

NO. 36276-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,  
Respondent,  
v.  
SHANE NULF,  
Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

APPELLANT'S REPLY BRIEF AND  
SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR<sup>1</sup>

The trial court improperly sentenced Mr. Nulf to a term of imprisonment and period of community custody that exceeds the statutory maximum.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

A sentencing court may not impose a sentence exceeding the statutory maximum, including the imposition of a term of imprisonment and community custody that together exceeds the maximum term permitted by statute. The statutory maximum for a Class C felony is five years, but Mr. Nulf received a sentence of 54 months incarceration as well as nine to 18 months community custody, for a total minimum of five years and three months with a maximum of 72 months, or six years. Should this Court vacate the unlawful sentence and remand for resentencing?

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<sup>1</sup> A motion asking permission to file a supplemental assignment of error is being filed simultaneously with the Reply Brief.

C. ARGUMENT.

1. MR. NULF'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM AND MUST BE REVERSED AND REMANDED FOR IMPOSITION OF A LAWFUL SENTENCE

"A trial court only possesses the power to impose sentences provided by law." In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.505(5) provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4) a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

The plain language of this statute bars a court from imposing a total term of confinement plus community custody which exceeds the statutory maximum for the offense. State v. Zavala-Reynoso, 127 Wn.App. 119, 123, 110 P.3d 827 (2005).

When the combined total of a defendant's community custody term and standard range sentence exceeded the statutory maximum term, this Court must vacate the sentence and remand for resentencing. Id. at 124. Alternatively, the trial court may impose community custody that could exceed the statutory maximum sentence for an offense, but must set forth the maximum sentence in the judgment and sentence and order that the total of

incarceration and community custody cannot exceed that maximum. State v. Sloan, 121 Wn.App. 220, 223-24, 87 P.3d 1214 (2004).

Here, Nulf was convicted of a Class C felony, for which the statutory maximum is five years. RCW 26.50.110(4); RCW 9A.20.021(1)(c); CP 1-2. Yet his total combined sentence exceeds the statutory maximum of 60 months. CP 47-48. The Judgment and Sentence contains no notation that any continuation of community custody beyond five years is unlawful. CP 44-52. Without a notation on the Judgment and Sentence stating that the duration of confinement plus the term of community custody shall not exceed the five year statutory maximum, the judgment and sentence is facially invalid and must be corrected on remand. Zavala-Reynoso, 127 Wn.App. at 124; Sloan, 121 Wn.App. at 224.

2. THE STATE CITES NO FACTS IN EVIDENCE  
DEMONSTRATING ITS PROOF OF VENUE

The prosecution concedes it was required to prove the offense occurred in Grays Harbor County but points to nowhere in the record that it established the charged offense occurred in this county. Respondent's Brief at 2, 4.

The prosecution asserts that "Alfredson Road" is in Grays Harbor but cites no authority for this proposition. Resp. Brf. at 4. Even if the location of "Alfredson Road" is something that could be only in Grays Harbor County, three witnesses gave differing descriptions of the location of the incident. Barrie Christman said the incident was at "30 Elkinson Road." 1RP 18. Lieutenant David Porter said he responded to "Aldolfsen Road off of State Route 12." 1RP 35. Only Officer Eric Cowsert said he responded to, "Alfredson Road." 1RP 48. The county in which the incident occurred was simply not established by reasonable evidence.

The prosecution further argues that State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1988), is inapposite because the offense in Hickman occurred in several different places and the prosecution did not establish that the crux of the crime occurred in the county listed in the "to convict" instruction. But this effort to distinguish Hickman is misplaced. Hickman was certainly based on a different set of facts than the case at bar, but the legal principle is identical. The prosecution took on the obligation to prove the offense occurred a specific county in the "to convict" instruction and yet failed to offer proof of the county in which the offense occurred. 135 Wn.2d at 102, 105-06. A jury is only permitted to make

reasonable inferences from the evidence, not to speculate that a certain road must be in a certain county. See State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972) (“the existence of a fact cannot rest on mere guess, speculation, or conjecture.”). A fact is proven only if, when viewed in the light most favorable to the prosecution, it attains “that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” Id.

The prosecution’s response brief essentially concedes that the State offered no factual support for establishing the county in which the offense occurred, and accordingly, the conviction must be dismissed due to insufficient evidence. Hickman, 135 Wn.2d at 103.

3. THE STATE PROPERLY CONCEDES THE CONFRONTATION CLAUSE VIOLATION BUT MISREPRESENTS THE FUNDAMENTAL IMPORTANCE OF THE UNCONFRONTED TESTIMONY

The prosecution correctly concedes that it violated Mr. Nulf’s Sixth Amendment right of confrontation by eliciting statements that the complaining witness made to a police officer when the complainant did not testify at trial. Resp. Brf. at 5. However, the prosecution’s harmless error analysis is misplaced, as it overlooks

the issue on which the statement was particularly prejudicial and probative.

Mr. Nulf was not arrested at the scene of the offense and the one eyewitness had a limited opportunity to observe the perpetrator, who remained inside a car throughout the incident. 1RP 19-21. In order to establish Mr. Nulf was the person responsible for the offense, Lieutenant Porter explained he arrested Mr. Nulf only after the complainant verified that the owner of the car, i.e. Mr. Nulf, was the perpetrator. 1RP 36.

This testimony was critical to the prosecution's case. It provided the only verification from the victim that she named Mr. Nulf as the perpetrator. Because it was evidence obtained from the complainant herself, rather than a bystander who had a limited opportunity to observe, the police officer's recitation of the complainant's out of court statements was an important link in the prosecution's case.

The improperly admitted statements in violation of Mr. Nulf's right of confrontation are harmless only if the State proves beyond a reasonable doubt they did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684,

106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”). Because the unfronted evidence involved an essential part of the case against Mr. Nulf, the State has not proven the violation of Mr. Nulf’s confrontation right was harmless beyond a reasonable doubt.

4. THE STATE MISREPRESENTS THE LEGAL AND FACTUAL STANDARD FOR A MISSING WITNESS INSTRUCTION

The prosecution contends that it had less of a community of interest with the complainant than Mr. Nulf, and therefore no missing witness inference would be appropriate. Conspicuously absent from the State’s argument is any acknowledgement that the existing no contact order would bar Mr. Nulf from contacting the complainant or from asking anyone to contact her on his behalf. See e.g., State v. David, 118 Wn.App. 61, 67, 74 P.3d 683 (2003), reversed on other grounds, 160 Wn.2d 1001 (2007) (victim of domestic violence not accessible to defense counsel because of domestic violence allegations).

Furthermore, the State admitted that it did not believe the complainant would testify favorably to its case and even though she was on its witness list, it did not really intend to call her to testify. 1RP 103-04. The State had not served Ms. Moore with a subpoena, contrary to the implication in its response brief. Resp. Brf. at 8. It only attempted personal service and gave no explanation as to how often it tried or how extensive its efforts. 1RP 105. The prosecution did not attempt any other means of serving a subpoena or ask for a material witness warrant. See CR 45 (describing mechanisms for serving subpoena); CrR 4.8 (civil rules apply to service of subpoena); see also State v. DeSantiago, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003) (finding service by mail combined with statements from family members that witnesses moved away adequate to show reasonable efforts made to secure witness testimony).

The State asserts on appeal that the complainant had “outstanding warrants” but the prosecutor told the trial court there was one unspecified warrant on a misdemeanor or district court matter. 1RP 105. The prosecution did not claim that any police officer had ever tried to find her to serve the warrant, that she even knew about the warrant, or that the warrant involved anything more

a small fine or other easily disposed of issue. Based on the absence of evidence the prosecution tried to locate the complaining witness by more than a single attempt to serve a subpoena, the prosecution did not demonstrate that it made reasonable efforts to find the complainant or that the reason she did not testify was not due to the fact that her testimony would not have been favorable to the prosecution's case. The complainant was on the State's witness list and Mr. Nulf had no responsibility to subpoena her himself.

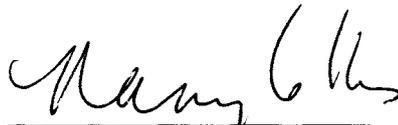
The court's unfounded refusal to provide a missing witness instruction denied Mr. Nulf a fair trial, as discussed in more detail in Mr. Nulf's Opening Brief.

D. CONCLUSION.

For the reasons stated herein and in Appellant's Opening Brief, Mr. Nulf asks this Court to reverse his conviction and dismiss for insufficient proof. Alternatively, he asks for a new trial based on the violation of the Sixth Amendment and the failure to properly instruct the jury regarding the missing witness, as well as further sentencing proceedings to correct the unlawful term imposed.

DATED this 5<sup>th</sup> day of February 2008.

Respectfully submitted,



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