71342-6

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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Insufficient evidence was presented to establish Mr. Alexis acted as a principle or as an accomplice in N.A.'s restraint.

Mr. Alexis did not "restrain" N.A., an essential element of the offense of unlawful imprisonment. N.A. testified that Ms. Mazalic placed her in the dog crate and left for work. RP 626. N.A. made some noise and Mr. Alexis came into the room with a belt where she was confined, "probably thinking I was getting out." Regardless of her theory for his appearance in the room, however, N.A. did not testify that Mr. Alexis actually did anything and she could not recall whether he said anything,. RP 627.

In closing argument, the prosecutor urged the jury to consider Mr. Alexis's liability as an accomplice to Ms. Mazalic. RP 1128-29. But because accomplice liability does not extend to mere presence or failure to act, there was insufficient evidence to support Mr. Alexis's conviction for unlawful imprisonment. *See State v. Jackson*, 137 Wn.2d 712, 722, 976 P.2d 1229 (1999) ([W]e are bound to conclude that the Legislature's failure to include the language of [Model Penal Code] § 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).

In addition, the jury instructions did not direct the jury to consider accomplice liability for the charge of unlawful imprisonment. When read as a whole, instructions must clearly inform the jury of the applicable law and the State's burden of proof, and not be misleading. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The "to convict" instruction for unlawful imprisonment did not mention accomplice liability. CP 56 (Instruction No. 9). In contrast, the "to convict" instruction for criminal mistreatment specifically included the phrase "the defendant, or a person to whom the defendant was an accomplice." CP 52 (Instruction No. 5). In general, accomplice liability need not be included in a "to convict" instruction. *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004). In this context, however, where accomplice liability was included in one "to convict" instruction and not another, the instructions were misleading and improperly relieved the State of its burden of proof as to accomplice liability on the charge of unlawful imprisonment.

For the first time on appeal, the State argues the evidence was sufficient to establish Mr. Alexis's liability as a principle, and not only as an accomplice as argued at trial. *Compare* Br. of Resp. at 8-9 *with* RP 1128-29. To support its argument, the State erroneously contends Mr. Alexis used the belt to intimidate N.A. to prevent her "attempted escape" from the crate. Br. of Resp. at 8-9. But N.A. did not testify that Mr. Alexis

did or said anything, that she was intimidated by the belt, or that she attempted to escape. The State's argument misstates the evidence and should be rejected.

In the absence of sufficient evidence to establish Mr. Alexis's culpability for N.A.'s confinement, his conviction for unlawful imprisonment must be reversed.

2. The exceptional sentence based on judicially-found facts violated Mr. Alexis's right to jury trial.

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 v. Washington*, 542 U.S. 296, 301, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *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 entered factual findings that far exceeded the special verdicts, in violation of Mr. Alexis's right to jury trial and proof beyond a reasonable doubt. CP 28-29.

Citing RCW 9.94A.535, the State contends the court was not limited to facts found by the jury and could consider facts beyond those

found by the jury. Br. of Resp. at 15-16. This is incorrect. RCW 9.94A.535 provides, "Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537." RCW 9.94A.537(3) provides:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Where, as here, a defendant's right to a jury finding of every fact supporting an aggravated sentence is violated, the State bears the burden of proving the violation was harmless. *Washington v. Recuenco*, 548 U.S. 212, 218-220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). Because the State does acknowledge error, the State does not attempt to argue the violation was harmless. Accordingly, the State does not meet its burden. The exceptional sentence based on judicially-found facts must be reversed.

3. Abuse of a position of trust inheres in the offense of criminal mistreatment and the exceptional sentence based on that factor was erroneous as a matter of law.

A factor inherent in the offense cannot be used as an aggravating circumstance. *State v. Ferguson*, 142 Wn.2d 631, 647-48 15 P.3d 1271 (2001); *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992).

Abuse of a position of trust inheres in the offense of criminal mistreatment in the first degree. *See State v. Creekmore*, 55 Wn. App. 852, 863, 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."). Therefore, the exceptional sentence for criminal mistreatment based on "abuse of a position of trust" was erroneous as a matter of law. The State's concession is well-taken and should be accepted by this Court.

4. N.A. was not "particularly vulnerable" and the exceptional sentence based on that factor was clearly erroneous.

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); *accord State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001); *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989). Here, there was no evidence that N.A. was more vulnerable than

any other person or that any alleged vulnerability was a substantial factor in the offenses. Rather, the evidence overwhelmingly established the offenses were the direct result of Ms. Mazalic's untreated mental illness and Mr. Alexis's passivity. Moreover, 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.

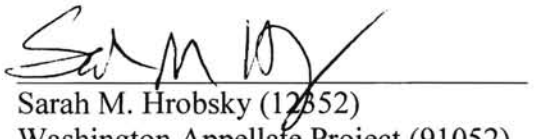
The State does not address the lack of finding, by either the jury or the court, that any vulnerability was a substantial factor in the commission of the offenses. Rather, the State argues Mr. Alexis would not have attempted to commit the offenses against "an adult or even a physically fit, 16 year old male child with a network o friends and family in the area." Br. of Resp. at 17-18. This argument is completely unfounded and should be rejected. In the absence of evidence to support the finding of particular vulnerability and in the absence of a finding that any vulnerability was a substantial factor in commission of the offenses, the exceptional sentence based on particular vulnerability must be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Alexis respectfully requests this Court reverse his conviction unlawful imprisonment, reverse his exceptional sentence, and remand for sentencing within the standard range on the offense of criminal mistreatment.

DATED this 5th day of December 2014.

Respectfully submitted,



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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 5TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X]	MARA ROZZANO, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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