71408-2

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NO. 71408-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

LELAND HARRIS,

Appellant.

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

The Honorable Laura G. Middaugh, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The trial court imposed an exceptional sentence on Leland Dulani Harris, but a jury did not find aggravating facts that supported an exceptional sentence, Harris did not stipulate to such facts for the purpose of sentencing, nor did Harris consent to judicial fact finding. Therefore, Harris's exceptional sentence violated the Sixth Amendment to the United States Constitution and the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. Harris was entitled to have a jury find aggravating facts supporting an exceptional sentence beyond a reasonable doubt. This court must accordingly remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence because the defendant did not stipulate to facts justifying an exceptional sentence, did not consent to judicial fact finding, and no jury found aggravating facts justifying an exceptional sentence beyond a reasonable doubt.

2. The trial court erred in entering Appendix D to the judgment and sentence in which the trial court made findings of fact and conclusions of law supporting an exceptional sentence. CP 41.

3. Defense counsel, in acquiescing or agreeing that the trial court could impose an exceptional sentence, rendered ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. When neither a jury nor judge determines beyond a reasonable doubt aggravating facts justifying an exceptional sentence, and the defendant refuses to stipulate to such facts, does the trial court lack authority under the Sixth Amendment and the SRA to impose an exceptional sentence?

2. Does defense counsel's acquiescence to an unlawfully imposed exceptional sentence implicate the invited error doctrine despite the rule that a defendant may not agree to be punished beyond the strictures of the SRA?

3. Does defense counsel's agreement to or acquiescence in an unlawfully imposed exceptional sentence constitute ineffective assistance of counsel?

C. STATEMENT OF THE CASE

On April 13, 2013, police responded to reports that Carmen Young, Harris's ex-girlfriend, had been repeatedly stabbed in her apartment. CP 5. Young reported to officers that Harris stabbed her. CP 5. Harris's and Young's two children aged five and three where present when officers

arrived. CP 5. While officers were interviewing Young, Harris arrived on the scene and allegedly confessed to stabbing Young. CP 5.

The State charged Harris with attempted murder in the second degree and two counts of fourth degree assault. CP 1-2. All crimes were charged as domestic violence offenses. CP 1-2. The second degree attempted murder charge also alleged that Harris committed the crime within sight or sound of the victim's or offender's minor child contrary to RCW 9.94A.535(3)(h)(ii) and that Harris was armed with a deadly weapon. CP 2.

Harris wished to plead guilty to the charged crimes. RP 10. In exchange for Harris's guilty plea to attempted murder in the second degree, including the deadly weapon enhancement and the sight-and-sound-of-child aggravator, the State offered to dismiss the assault charges. RP 23-25. Following a lengthy colloquy regarding Harris's guilty plea, Harris entered an Alford[1] plea to second degree attempted murder with a deadly weapon enhancement and the sight-and-sound aggravator. CP 22; RP 68. Specifically, Harris stated, "This is an Alford plea. I wish to plead guilty without having to admit that I committed the acts. I have reviewed the police reports in this case and believe that there is a substantial probability that I would be convicted if this matter went to trial." CP 22; RP 66. To establish a factual basis for the plea, Harris permitted the trial court to

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

"review the certification of probable cause to determine that there is a factual basis for this plea." CP 22. Based on the certification for determination of probable cause, the trial court determined there was a sufficient factual basis to accept Harris's Alford plea. RP 77-78.

When it came to the issue of sentencing, however, Harris refused to sign the plea agreement that would allow the court to consider the certification for determination of probable cause for sentencing purposes. RP 70-71, 73, 77. The trial court stated that the consequence for this refusal

> might be that the State will be put in a position of having to bring in medical records for me to review of what happened and a potential longer statement from the victim about what happened to her and the children being there since I won't have the Certification to read.

RP 72. When Harris continued to disagree that the trial court could consider the certification for the purposes of sentencing, the court concluded,

> Then I think we're going to have to set aside a few hours for his sentencing hearing because I will hear the facts in this case. And if that means that we have to have the testimony of the victims, I guess we'll have to do that so that I get the facts. That's your choice, sir.

RP 77.

Prior to hearing such testimony, the State asserted that Harris's refusal to stipulate to facts supporting an exceptional sentence entitled Harris to a jury determination on the aggravating facts. RP 92. In support of its position, the State argued,

> I just don't believe that there are facts or anything that he is agreeing to that support or stipulate to the aggravating factor . . . . there's no additional language that he's agreeing to the crime that he's pleading to, that it happened within the sight or sound of his minor children.

RP 91. In addition, the State stated, "the only fact that I could see supporting [the exceptional sentence] is simply that the defendant admitted in his plea form to the crime, that it was committed in the presence of the children . . . ." RP 93.

Despite the State's concerns, the trial court's view was that Harris's entry of an Alford plea to the sight-and-sound aggravator was sufficient to establish facts justifying the imposition of an exceptional sentence. RP 92-93. Although the trial court proceeded to hear testimony prior to sentencing, it indicated it was not considering this testimony for the purposes of imposing a sentence above the standard range. RP 132. Instead, the trial court "bas[ed] [its] decision [to impose an exceptional sentence] solely on the fact that there was a plea to an aggravating factor and not considering what happened." RP 132. Thus, the trial court imposed an exceptional sentence for the sole reason that Harris entered an Alford plea that included RCW 9.94A.535(3)(h)(ii)'s sight-and-sound-of-children aggravating factor.

The trial court imposed an exceptional sentence of 216 months. CP 37; RP 132-33. The trial court calculated this sentence by imposing the top end of the standard range of 175.5 months along with the 24-month deadly

weapon enhancement, which totaled 199.5 months. CP 35. In order to ensure that Harris's children had reached the age of 18 years by the end of Harris's sentence, the court imposed 16.5 additional months to reach a total sentence of 216 months. CP 37; RP 132-33. To support its exceptional sentence, the trial court entered a finding that Harris's "crime was committed in the presence of the victim and defendant's minor children," and concluded "there are substantial [and] compelling reasons justifying an exceptional sentence based on the victim's children being present." CP 41. The court also imposed 36 months of community custody and $600 for the mandatory victim's penalty assessment and DNA collection fee. CP 36, 38; RP 133.

Harris's timely appeal follows. CP 45.

D. ARGUMENT

THE TRIAL COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE, REQUIRING REMAND FOR RESENTENCING

The Sixth Amendment to the United States Constitution guarantees criminal defendants a right to trial by jury. Under the Sixth Amendment, "[o]ther 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." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The statutory maximum referenced in Apprendi "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 v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis omitted). "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Id. at 310.

Under the SRA, a sentencing court may impose an exceptional sentence "if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Consistent with the Sixth Amendment requirements laid out in Blakely and Apprendi, our legislature has provided, "The facts supporting aggravating circumstances [for exceptional sentences] shall be proved to a jury beyond a reasonable doubt . . . . If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts." RCW 9.94A.537(3); see also RCW 9.94A.535 ("Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537."); State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006) ("[E]xceptional sentences violate Blakely when they are based on facts not stipulated to by the defendant or found by a jury beyond a reasonable doubt.").

1. Absent a stipulation to aggravating facts, Harris was entitled to a jury finding aggravating facts beyond a reasonable doubt

In this case, the facts relied on by the trial court to justify Harris's exceptional sentence were not found by a jury or the court beyond a reasonable doubt and were not stipulated to by Harris. See RP 70-71, 73, 77 (Harris refusing to stipulate to or allow the court to consider the facts set forth in the certification for determination of probable cause for sentencing purposes). Therefore, the trial court's imposition of an exceptional sentence violated Blakely and Apprendi as well as the SRA.

Instead of following the SRA's direction, the trial court determined it could impose an exceptional sentence based on the fact that Harris entered an Alford plea to second degree attempted murder with an aggravating factor. Specifically, Harris's Alford plea encompassed the domestic violence aggravator under RCW 9.94A.535(3)(h)(ii), which permits imposition of an exceptional sentence if the facts establish that a domestic violence "offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years . . . ." Based solely on Harris's Alford plea to this aggravating factor in his statement on plea of guilty—and in spite of Harris's refusal to stipulate to or allow the court to consider any other facts for sentencing purposes—the court imposed an exceptional sentence. RP 132.

The trial court misapprehended the significance of the fact that Harris's plea was an Alford plea. CP 22; RP 66, 68. In his statement on plea of guilty, Harris stated, "This is an Alford plea. I wish to plead guilty *without having to admit that I committed the acts*. I have reviewed the police reports in this case and believe that there is a substantial probability that I would be convicted if this matter went to trial." CP 22 (emphasis added). Despite Harris's express statement that he was not admitting he committed the acts constituting attempted second degree murder in front of his children, the trial court stated,

> So you can't plead guilty to a crime even under an Alford plea and then say: But I'm not really pleading guilty to that portion of the crime. He pled guilty to the crime in [paragraph] 7 [of his statement on plea of guilty] and he is stuck with what he pled to.

RP 95. The trial court's statement reflects its misunderstanding of an Alford plea.

The purpose of an Alford plea is to permit a defendant to waive trial due to the risk of conviction without having to admit actual guilt. Alford, 400 U.S. at 33. Indeed, a defendant may enter such a plea "even if he [or she] is unwilling or unable to admit his [or her] participation in the acts constituting the crime." Id. at 37. Thus, by entering an Alford plea, Harris did not acknowledge he committed attempted second degree murder or that

he did so within sight and sound of his children.[2] Rather, Harris merely waived his right to trial on these issues. Because Harris's Alford plea did not admit any facts, it did not establish the aggravating facts necessary to justify an exceptional sentence.

Arguing that the trial court lacked a factual basis to impose an exceptional sentence, the deputy prosecuting attorney directed the trial court to State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006). RP 80. In that case, Suleiman's aggressive driving rendered one of his passengers paralyzed from the neck down. Suleiman, 158 Wn.2d at 285. Suleiman pleaded guilty to vehicular assault and was sentenced to an exceptional sentence based on the vulnerability of the victim. Id. at 285-86. As part of his plea, Suleiman stipulated to the facts contained in the certification for determination of probable cause. Id. at 292. Our supreme court found Suleiman's stipulation insufficient for an exceptional sentence, stating,

> While the documents imply that Suleiman knew or should have known that [the victim] was particularly vulnerable, they do not say so specifically, nor do they state that vulnerability was a substantial factor in the crime. In

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[2] The State agreed with this conclusion prior to sentencing:

> The way I read the plea form and the Alford plea, the State's position is that the defendant is not stipulating to the facts that the acts occurred in the presence of the minor children. He's not admitting it which therefore would mean that the defendant would need to waive his right to a jury trial on the aggravating factor or simply admit to the crime being committed in the presence of his children.

RP 81.

> addition, Suleiman did not stipulate that the record supported a finding that [the victim] was a particularly vulnerable victim.

Id. at 293. Thus, determined the Suleiman court, "Because these factual conclusions were not part of the stipulation and they were not found by a jury beyond a reasonable doubt, we conclude that Suleiman's exceptional sentence violates Blakely." Suleiman, 158 Wn.2d at 293. Suleiman made clear what is required for a valid Blakely stipulation:

> [I]n order for [a defendant's] plea to comply with the Blakely stipulation exception, [a defendant] must have stipulated to the underlying facts. [A defendant] must also have stipulated to the enumerated factual bases for the [aggravating factor] .... Finally, [a defendant] must have stipulated that the record supported a determination of [the aggravating factor]. Otherwise, the trial court engage[s] in decision-making that this court has labeled as fact finding.

Id. at 292.

This case presents a clearer Blakely error than did Suleiman because, unlike Suleiman, Harris did not stipulate to any facts for the purpose of sentencing, let alone facts justifying an exceptional sentence. Because it lacked Harris's factual stipulation, the trial court's imposition of an exceptional sentence required that a jury find the aggravating facts beyond a reasonable doubt.[3]

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[3] The deputy prosecuting attorney below agreed that Harris was entitled to a jury trial on the sight-or-sound-of-children aggravating factor absent a jury waiver and stipulation to the aggravating facts. RP 90-92.

Suleiman's companion case, State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006), is also instructive. There, the defendant entered an Alford plea. Ermels, 156 Wn.2d at 532. However, when he entered his plea, Ermels "stipulated to facts supporting his exceptional sentence and that a legal basis existed for an exceptional sentence . . . ." Id. at 538. Considering Ermels's Blakely challenge to his exceptional sentence, our supreme court stated, "Here, the trial court's imposition of the exceptional sentence did not violate Blakely because Ermels stipulated to *both the facts supporting his exceptional sentence and that there was a legal basis for the exceptional sentence*." Ermels, 156 Wn.2d at 540 (emphasis added). Thus, the Ermels court concluded that Ermels's "stipulation to the factual and legal validity of an exceptional sentence [wa]s [in]separable from the rest of his plea agreement. Ermels cannot challenge his stipulations without challenging the entire agreement." Id. at 541.

In contrast to Ermels, Harris neither stipulated to facts supporting an exceptional sentence or that the exceptional sentence had any legal basis. Thus, unlike Ermels, Harris is entitled to challenge his exceptional sentence as a matter wholly independent of his Alford plea.

Because the exceptional sentence imposed on Harris plainly violated Blakely and the SRA, Harris is entitled to a jury finding regarding aggravating facts justifying an exceptional sentence. This court, in

accordance with RCW 9.94A.537(2), must remand for resentencing to honor Harris's right to have a jury determine the facts justifying an exceptional sentence.

2. Defense counsel's acquiescence in the trial court's erroneous analysis regarding the exceptional sentence did not constitute invited error

When it ruled that Harris's Alford plea to the aggravating fact that his children were present sufficed as a factual basis for sentencing purposes, the trial court stated,

> So I guess what I'm hearing from the defense is that was the intent, that [Harris] was pleading guilty to what is stated in Paragraph 7. He'd have a difficult time, I think, trying to appeal this issue because it's clearly invited error if, you know, he then goes up to the Court of Appeals and argues that's not what I was intending. Today he's arguing that is what he was intending, to plead guilty to it. Just that if I'm going to sentence him . . . outside the standard range it has to be on the aggravating factor that he . . . pled guilty to, which is the presence of the children, not the facts in addition to the presence. Not how they were present, what he said, what they said, what they did, that kind of stuff.

RP 92-93. Defense counsel agreed that the trial court could impose an exceptional sentence on Harris based solely on the fact that he entered an Alford plea. RP 93.

Defense counsel's mistaken impression regarding the requirements for imposing an exceptional sentence cannot qualify as an invited error, contrary to the trial court's suggestion. The invited error doctrine provides that "a party who sets up an error at trial cannot claim that very action as

error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). Here, defense counsel did not "set up" any error, but rather acknowledged that he had little experience with exceptional sentences. RP 87. Defense counsel was merely confused about the trial court's sentencing authority and plainly did not intend to lead the trial court into committing an error.

Moreover, defense counsel's misunderstanding of sentencing laws should not negate Harris's entitlement to receive a lawful sentence. Indeed, even if this error were invited, so holding would conflict with the rule that criminal defendants may not agree to be punished beyond what the legislature has provided. See State v. Barber, 170 Wn.2d 854, 870-71, 248 P.3d 494 (2011); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 871, 50 P.3d 618 (2002); In re Pers. Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991); In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). Harris could not have agreed to or invited an exceptional sentence that the trial court lacked authority to impose.

Even assuming that defense counsel's agreement to the exceptional sentence was invited error, it constituted ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and article I, section

22 of the Washington Constitution guarantee effective assistance of counsel. To establish ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466, U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." Yarbrough, 151 Wn. App. at 90.

No objectively reasonable attorney could agree to the imposition of an exceptional sentence that exceeded the trial court's sentencing authority. Nor could any legitimate strategy explain agreeing to unlawfully imposed punishment. This is especially true in this case given that the State repeatedly expressed concern that the trial court lacked authority to impose an exceptional sentence. As for prejudice, had defense counsel insisted that a jury determine aggravating facts justifying an exceptional sentence—as Blakely and the SRA require—there is a reasonable, if not a high, probability the trial court would not have imposed an exceptional sentence without the required factual basis. Therefore, even if defense counsel's agreement to an

exceptional sentence falls under the invited error doctrine, such an agreement constituted ineffective assistance of counsel, and thus cannot overcome Harris's right to receive a lawful sentence.

E. CONCLUSION

In this case, the trial court had no factual basis for imposing an exceptional sentence because Harris did not stipulate to any aggravating facts and neither the trial court nor the jury found aggravating facts beyond a reasonable doubt. This court must remand for resentencing as contemplated by RCW 9.94A.537(2).

DATED this 10th day of June, 2014.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71408-2-I
	)	
LELAND HARRIS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LELAND HARRIS
DOC NO. 371399
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2014.

X Patrick Mayovsky