

+

NO. 48143-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY ALLEN WING,

Appellant.

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

The Honorable Nelson Hunt, Judge

REPLY BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

Page

ARGUMENT..... 1

1. Giving a child to an acquaintance and signing a document characterizing the acquaintance as the child’s guardian does not create a “family or household members” relationship. As such, a crime committed by one against the other is not properly characterized as domestic violence...... 1

2. The state-acknowledged incorrect offender score calculation and standard range sentence representation makes Wing’s guilty plea involuntary...... 3

3. The state’s breach of the Proffer Agreement requires remand and allows Wing his choice of remedies...... 5

CONCLUSION 6

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Page

Cases

In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) 5

Berg v. Hudesman, 115 Wn.2d 667, 801 P.2d 222 (1990) 6

State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006) 5

State v. Turley, 149 Wn.2d 395, 69 P.3d 338 (2003)..... 5

Statutes

RCW 10.99.020(3)..... 2, 3

RCW 10.99.020(5)..... 1

RCW 26.26.101 3

ARGUMENT

- 1. Giving a child to an acquaintance and signing a document characterizing the acquaintance as the child's guardian does not create a "family or household members" relationship. As such, a crime committed by one against the other is not properly characterized as domestic violence.**

Wing's first argument on appeal is the state failed to plead and prove the two offenses to which Wing pleaded guilty qualify under RCW 10.99.020(5) as domestic violence offenses. Section 2.1 of Wing's judgment and sentence improperly characterizing finding to the contrary was error and should be stricken.

In Respondent's Brief, the state offers two responses.

First the state argues Wing stipulated the crimes were domestic violence. Respondent's Brief at 15. This is untrue. In his statement of defendant on a plea of guilty, Wing characterizes the child, JHW, as "a member of my household." CP 17. When taking Wing's plea, the court repeated the "member of my household" language from Wing's guilty plea form. RP 3/18/15 at 10-11. But simply sharing a household does not satisfy the statutory requirements for qualification as domestic violence.

By statute, a crime does not qualify as domestic violence unless the crime is committed by "one family or household member against another."

RCW 10.99.020(3). The definition of “family or household member” is both specific and limited. “Family or household member” are only

- spouses
- former spouses
- persons who have a child in common regardless of whether they have been married or have lived together at any time
- adult persons related by blood or marriage
- adult persons who are presently residing together or who have resided together in the past and who have or have had a dating relationship
- persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and
- persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(3). Wing’s relationship with JHW fits none of these criteria. As such, the characterization of the crimes as domestic violence is simply wrong.

The state's second response to Wing's argument is that any time a person entrusts their child to even a temporary caregiver, that establishes a "legal parent-child" relationship. Brief of Respondent at 16. The state's theory sweeps much too broadly and devalues the term "legal parent-child relationship" to the point of meaninglessness. Under the state's theory, a playground monitor, a school bus driver, a 10-year old babysitter, or the neighbor who is watching your child while you run to the store, has the same standing as the person identified by law as biological, adoptive, step, or adjudicated parents. See RCW 26.26.101.

Lack of the ability to characterize a crime under the umbrella of domestic violence does not mean crimes go unpunished. Here the state can proceed against Wing for assaulting JHW or recklessly causing JHW's death. What the state cannot do is improperly label the crime as "domestic violence." RCW 10.99.020(3).

The state did not, and can not, prove domestic violence in this case. Section 2.1 of the judgment and sentence stating that the state "proved" domestic violence is in error and must be stricken.

2. The state-acknowledged incorrect offender score calculation and standard range sentence representation makes Wing's guilty plea involuntary.

Wing maintains both the calculation of the offender score and the standard range on the first degree manslaughter was incorrectly calculated.

Under Issue I, neither of Wing's two convictions were domestic violence. Correctly scored his offender score is 5 and not 6.

Significantly, the state concedes error and misrepresentation of the offender score and standard range on count two, assault of a child in the third degree. The invalid score does not depend upon the improper domestic violence mischaracterization.

Wing argues correctly that he may withdraw his guilty plea because miscalculated offender scores made his plea not knowing, intelligent, or voluntary. The state did not prove either offense was domestic violence. Under any interpretation of the facts in the record, the crimes were not domestic violence because the relationship between Wing and JHW did not meet the criteria of family or household members.

The state concedes Wing relied on a miscalculated offender score in pleading guilty to Count II but argues it does not matter because the two crimes ran consecutive thus there was not harm to Wing. Brief of Respondent at 23. The state cites no authority to support its theory. The law is contrary to the state's position. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002). When a defendant shows manifest injustice on one charge in an indivisible plea agreement, he may move to

withdraw the agreement. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). An indivisible plea agreement is a “package deal.” *State v. Bisson*, 156 Wn.2d 507, 519, 130 P.3d 820 (2006). Wing may withdraw his plea on both counts.

3. The state’s breach of the Proffer Agreement requires remand and allows Wing his choice of remedies.

Wing’s third issue is the state breached the plea agreement by advocating for sentencing aggravators and not sentencing enhancements contrary to the written Proffer Agreement. Sentencing enhancements were the only sentencing options in the plea agreement which would allow the court to exceed a standard range sentence. When Wing did not abide by certain polygraph conditions of the plea agreement, the state, contrary to the Proffer Agreement, advocated for aggravating factors to exceed the standard ranges.

Wing stands by the argument in the Corrected Brief of Appellant arguing still that the state breached the plea agreement by advocating for sentencing enhancements in violation of the Proffer Agreement.

In its reply to this issue, the state asks this court to apply the “context rule” articulated in *Berg v. Hudesman*, 115 Wn.2d 667, 801 P.2d 222 (1990) to the plea agreement, and claims that under the context rule, defense counsel used the words enhancement and aggravating factor at the

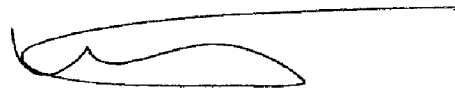
guilty plea and at sentencing putting Wing on notice that what was really meant in the Proffer Agreement was aggravating factors could increase Wing's standard range sentences. Brief of Respondent at 12.

The "context rule" is used merely "as an aid in ascertaining the parties' intent" in civil contract disputes. *Berg*, 115 Wn.2d at 667. It has not application in Wing's criminal case.

CONCLUSION

Wing's case should be remanded to the trial court for Wing to elect his remedy. Regardless of the chosen remedy, any reference to the offenses as domestic violence should be stricken because no factual basis supports a domestic violence claim.

Respectfully submitted October 3, 2016.



LISA E. TABBUT/WSBA 21344

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov and (3) I mailed it to Danny Allen Wing/DOC# 326805, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 3, 2016, in Winthrop, Washington.

/s/ Lisa E. Tabbut

Lisa E. Tabbut, WSBA No. 21344
Attorney for Danny Allen Wing, Appellant

LISA E TABBUT LAW OFFICE

October 03, 2016 - 4:50 PM

Transmittal Letter

Document Uploaded: 4-481430-Reply Brief.pdf

Case Name: State v. Danny Wing

Court of Appeals Case Number: 48143-0

Is this a Personal Restraint Petition? Yes No

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: Reply

Statement of Additional Authorities

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: Lisa E Tabbut - Email: ltabbutlaw@gmail.com

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

appeals@lewiscountywa.gov

sara.beigh@lewiscountywa.gov