SUPREME COURT NO. 92099-1

NO. 71408-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LELAND HARRIS,

Petitioner.

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

The Honorable Laura G. Middaugh, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Leland Dulani Harris, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Harris requests review of the Court of Appeals decision in State v. Harris, 2015 WL 4199845, No. 71408-2-I (Wash. Ct. App. Jul. 6, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. When neither a jury nor judge determines beyond a reasonable doubt aggravating facts justifying an exceptional sentence, the defendant enters an Alford[1] plea that does not establish the aggravating facts, and the defendant refuses to otherwise stipulate to the aggravating facts, does the trial court lack authority under the Sixth Amendment and the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, to impose an exceptional sentence?

2. Did defense counsel's agreement to the imposition of an exceptional sentence without the required factual stipulation or a jury finding beyond a reasonable doubt constitute constitutionally ineffective assistance?

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

3. Is review appropriate under RAP 13.4(b)(1) and (3) because the Court of Appeals decision conflicts with a decision of this court and because this case involves significant constitutional questions?

D. 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 said Harris stabbed her. CP 5. While officers were interviewing Young, Harris appeared and allegedly confessed to the stabbing. 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 attempted second degree murder charge also alleged Harris committed the crime within sight or sound of the offender's or victim'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. RP 10. In exchange for Harris's guilty plea to the attempted second degree murder, including the deadly weapon enhancement and the sight-and-sound aggravator, the State offered to dismiss the assault charges. RP 23-25. Harris entered a plea to the attempted second degree murder with a deadly weapon enhancement and the sight-and-sound aggravator under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970): "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. Harris permitted the trial court to "review the certification of probable cause to determine that there is a factual basis for this plea." CP 22. The trial court accepted Harris's Alford plea. RP 77-78.

However, Harris refused to agree the court could consider the certification for determination of probable cause for sentencing purposes. RP 70-71, 73, 77. The trial court suggested it would need to hear from the victim "about what happened to her and the children being there since I won't have the Certification to read." RP 72. Harris continued to disagree that the court could consider the certification for the purposes of sentencing, prompting the trial court to comment,

> 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 this testimony, the State asserted Harris's refusal to stipulate to facts supporting an exceptional sentence entitled Harris to a jury determination on the aggravating facts:

> 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. The prosecutor had also earlier asserted that an Alford plea does not establish a factual stipulation:

> 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.

Despite the State's concerns, the trial court determined Harris's Alford plea to the sight-and-sound aggravator was sufficient to establish facts justifying the imposition of an exceptional sentence.[2] RP 92-93. The trial court thus imposed an exceptional 216-month sentence. 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 Harris's children had reached the age of 18 by the end of Harris's sentence,

[2] The trial court nonetheless heard testimony prior to sentencing but indicated it "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.

the court imposed 16.5 additional months to reach 216 total months. CP 37; RP 132-33.

Harris appealed. CP 45. The Court of Appeals determined Harris's Alford plea to the aggravating sight-or-sound factor, which by its own terms did not admit or contain a stipulation to any facts, allowed the trial court to impose an exceptional sentence. Harris, slip op. at 10.

E. ARGUMENT

THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S AND THE UNITED STATES SUPREME COURT'S CONSTITUTIONAL PRECEDENT, BECAUSE NO COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE ABSENT A STIPULATION OR JURY VERDICT THAT ESTABLISHES THE UNDERLYING FACTS

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a jury trial. 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 (emphasis added).

Consistent with these requirements, the SRA provides, "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. Harris did not stipulate to any aggravating facts, which entitled him to a jury finding of these facts beyond a reasonable doubt

Harris refused to stipulate to facts set forth in the certification for determination of probable cause. RP 70-71, 73, 77. Indeed, Harris's plea was an Alford plea that admitted no facts at all. The trial court's imposition of an exceptional sentence without Harris's stipulation to aggravating facts therefore violated Blakely and the SRA.

The purpose of an Alford plea is to allow a defendant to waive trial due to the risk of conviction without having to admit actual guilt. Alford, 400 U.S. at 33. A defendant may enter such a plea "even if he is unwilling or unable to admit his participation in the acts constituting the crime." Id. at 37. By pleading guilty under Alford, Harris did not admit he committed attempted second degree murder within sight and sound of his children. CP 22 ("I wish to plead guilty without having to admit that I committed the acts."). Therefore, the Alford plea did not establish the aggravating facts necessary to justify an exceptional sentence.

This court has spelled out what is required for a valid stipulation to facts supporting an exceptional sentence:

> [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.

State v. Suleiman, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). Suleiman stipulated "to real and material facts as written in the certification for determination of probable cause" as part of his non-Alford guilty plea.[3] Id.

[3] The Court of Appeals erroneously stated Suleiman involved an Alford plea. Harris, slip op. at 7. Suleiman entered a standard guilty plea and specifically agreed to stipulate to the facts contained in the certification for determination of probable cause. Suleiman, 158 Wn.2d at 285.

However, because Suleiman did not stipulate that those facts were a legal basis for an exceptional sentence and because the facts themselves did not establish that one of the victims was particularly vulnerable, this court determined Suleiman's exceptional sentence violated Blakely. Id. at 292-93.

This case presents a clearer Blakely error than did Suleiman because, in entering an Alford plea, Harris did not "stipulate[] to [any of] the underlying facts." Suleiman, 158 Wn.2d at 292. He did not "stipulate[] that the record supported a determination of" the sight-and-sound aggravator. Id. Because it lacked Harris's stipulation to any facts or to any legal basis for an exceptional sentence, the trial court's imposition of an exceptional sentence violated Blakely. Id.

The Court of Appeals determined Harris's reliance on Suleiman was "misplaced." Harris, slip op. at 7. The Court of Appeals stated "the error in Suleiman was that the sentencing court had to find facts beyond those set forth in the stipulated documents in order to establish the aggravating factor and Suleiman had neither agreed to those facts nor waived his right to have a jury determine their existence." Id. at 8. But the Court of Appeals ignored that Harris, by entering an Alford plea, did not stipulate to *any* facts. Thus, like Suleiman, Harris neither agreed to facts supporting an exceptional sentence nor waived his right to a jury determination of their existence. Only by erroneously ignoring that Harris's plea was an Alford plea— a plea

that, by definition, admits no facts—was the Court of Appeals able to avoid Suleiman's requirements.

Moreover, the Court of Appeals wholly overlooked Harris's discussion of State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006), which is instructive because it did involve an Alford plea. See Br. of Appellant at 12. Ermels, when he entered his Alford plea, specifically "stipulated to facts supporting his exceptional sentence and that a legal basis existed for an exceptional sentence . . . ." 156 Wn.2d at 538. Thus, this court concluded "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 an exceptional sentence.*" Id. at 540 (emphasis added). Thus, for Alford pleas to establish a factual basis for an exceptional sentence, defendants must stipulate (1) to the facts supporting the exceptional sentence and (2) that there is a legal basis for the exceptional sentence. Harris did neither.[4] Harris's exceptional sentence accordingly violates Blakely and the SRA.

[4] The Court of Appeals suggested Harris was repeatedly and fully informed of the consequences of pleading guilty to the aggravating factor. Harris, slip op. at 4 n.3. ("[T]he court specifically asked Harris several times whether he was pleading guilty to the [sight-and-sound aggravator]."). But the trial court never informed Harris before he entered the Alford plea to the sight-and-sound aggravator that it would constitute the legal basis for imposing an exceptional sentence. Thus, contrary to the Court of Appeals decision, Harris never stipulated that an Alford plea to the sight-and-sound aggravator was a legal basis for imposing exceptional sentence, as Ermels explicitly requires.

The exceptional sentence imposed on Harris violated Harris's Sixth Amendment rights to a jury determination of "any fact that increases the penalty for a crime . . . beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Because the Court of Appeals' decision endorses an unconstitutional exceptional sentence, review is warranted under RAP 13.4(b)(3). The Court of Appeals decision also conflicts with Suleiman and Ermels, necessitating review under RAP 13.4(b)(1). This court should grant review and reverse.

2. Harris's trial attorney rendered ineffective assistance by agreeing to an exceptional sentence without the requisite factual stipulation

Defense counsel agreed the trial court could impose an exceptional sentence based solely on Harris's Alford plea.[5] RP 93. This agreement 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 an ineffective assistance of counsel claim, counsel's performance must have been deficient and the deficient performance must

[5] The trial court stated the invited error doctrine would preclude Harris's challenge to the exceptional sentence on appeal. RP 92-93. But no criminal defendant may agree to an unlawful sentence. See, e.g., 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). Moreover, ineffective assistance trumps invited error. See State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) ("Review is not precluded where invited error is the result of ineffectiveness of counsel.").

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." Id.

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 or tactic explain agreeing to unlawful punishment. This is especially true in this case given that the prosecutor repeatedly and forcefully asserted that the trial court lacked authority to impose an exceptional sentence because an Alford plea was not a stipulation to the necessary aggravating facts. See RP 81, 91-93. Counsel's performance was deficient.

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 that the trial court would not have imposed an exceptional sentence without the required factual basis. Indeed, it could not lawfully do so. Counsel's deficient performance was prejudicial.

Harris did not receive a lawful sentence. This was partially the result of the constitutionally ineffective assistance of Harris's trial counsel, calling for review under RAP 13.4(b)(3).

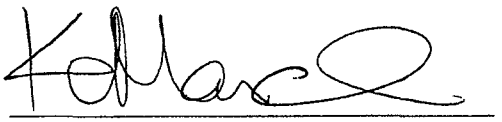
F. CONCLUSION

There was no factual basis for imposing an exceptional sentence because Harris did not stipulate to any facts and no jury found any facts beyond a reasonable doubt. Because the Court of Appeals decision conflicts with this court's precedent and runs afoul of Harris's Sixth Amendment rights, Harris asks this court to grant review pursuant to RAP 13.4(b)(1) and (3), and to reverse.

DATED this 5th day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 71408-2-I
v.	)	DIVISION ONE
LELAND DULANI HARRIS, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: July 6, 2015

SPEARMAN, C.J. — Pursuant to plea negotiations, Leland Dulani Harris waived his right to a jury trial and entered an Alford[1] plea of guilty to the charge of attempted murder in the second degree, while armed with a deadly weapon, and to the aggravating factor that the crime involved domestic violence and occurred within sight or sound of his minor children. The sentencing court imposed an exceptional sentence above the standard range. Harris appeals, contending that the exceptional sentence violated his rights under the Sixth Amendment of the United States Constitution and the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. Finding no error, we affirm.

FACTS

In early 2013, Leland Harris and Carmen Young had been in a dating relationship in New Jersey for about six years and had two children together,

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

ages five and three. The relationship was marred by domestic violence and eventually Harris was incarcerated. While he was serving his sentence, Young moved to Washington. After Harris's release from custody, Young allowed him to come to Washington to visit her and the children for a week. At the end of the week, Harris refused to leave, but he eventually agreed to do so and Young bought him a return ticket to New Jersey.

The day before Harris was scheduled to leave, Young returned home from work to find him drinking outside her apartment building. Harris followed Young into her apartment and they sat quietly on the sofa for a while. Suddenly, Harris grabbed her by the hair and said "Bitch, I'm not going to let you take my kids from me." Clerk's Papers (CP) at 7. He then dragged her into the kitchen by her hair. Harris pulled a knife from the kitchen drawer and dragged Young to the bedroom. The younger child came running into the bedroom and as Young "was holding her, telling her to calm down and stop crying and go in her room ... [t]hat's when he stabbed [her] the first time, when I was holding H.H. . . . . He stabbed me on my left side and said 'I'm going to kill you bitch.'" Id. Their older child started to enter the bedroom and Young told the two to leave. Harris kicked both children out of the room and closed the door. He then stabbed Young again, this time in the chest, before fleeing with Young's cell phone.

A neighbor found Young bleeding profusely and called the police. When the police arrived, they found the children shaking and distraught. As Young explained that she had been stabbed by Harris, Harris returned to the scene and confessed to the crime. He was placed under arrest. Young was taken to

Harborview Medical Center and treated for injuries to her kidney, spleen pancreas and lung.

Harris was charged with attempted murder in the second degree–domestic violence, while armed with a deadly weapon and an aggravating factor that the crime involved domestic violence and occurred within sight or sound of his minor children. He was also charged with two counts of fourth degree assault–domestic violence. Pursuant to plea negotiations, the State agreed to dismiss the fourth degree assault charges and Harris agreed to plead guilty to the remaining allegations by way of an Alford plea. In the statement of defendant on plea of guilty he stated:

> I plead guilty to the crime(s) of [a]ttempted murder 2 with domestic violence allegation under RCW 10.99.020; an aggravating factor under RCW 9.94A.535(3)(h)(ii) of the crime involving domestic violence and being committed in the presence of the victim or offender's minor children and a special allegation of being armed with a deadly weapon, to wit: a knife (sic) as charged in the information, including all charged enhancements and domestic violence designations.

CP at 22. In addition, the form asks Harris to "state briefly in [his] own words what [he] did that makes [him] guilty of this (these) crime(s), including enhancements and domestic violence relationships, if they apply[,] . . ." 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. The court can review the certification of probable cause to determine that there is a factual basis for this plea.

CP at 22.

Harris also stipulated that "[f]or purposes of the plea ... the knife used was 3 inches or longer."[2] Id.

The trial court reviewed the certification of probable cause and found a factual basis for the plea. The court accepted Harris's guilty plea after determining that it was knowingly, intelligently and voluntarily made.[3] Id. At the conclusion of the hearing Harris refused to sign the State's felony "plea agreement." Harris acknowledged that in exchange for his plea of guilty the State agreed to dismiss the assault charges as to the children. But he contended there was no plea agreement and that he "was just pleading to the mercy of the court, though, and to the judge's discretion." VRP at 48. Although the "plea agreement" is not part of the record on appeal, the parties appear to agree that it contained language which would have expressly permitted the court to consider the certification for determination of probable cause for sentencing purposes.

The standard range for Harris's charges, based on the seriousness level and his offender score, including the twenty-four month deadly weapon enhancement, was 124.5-199.5 months. But the court imposed an exceptional

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[2]Harris's stipulation to the knife having a blade longer than three inches was necessary because the certification of probable cause did not specify the length of the knife, and thus, could not by itself establish a factual basis for the court to find that the knife qualified as a deadly weapon under RCW 9.94A.825. The finding required the court to add twenty-four months to Harris's standard range under RCW 9.94A.533(4)(a).

[3] During an extensive colloquy at the guilty plea hearing, the court specifically asked Harris several times whether he was pleading guilty to the "aggravating factor of the crime involving domestic violence, and being committed in the presence of the victim or offender's minor children. . . ." Verbatim Record of Proceedings (VRP) at 58. (See also VRP at 25, 61, 67, 68.) After the court answered several of Harris's questions and allowed him opportunities to speak privately with his attorney, he answered "I plead guilty." VRP at 68. He also acknowledged that he was "giving up [his] rights to trial, giving up [his] rights to fight the charges, understanding all the consequences" and agreed the court could "review the Certification of Probable Cause to determine that there is a factual basis for this plea." VRP at 61, 66.

sentence of 216 months, finding that "[t]he crime was committed in the presence of the victim and defendant's minor children." CP at 41. The finding was based "solely on the fact that there was a plea to an aggravating factor. . . ." VRP at 132. Harris appeals.

DISCUSSION

Harris contends the trial court was without authority to impose an exceptional sentence. He claims he is entitled to a jury trial on the aggravating factor because he did not stipulate to the facts relied upon by the judge to impose the exceptional sentence. The State argues that Harris pled guilty as charged, including to the aggravating factor. By pleading guilty, the State claims that Harris established the aggravating factor as a matter of law, despite his Alford plea and refusal to sign the felony plea agreement.

We review de novo whether a court was authorized to impose an exceptional sentence. State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

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. The statute sets forth a number of factors that would support an aggravated sentence. RCW 9.94A.535(2). RCW 9.94A.537(3) states that "[t]he 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."

The Sixth Amendment requires that any fact, other than the fact of a prior conviction, 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 relevant "statutory maximum" is the maximum sentence a judge may impose on the basis of 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). Nothing, however prevents a defendant from waiving his Apprendi rights. Id. at 310. "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. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." Id. (internal citations omitted).

Harris argues that the trial court violated Blakely and the SRA because it imposed an exceptional sentence in reliance on facts that were not found by a jury or a court beyond a reasonable doubt and not stipulated to by Harris. But the record shows that as part of his Alford plea of guilty to the underlying crime and the aggravating factor, Harris stipulated that the court could consider the certificate for determination of probable cause to find a factual basis for both pleas. Harris does not dispute that based on that stipulation and the finding of a factual basis for the plea to the underlying crime that he is guilty of that crime as

a matter of law or that the court may constitutionally sentence him for that crime. But he argues these same principles do not apply to his Alford plea of guilty to the aggravating factor. The argument is unconvincing because Harris does not explain why his plea of guilty to the aggravating factor should be treated differently than his plea of guilty to the underlying crime.

Harris's reliance on State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006), is misplaced. In that case, the defendant was charged with three counts of vehicular assault. The victims were passengers in the car Suleiman was driving. Suleiman entered an Alford plea of guilty to the charges. The State indicated that at sentencing it would seek an exceptional sentence on the ground that Suleiman knew or should have known that one of the victims, K.D., was particularly vulnerable. Suleiman stipulated that the facts set forth in the certification for determination of probable cause and the prosecutor's summary were real and material facts for sentencing purposes. However, he did not agree that those facts formed a legal basis for an exceptional sentence.

The stipulated documents established that as Suleiman was driving aggressively and at excessive speeds, the passengers yelled at him to slow down and stop so they could get out. Suleiman ignored their pleas and told them to shut up. He eventually lost control of the car and crashed into an embankment, causing serious injuries to the passengers, including K.D. who was paralyzed from the neck down. The sentencing court determined that K.D. was particularly vulnerable and the defendant knew or should have known of that vulnerability

and imposed an exceptional sentence of twenty-eight months beyond the high end of the standard range.[4]

On appeal, the Washington Supreme Court agreed with Suleiman and found that the real and material facts to which he had stipulated were insufficient by themselves to establish a factual basis for the conclusion that the victim was particularly vulnerable. The court stated:

> While the documents imply that Suleiman knew or should have known that [K.D.] was particularly vulnerable, they do not say so specifically, nor do they state that vulnerability was a substantial factor in the crime. In addition, Suleiman did not stipulate that the record supported a finding that [K.D.] was a particularly vulnerable victim. Even assuming Suleiman's stipulation is valid, the trial court still had to make these factual conclusions to support an exceptional sentence based on victim vulnerability. 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.

Id. at 293. Thus, the error in Suleiman was that the sentencing court had to find facts beyond those set forth in the stipulated documents in order to establish the aggravating factor and Suleiman had neither agreed to those facts nor waived his right to have a jury determine their existence.

In this case, however, Harris pleaded guilty to the aggravating factor and agreed that the court could determine whether the facts set out in the certification for determination of probable cause were sufficient to establish that he had committed a crime of domestic violence within sight and sound of his minor

[4] The sentencing court also found two other aggravating factors, but the Court of Appeals affirmed only on the ground of the victim's particular vulnerability and the State relied solely on that ground before the Supreme Court.

children. The court did so and concluded the facts were sufficient. Unlike in Suleiman, here, the court did not have to rely on inferences or implications beyond those explicitly stated in the certification to find the requisite factual basis for the aggravating factor. The certification clearly established that the crime was one of domestic violence ("Leland Dulani Harris (07-22-75) and Carmen Rae Young (10-29-84) have had a 6 year dating relationship and two children in common; 5 year old R.H. and 3 year old H.H." CP at 5) and that it was committed within sight and sound of his minor children ("So I was holding [H.H.], telling her to calm down and stop crying and go in her room. . . .That's when he stabbed me the first time, when I was holding H.H. ... He stabbed me on my left side and said 'I'm going to kill you bitch.'... R.H. was about to start coming out too and he kicked R.H. back and closed the door." CP at 7)

Harris also points out that he refused to sign a document summarizing his plea agreement with the State that expressly permitted the court to consider the certification for determination of probable cause for sentencing purposes. He argues that as a result, the court was prohibited from relying on that document to find facts supporting the aggravating factor. But it is clear from the record that the court did not rely on the certification as a basis for imposing the exceptional sentence. The court noted it was "clear" that Harris "pled to the aggravating factor and he waived his right to a jury trial to find the aggravating factor." VRP at 131. The court then stated that its decision to impose an exceptional sentence was based "solely on the fact that there was a plea to an aggravating factor...." VRP at 132.

Harris does not contest his plea of guilty to the aggravating factor. He appears to argue only that his failure to sign the State's document summarizing the plea agreement somehow negates his express agreement to permit the court to review the certification to determine if it contained facts sufficient to support his plea of guilty to the aggravating factor. The argument is untenable and we reject it.

Because Harris pleaded guilty to the aggravating factor and consented to judicial determination of whether the facts set for in the certification for determination of probable cause were sufficient to establish the aggravating factor and because those facts, without the necessity of additional judicial fact-finding, support the trial court's conclusion that the aggravating factor was present, we affirm the exceptional sentence imposed in this case.[5]

Affirmed.

Specimen, C.J.

WE CONCUR:

[5]Harris also claims that he received ineffective assistance of counsel at trial because his attorney agreed or acquiesced to the exceptional sentence. Because we find that the trial court did not err, we decline to review the issue of ineffective assistance of counsel.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71408-2-I
	)	
LELAND HARRIS,	)	
	)	
Petitioner.	)	

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 5TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF AUGUST 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 05, 2015 - 3:01 PM

Transmittal Letter

Document Uploaded: 714082-Petition for Review.pdf

Case Name: Leland Harris
Court of Appeals Case Number: 71408-2

Party Respresented:

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
deborah.dwyer@kingcounty.gov