No. 45232-4

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FRANK S. BELLUE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE THOMAS LARKIN

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF FACTS ON REPLY

Mr. Bellue incorporates by reference the facts as presented in appellant's opening brief and adds the following, which include corrections to the State's statement of facts.

A. Officers' Entry Of the Motel Room Prior To Obtaining The Search Warrant

Officer Lopez testified on direct examination that officers entered the motel room *prior to* obtaining a search warrant. (Vol. 2RP 26). He also testified that he entered the motel room while Mr. Bellue and another officer were in the room. (Vol. 2RP 26-27; 38-39). After entry and seeing items around the room, he determined they needed a search warrant. (Vol. 2RP 27).

B. The Motel Room Search

Detective Canion testified that he entered the motel room *prior to* the detectives who were to conduct the search. (Vol. 3RP 218). He stated that when he entered the motel room he saw a police evidence bag set on a chair that contained the ripped up checks that had previously been on the floor near the garbage can. (Vol. 3RP 216-217). Prior to officers officially searching the motel room and collecting evidence, a forensic officer took pictures of the

room; she photographed a bag on the chair next to the garbage can. (Vol. 3RP 192-193; Vol. 4 RP 238-242).

C. Carlson Testimony

Ms. Carlson testified that she had used the card and ID and check of Ms. Sutter at the Target store. (Vol. 5RP 455). She also stated she went to Target on multiple occasions. (Vol. 5RP 455). She did *not* state that she used the Sutter ID on multiple occasions at Target.

D. Exceptional Sentence

Mr. Bellue was charged with and the jury was instructed on the aggravating circumstance of a major economic offense for 23 counts of second degree identity theft, 3 counts of unlawful possession of payment instruments, 2 counts of forgery, 1 count of unlawful possession of instruments of financial fraud and 1 count of possession of stolen property. (CP 85-86;593-94). For each of the above listed charges, the jury was instructed that he could be convicted as either a principal or an accomplice. (CP 76;571). The jury was also instructed that if it found Mr. Bellue guilty of leading organized crime, it must also determine whether the crime was a major economic offense. (CP 611).

In the jury instruction on major economic offense, the court gave the alternative means instruction that at least one of the factors must be proved beyond a reasonable doubt: either the crime involved multiple victims or multiple incidents per victim; or the crime involved a high degree of sophistication or planning or occurred over a lengthy period of time. (CP 85;594).

At the time the trial court imposed the exceptional sentence it stated:

> "I do believe there are aggravating circumstances in this case. This went on for a long period of time and involved a lot of different people and a lot of different victims…I think there are some exceptional circumstances, and I'm going to impose a sentence of 225 months. So that's 27 months above the high end." (Vol. 10RP 637-38).

In its oral ruling, the court made no mention of the "free crimes" aggravator. The judgment and sentence for each cause number (12-1-02120-3 and 12-1-04771-7) show the court imposed the exceptional sentence on counts 1-10 and 1-22, although count 22 was later vacated. (CP 451; 879;881).

On August 25, 2014, Appellant submitted a Motion to Strike references in the State's response brief to written findings of fact

and conclusions of law and the argument based on them that are not in the record before this Court.

II. ARGUMENT

A. Mr. Bellue Had A Reasonable Expectation of Privacy in The Motel Room Where He Stayed.

Mr. Bellue incorporates the arguments of his opening brief and adds the following.

In *Minnesota v. Carter,* 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998), the Court held that an overnight guest in a home may claim the protection of the Fourth Amendment.

> "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy…although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, *whether it be a hotel room* or the home of a friend." *Id.* at 89 (internal citations omitted; emphasis added).

In its response brief, the State cited several reasons why Mr. Bellue would not have a reasonable expectation of privacy in his motel room, but does not cite any legal authority. (Brief of Resp. at 28-29). The stated reasons are: first, Mr. Bellue was not a

registered guest of the motel because someone else rented the room for him; second, Mr. Bellue was scheduled to check out on the day the room was searched so his tenancy had ended; and finally, once police arrived, the motel manager told them that Mr. Bellue was no longer welcome on the property. (Brief of Resp. at 11,12, 28-29).

As argued in appellant's opening brief, Mr. Bellue was legitimately on the premises as an overnight guest. (Vol. 5RP 484-85). Contrary to the State's assertion, the evidence established that the motel owner told officers that a woman rented the room and stated that a male would be staying with her for a couple of nights. (Vol. 3RP 223). The officer testified the motel "did not have very good documentation". The documentation he saw consisted of a ruled sheet of paper with a signature name on it. There was no official "registration" card required of guests. (Vol. 3RP 222).

Aside from the fact there is no legal restriction on whether an agent can procure a motel/hotel room for another, the motel clerk had been informed a male would be staying there. The room had been paid for two nights. The key was under Mr. Bellue's constructive possession, his luggage found in the room, and he

spent two nights there. Mr. Bellue was a guest of the motel and maintained a constitutional right to privacy.

The second argument is that Mr. Bellue's tenancy had "expired" prior to the search. (Brief of Resp. at 29). The State presented no evidence at trial of a required checkout time.

Finally, the State has argued that there was no reasonable expectation of privacy because the motel manager told officers that Mr. Bellue, Ms. Carlson, Spencer Bellue, and Ms. Moore were no longer welcome at the motel. (Brief of Resp. at 29). The evidence, through Officer Hensley was as follows:

> "When there is suspected criminal activity at one of our motels, I want to be sure that whatever happens in the end, those people that were involved are gone and they're trespassed, meaning that we give them the warning that they cannot be on the property ever again; and if they come back, and we hear about it, we're going to arrest them for trespassing. And we work through ownership to do that." (Vol. 2RP 95).
>
> "Per the owner, I told Mr. Bellue that he and his group were going to be no longer welcome on that property and that if they ever returned they'd be arrested for trespassing." (Vol. 2RP 97-98).

Again, the facts establish that after police arrived the motel the owner decided to ban them as future guests. This does not diminish Mr. Bellue's reasonable expectation of privacy in the room that was paid for and which he was preparing to leave.

The facts of the case establish that officers entered the room and gathered initial evidence without a search warrant. Officer Wiley testified she took photos before officers did any searching under the warrant. (Vol. 4RP 238). She photographed a small bag on the chair next to the trash can. (Vol. 4RP 242). Detective Canion found the police evidence bag full of the ripped checks on top of a chair next to the trash can. (Vol. 3RP 190).

Mr. Bellue rests on the authorities in his opening brief to establish he had an expectation of privacy and the facts of the case which establish that right was violated by police by their own testimony.

B. THE STATE HAS TAILORED ITS RESPONSE ARGUMENT REGARDING THE EXCEPTIONAL SENTENCE TO MEET THE ERROR ASSERTED ON APPEAL.

Mr. Bellue incorporates the argument and authorities presented in the opening brief and adds the following.

In the opening brief the appellant assigned error to the major economic offense sentence enhancement, as the statute does not extend to convictions based on accomplice liability. (Brief of App. at 25); *State v. Hayes,* 177 Wn.App. 801, 806, 312 P.3d 784 (2013). In the response brief, the State has asserted that the sentencing court did not impose an exceptional sentence on 30 counts, but rather only on count 10 of cause number 12-1-02120-3. (Brief of Resp. at 42).

Reversal is warranted if a defendant can show actual prejudice from the lack of findings or remand for entry of findings. *State v. Pruitt,* 145 Wn.App. 784, 794, 187 P.3d 326 (2008), (citing *State v. Head,* 136 Wn.2d 619, 624, 964 P.2d 1187 (1998)). The defendant may show prejudice by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief. *Id.* The burden of proving any such prejudice is on the defendant. *Id.*

Here, the trial court had not entered written findings of fact and conclusions of law with respect to the exceptional sentence at the time of the filing of appellant's brief.[1] Disregarding any

[1] Appellant has made a motion to strike the references in respondent's brief to written findings of fact and conclusions of law. They were

reference to matters outside the appellate record, the State's argument that the sentencing court did not base the exceptional sentence on all 30 counts is wrong. The judgment and sentence for both causes listed the exceptional sentence was being imposed for all counts. (CP 451;879). Additionally, in its oral ruling the sentencing court never once mentioned the "free crimes" circumstance as a basis for the exceptional sentence. (Vol. 10RP 636).

This is a classic example of tailoring to counter the issue raised on appeal and therefore, reversal is warranted. Mr. Bellue respectfully asks this Court to reverse the exceptional sentence. *Head,* 136 Wn.2d at 624.

C. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION FOR LEADING ORGANIZED CRIME.

Mr. Bellue rests on the authority and argument in his opening brief with addition of the following.

In its response brief, the State has argued that the opinion in *Strohm* with respect to leading organized crime was *dicta.* (Brief of Resp. at 46). *State v. Strohm,* 75 Wn.App. 301, 879 P.2d 962

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entered after the appellant's opening brief was filed, and the State did not supplement the appellate record.

(1994). The State relied on the opinions in *Lindsey* and *Owens.* *State v. Lindsey,* 177 Wn.App. 233, 243, 311 P.3d 61 (2013) and *State v. Owens,* 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

The *dicta* to which *Lindsey* and *Owens* refer was that the issue in *Strohm* "was not the number of alternative means described in former RCW 9A.8s.050(2) [1984], but that former RCW 9A.82.020(10) [1994], which defined "traffic", listed several alternative means of trafficking in stolen property in addition to the means stated in former RCW 9A.82.050(2)." *Owens,* 180 Wn.2d at 98. Both *Lindsey* and *Owens* were concerned with trafficking in stolen property. The *dicta* had nothing to do with the charge of leading organized crime.

In *Hayes,* the Court reversed the conviction for leading organized crime, but made a point of showing the proper analysis of the issue. *State v. Hayes,* 164 Wn.App. 459, 474, 262 P.3d 538 (2011). The Court very clearly stated that leading organized crime, as charged in that case, had five alternative means: the defendant must intentionally, and with the intent to engage in a pattern of criminal profiteering activity, (1) organize, (2) manage, (3) direct, (4) supervise, or (5) finance three or more persons. *Id.*

Mr. Bellue was similarly charged, and in appellant's opening brief, pointed out there was no evidence that he financed, organized, managed, directed, or supervised three or more people with the intent to engage in a pattern of criminal profiteering.

III. CONCLUSION

Based on the foregoing facts and authorities as well as the facts and authorities contained in appellant's opening brief, Mr. Bellue respectfully asks this Court to reverse his convictions and sentence, and dismiss with prejudice.

Respectfully submitted this 25th day of August, 2014.

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DIVISION II

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I, Marie J. Trombley, attorney for Appellant FRANK S. BELLUE, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the APPELLANT'S REPLY BRIEF was sent by first class mail, postage prepaid on August 25, 2014, to

FRANK S. BELLUE, DOC # 293538
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and by electronic service per prior agreement between the parties to:

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