p. 8. In any event, the Respondent then goes on to cite case law stating that a reviewing court can uphold an exceptional sentence based on affirmance of one of the aggravating factors employed by the trial court if it is satisfied the court would impose the same sentence. BOR at 62-63. But for that proposition, Respondent cites State v. Hughes, 154 Wn.2d 118, 134, 110 P.3d 192 (2005) [overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)] and Hughes' citation of State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003), a case prior to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and Respondent does not note the

But the Hayes Court specifically also rejected the State's additional argument in that case, which is the same as the State's here, that the statutory use of the term "the defendant" in one statutory aggravating factor, versus language such as "the offense" in another, is a material distinction. Hayes, 177 Wn. App. at 810 ("We disagree with the State because every time that "the defendant" is referenced," the legislature chose not to say "the defendant or an accomplice.") ("Also, we must read the entire RCW 9.94A.535 as a whole and nowhere in RCW 9.94A.535 did the legislature choose to reference accomplices.").

The law requires that an aggravating factor must explicitly authorize itself to be applied to a person found guilty of the underlying crime as an accomplice – unless the State sought a special verdict asking the jury to specify who the principal was, and who was complicit, which the prosecutor in this case could have done but did not do.

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general principle that this rule of affirmance most commonly relies on circumstances where the trial court explicitly stated it would impose the same exceptional sentence based on any one of the four articulated aggravating factors standing alone. See, e.g., State v. Nysta, 168 Wn. App. 30, 275 P.3d 1162 (2012).

(ii). Pre-Blakely cases that do not discuss statutory authority under current RCW 9.94A.535(3) do not control the outcome here.

The Respondent's citations to the Altum and Hawkins cases are inapposite, because those cases come from the time pre-Blakely v. Washington, when judges found all sentencing facts, and could impose exceptional sentences *whenever* such circumstances – from among illustrative examples set out by the Legislature, *or not* -- were deemed "substantial and compelling" such as to merit a departure upward. See BOR at pp. 58, 59, 60, 61, 62, 63 (citing State v. Altum, 47 Wn. App. 495, 735 P.2d 1356, review denied, 108 Wn.2d 1024 (1987) and State v. Hawkins, 53 Wn. App. 598, 769 P.2d 856 (1989)).

Respondent also states that these cases held that certain aggravating factors (such as deliberate cruelty) could be applied to accomplices, suggests these Courts were interpreting the aggravator statutes to so apply, and then argues that the Legislature must surely approve of such interpretations, because it has not taken legislative action to change the statutory factor(s) since the time of those cases. BOR, at pp. 59-62.

But the pre-Blakely cases of Altum and Hawkins were not interpreting the scope of authority granted by the statutory

aggravating factors in question, much less deciding if the statutory language authorized application to accomplices. Rather, these Courts of Appeal were approving the trial judge's overall factual assessment of the culpability of the various participants' conduct, and were then affirming those lower courts' determinations that these facts were so "substantial and compelling" that they justified an exceptional sentence. State v. Altum, 47 Wn. App. at 502-03 ("the [judge's] finding, which was based on the facts established at trial, describes conduct that compels a departure from the standard sentencing range."); State v. Hawkins, 53 Wn. App. at 606 (refusing to "split hairs" over the irrelevant issue of the "greater or lesser roles of these three participants" in gratuitous violence of a kind not usually associated with the offense in question). The Altum and Hawkins cases have no bearing on the statutory authority issue before this Court of Appeals in the present case.

(iii). Even if the evidence did "inarguably" show that Sandra Weller was not an accomplice to unlawful imprisonment, which it does not, the evidence does not matter where the State did not seek a special verdict of principal liability in anticipation of the sentencing phase.

Finally, the State remarks that the evidence shows that Sandra Weller was "inarguably" convicted as a principal for the

crime of Unlawful Imprisonment, and, therefore the exceptional sentence can be affirmed on the basis of *that* conviction alone. BOR at pp. 64-65; but see State v. Nysta, 168 Wn. App. at 54, supra (appellate court would affirm exceptional sentence after invalidating some factors if trial court stated it would impose same sentence based on any one of the factors).

On first blush, this argument would suggest to the reader that the State is conceding that the 'to-convict' instructions for the assaults included the language 'the defendant *or an accomplice*,' but is then arguing that the 'to-convict' for the unlawful imprisonment said only, '*the defendant*,' thus showing Sandra Weller was convicted as a principal for the unlawful imprisonment.

But none of the 'to-convict' instructions said 'or an accomplice,' CP 70-71, 81, 83-85, which does not matter anyway, because it does not change the fact that both Wellers were convicted pursuant to complicity law under jury instructions that included a general RCW 9A.28.020 accomplice liability instruction – principal liability was not proved beyond a reasonable doubt.[2]

[2] Accomplice liability language need not be added to any 'to convict' instruction; rather, it is sufficient for an accomplice liability conviction to include a separate, general instruction on accomplice liability per RCW 9A.28.020. State v. Teal, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004).

That is what matters, and that is what results in the inapplicability to Sandra Weller of all statutory aggravating factors that do not explicitly authorize their application to accomplices. It is the decision of the State to not seek a special verdict on that question that leads to this outcome, and the 'evidence' cannot overcome that decision that was made in the prosecution of the guilt phase. Had the prosecutor sought a special verdict asking the jury to indicate if it premised Ms. Weller's guilt on principal liability (this omission is understandable given the evidence), and obtained one, the aggravating factors would apply to her and could justify an exceptional sentence. But the prosecutor declined to seek a special verdict. No language in, or not in, the unlawful imprisonment "to-convict" instruction rescues this omission from its sentencing consequences. Sentencing authority is derived solely from the SRA. The exceptional sentences on all counts must be reversed and the case remanded for imposition of standard punishment.

2. CrR 3.6 issue.

(i). The stick was improperly admitted into evidence following an illegal warrantless entry and search of the Weller home.

As Sandra Weller noted in her Opening Brief, she joined the co-defendant Jeffrey Weller's written briefing challenging the initial police entry into her home through the front door on ground that the circumstances did not satisfy the emergency exception. CP 20 (motion joining co-defendant's suppression motion); Supp. CP ___, ___, Sub # 37 and Sub # 39 in Superior Court file of Jeffrey Weller); AOB at p. 6. That motion sought suppression of any evidence including the "stick," arguing that the entry into the Weller home was not justified under the "emergency aid" exception to the warrant requirement, per the specific legal analysis set forth in the recent case of State v. Schultz, 170 Wn.2d 746, 750, 248 P.3d 484 (2011).

The issue was squarely presented to the suppression court in the pleadings. Further, the questioning of the CrR 3.6 suppression witnesses focused intently on the question whether there was an emergency basis for the police to enter the front door, *in addition* to the police conduct in the home and the police entry

into the garage where the stick was found, the latter issue having been emphasized by co-appellant Jeffrey Weller.[3] 1/31/13RP at 86-143 (Officer Sandra Aldridge), 144-57 (social worker Margie Dunn), 158-170 (Kim Karu).

It is true that the *prosecutor* in oral argument on the CrR 3.6 hearing focused primarily on his contention that consent to entry was given, including under State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998), a viable strategy given the absence of evidence of actual emergency under the case law criteria, although the prosecutor also briefly tossed out that the entry was a "wellness check." 1/31/13RP at 171-80. Defense counsel Kurtz argued that the issue hadn't anything to do with Ferrier, but rather, it concerned the issue of the "emergency exception" to the warrant requirement. 1/31/13RP at 180. Although he stated that a welfare check on children was probably an emergency, counsel was simply addressing the narrow question whether the officers *subjectively* believed they were entering to determine "whether or not the kids

[3] The Respondent also erroneously states that appellant Sandra Weller did not join in certain arguments briefed on appeal by her husband/co-appellant Jeffrey Weller; but Sandra Weller's motion to join in the arguments on appeal raised by Jeffrey Weller was granted by this Court on December 26, 2013.

were safe" – which is, at best, but one aspect of the 6-part Schultz "emergency" analysis.[4] 1/31/13RP at 180-81.

Ultimately, counsel argued that the emergency aid exception cannot overlap with a search performed during a criminal investigation, and contended that the officers in the present case quickly commenced such an investigation, as argued in the written suppression motion pursuant to State v. Schultz and State v. Kinzy, 141 Wn.2d 373, 386-88, 5 P.3d 668 (2000) (a proper community caretaking function is divorced from a criminal investigation). 1/31/13RP at 182-85.

For her part, counsel for Ms. Sandra Weller ably added to the legal arguments presented by pleading and oral argument, arguing that it appeared clear from the hearing that the social workers desired to civilly remove the children from the home, but wanted the assistance of police for safety reasons, and therefore it was not "clear cut as to what the situation was at the front door."

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[4] Because the CrR 3.6 testimony plainly showed there was no emergency under the case law, it is perhaps immaterial that the Respondent erroneously argues that Ms. Weller was required to but did not assign error to the suppression court's "factual findings," and announces that Ms. Weller must therefore face those findings on appeal as verities. BOR at pp. 33-35. Respondent claims to have "reprinted" the findings in its Brief. BOR at pp. 24-27, 33. But there were no findings entered (a matter to which Sandra Weller assigned separate error), so there was nothing for the State to "re" print. Instead, what the Respondent actually does in its brief is type the trial court's oral ruling, divide that oral ruling into separately paragraphed sections, and then assign its own numbers to those paragraphs. BOR at pp. 24-27, 33.

1/31/13RP at 185. This would mean that the State had failed to meet its burden to prove an exception to the warrant requirement. Counsel continued on to also argue that any entry certainly also became illegitimate when the police began an evidentiary search for the "stick." 1/31/13RP at 185-86.

Ultimately, as Ms. Weller's counsel argued, the evidence collected was obtained "during investigation of a crime" – not a "welfare check" – and the police "did need to get a warrant to search the garage area."[5] 1/31/13RP at 186.

This is the exact question governed by Schultz -- for the emergency aid *exception* to the search warrant requirement to apply, a true emergency must exist. Schultz, 170 Wn.2d at 754. Routine community-caretaking functions of the police, such as checking on the welfare of a child, are societally valued – but they do not outweigh citizens' privacy interests against invasion and

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[5] Of course, as the trial court recognized, the court could not properly address the sub-issue of whether the stick found in the garage was seen by the police in "plain view" unless one first established that the police were in the home properly in the first place, under the emergency aid (née community caretaking) function. 2/1/13RP at 237-38; Charles W. Johnson, Survey of Washington Search and Seizure Law: 2005 Update, 28 Seattle U. L. Rev. 467, 638 (2005). As Sandra Weller argued in her Opening Brief, "Importantly, the *scope* of the police and CPS workers investigation and search in the house, upwards of almost 4 hours in time, is further indication of both unreasonableness and an impermissible intrusion into private affairs." AOB at pp. 26-27 (citing 1/31/13RP at 169 and State v. Kinzy, 141 Wn.2d at 386-88 (a proper community caretaking function is divorced from a criminal investigation)).

search of the home where that is not necessary to perform the function, i.e., without a true emergency need to do so. Schultz, 170 Wn.2d at 754; Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). The essential facts were established by the officers' testimony that this was a routine safety check of the sort that they would assist CPS with frequently, they are undisputed and they support Sandra Weller's argument of law, that this was no emergency, as required under Schultz. See 7/30/12RP at 118; 1/31/13RP at 153-54.

Importantly, this Court should also reject the Respondent's arguments of CrR 3.6 error harmlessness in which the State contends that the fruits of the search – the supposedly bloody stick with which the children were allegedly struck by Jeffrey Weller – can be shown beyond a reasonable doubt to not have been material to the outcome.

(ii). The stick was crucial to persuading Sandy Weller's jury to find her guilty; it was not "harmless beyond a reasonable doubt."

Admission of evidence seized in violation of a defendant's Fourth Amendment or state constitutional privacy rights is constitutional error that is presumed prejudicial. State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003).

Constitutional error is harmless only if the State proves beyond a reasonable doubt that the verdict would have been the same without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Absent the evidence seized, the jury would not have found Mrs. Weller guilty, and reversal of her convictions is required. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005) (suppression error must be harmless beyond a reasonable doubt). Although the children and their adoptive siblings testified with relative consistency, the defendant parents also testified, and with the very same consistency vigorously denied the allegations. The prosecutor employed the stick in a dramatic demonstration of the manner in which it was allegedly used to hit the children. 2/5/13RP(B) at 808-09. Jurors requested to, and were permitted to, hold the stick before reaching their verdicts. Supp. CP ___, Sub # 87 (multiple page trial minutes, minutes of February 8, 2013 (jury handling of State's exhibit 1A); 2/8/13RP at 1489 (receipt of verdict on February 8 at 4:11 pm). The State's untainted evidence was not overwhelming so as to overcome the stick's admission. Mrs. Weller respectfully argues that the State's case does meet this high constitutional error standard on review. The erroneous admission

of the seized stick requires reversal because it was not only significantly persuasive in its dramatic nature, but it also was interjected into a case with affirmative, and opposing, prosecution and defense claims. The certain-seeming, scientific nature of the DNA evidence on the stick further aggravated the prejudice. 2/6/13RP(B) at 1096; McDaniel v. Brown, 558 U.S. 120, 136, 130 S.Ct. 665, ___ L.Ed.2d ___ (2010) (noting the powerful nature of scientific evidence in general and the persuasiveness of DNA evidence for a lay jury in particular). It cannot be said beyond a reasonable doubt that the jury would have convicted Mrs. Weller absent the constitutional error.

B. CONCLUSION

Based on the foregoing and on her Appellant's Opening Brief, Sandra Weller requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 20 day of May, 2014.

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

STATE OF WASHINGTON, Respondent, v. SANDRA WELLER, Appellant.	)))))))))	NO. 44726-6-II

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