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Division II  
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No. 53141-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Todd Marjama,**

Appellant.

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Clark County Superior Court Cause No. 16-1-01399-6

The Honorable Judge Gregory M. Gonzales

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Marjama's exceptional sentence was imposed in violation of his right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
2. The State presented insufficient evidence to prove beyond a reasonable doubt that the offense occurred within sight or sound of the victim's "minor children."

**ISSUE 1:** For purposes of an exceptional sentence, the State was required to prove that the offense occurred within sight or sound of the victim's or the offender's "minor children." Was the evidence insufficient to prove beyond a reasonable doubt that the crime occurred within sight or sound of more than one child?

3. The court's instructions relieved the State of its burden to prove the essential elements of the "sight or sound" aggravating factor.
4. The court's instructions permitted jurors to find the "sight or sound" aggravating factor even if the offense did not occur within sight or sound of more than one minor child.
5. The trial court erred by giving Instruction No. 29.

**ISSUE 2:** The elements instruction for an aggravating factor must include every essential element required for imposition of an exceptional sentence. Did the court's instructions relieve the State of its burden to prove that the offense occurred within sight or sound of the victim's "minor children"?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

After threatening to commit suicide, Todd Marjama accidentally shot himself in the hand. The bullet traveled through a closed bathroom door, killing his wife. His infant daughter A.K.M., who was in the bathroom, was unharmed. Mr. Marjama was convicted of manslaughter.

The State alleged that the offense was committed “within sight or sound of the victim’s or the offender’s minor children.” To prove this aggravating factor, the prosecution focused on A.K.M.’s presence in the bathroom. Instead of instructing jurors using the statutory language (which requires the presence of minor children), the court told jurors to return a special verdict if the offense was committed within the sight or sound “of the victim’s child.” CP 172.

The evidence was insufficient to prove the aggravating factor beyond a reasonable doubt. The State failed to prove that the offense occurred within the sight or sound of “minor children;” instead, it proved proximity to only a single child.

In addition, the court’s instructions relieved the State of its burden to prove an essential element of the aggravating factor. Jurors were instructed to return a “yes” verdict even if the State failed to prove that the offense occurred within sight or sound of “minor children.”

The aggravating factor must be vacated, and the case remanded for sentencing within the standard range. In the alternative, the case must be remanded for a jury trial on the aggravating factor.

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Todd Marjama met and married his wife Amanda when they were both still in their teens. RP 1307. Not long after, Mr. Marjama joined the Army. He trained for airborne deployment and was sent to Afghanistan. RP 1313-1317; CP 27. He served on a heavy weapons team, and was hit by a rocket. He sustained multiple injuries, including traumatic brain injury. RP 1318-1324; CP 31.

Despite his injuries, Mr. Marjama remained committed to military service and reenlisted. RP 1324. He was sent to Kuwait as a trainer, but due to his disabilities, he could not complete his service. CP 27. He was honorably discharged with 60% disability in 2014. RP 1325-1328; CP 27.

For his service, Mr. Marjama earned multiple awards, medals, badges and commendations, including a Purple Heart, an Afghanistan Campaign Medal with two campaign stars, and an Army Achievement medal. CP 27.

The Marjamas had three children by 2016. RP 1328. They also had significant marital problems and did not reside together. RP 1331-1340.

On June 28, 2016, Mr. Marjama was at the house spending time with his children. When she got home from work, the still-married couple argued about the future of their relationship. RP 1353-1361. Their children were with their uncle, Donny Bestpitch, who also lived in the house. RP 598-618. As they talked, Amanda Marjama went into the master bathroom. RP1373. Mr. Marjama got out his gun, a firearm on which he had not trained on in his military service. RP 1329-1330.

Mr. Marjama threatened suicide and hoped his wife would talk him down as she had done many times before. RP 1348-1352, 1386-1388. Mr. Marjama had calmed some and moved to decock his gun when it went off. RP 1373-1381, 1422-1464. The gun sent a bullet through Mr. Marjama's hand and into the closed bathroom door. RP 1398-1417. Mr. Marjama didn't know until much later, but his wife was struck in the head and died from the single gunshot. RP 1398-1400, 1418. Also unknown to Mr. Marjama, Amanda Marjama was holding their baby in the bathroom when she died. RP 1373-1375, 1418-1419.

The State charged Mr. Marjama with first degree murder, but the jury did not convict him of that charge.<sup>1</sup> CP 1, 126, 173. Mr. Marjama presented an accident defense and acknowledged that he was reckless in his efforts to decock the gun. RP 1037-1501, 1657-1704. The jury convicted him of first degree manslaughter. CP 174.

The State also charged a firearm enhancement, a domestic violence enhancement including the allegation that the offense occurred in sight or sound of minor children. CP 1. While the Information indicated *children*, the instruction given to the jury indicated the enhancement applied if it was in sight or sound of the victim's *child*. CP 126, 172. The jury returned a "yes" verdict to the question of whether the offense was an aggravated domestic violence offense. CP 180.

Mr. Marjama had no criminal history. CP 254. The trial court issued an exceptional sentence above the standard range of 198 months, based on the jury's finding. CP 254.

Mr. Marjama timely appealed. CP 251.

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<sup>1</sup> Another count of first degree assault was charged, and did not lead to conviction. CP 4, 127, 176.

## ARGUMENT

### **I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE OFFENSE OCCURRED WITHIN SIGHT OR SOUND OF “MINOR CHILDREN.”**

Before an exceptional sentence may be imposed, the State must prove the elements of an aggravating factor beyond a reasonable doubt. U.S. Const. Amends. VI and XIV; *State v. Joseph*, 3 Wn.App.2d 365, 416 P.3d 738 (2018), *review denied*, 191 Wn.2d 1022, 428 P.3d 1176 (2018). Failure to do so precludes retrial on the aggravating factor. *See State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018).

Here, the State sought an exceptional sentence, but failed to prove the elements of the “sight or sound” aggravating factor beyond a reasonable doubt. The exceptional sentence must be vacated, and the charge remanded for sentencing within the standard range.

An exceptional sentence may be imposed for any domestic violence offense that “occurred within sight or sound of the victim’s or the offender’s minor children under the age of eighteen years.” RCW 9.94A.535(3)(h)(ii). Here, the State alleged that Mr. Marjama’s offense occurred under these circumstances. CP 126.

At trial, the evidence focused on only one child, A.K.M., who was present at the time the gun discharged. RP 555-1076, 1657-1704. The

State presented evidence that A.K.M. was in the bathroom when Mr. Marjama accidentally shot his wife. RP 555-582.

This evidence was insufficient to prove that the offense occurred within sight or sound of “minor children,” as required to prove the elements of RCW 9.94A.535(3)(h)(ii). Although the couple had two other children, no evidence was introduced to prove that the offense occurred within sight or sound of those other children. RP 555-1076. In closing, the prosecutor focused exclusively on A.K.M.’s presence to prove the “sight or sound” aggravating factor.<sup>2</sup> RP 1657-1704.

Because the evidence was insufficient, the exceptional sentence must be vacated. *Joseph*, 3 Wn.App.2d at 369. The case must be remanded for sentencing within the standard range. *Id.*

**II. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT THE OFFENSE OCCURRED WITHIN SIGHT OR SOUND OF “MINOR CHILDREN.”**

It is reversible error to instruct jurors in a manner that relieves the State of its burden to prove the essential elements of an offense. U.S. Const. Amend. XIV; *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). Any fact<sup>3</sup> that increases the penalty for an offense is an element of

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<sup>2</sup> This is not surprising, as the court’s instructions required only proof that the offense occurred within sight or sound of the victim’s “minor child.” CP 172.

<sup>3</sup> Other than the fact of a prior conviction. *Allen*, 192 Wn.2d at 534.

that offense which must be proved to the jury beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; *Allen*, 192 Wn.2d at 534, *Joseph*, 3 Wn.App.2d at 369.

To prove the charged aggravating factor in this case, the State was required to establish beyond a reasonable doubt that the offense occurred within sight or sound of the victim's "minor children." RCW 9.94A.535(3)(h)(ii). Instead of instructing in the language of the statute, the court allowed the jurors to return a verdict against Mr. Marjama if they found that the offense "was committed within the sight or sound of the victim's *child*." CP 172 (emphasis added).

The statute requires proof that the offense occurred in the presence of "minor children." RCW 9.94A.535(3)(h)(ii). The court's instruction relieved the State of its burden to prove this element.

In the absence of a jury finding on all facts required to increase the penalty, the exceptional sentence violated Mr. Marjama's right to due process and his right to a jury trial. *Blakely v. Washington*, 542 U.S. 296, 313, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Given the deficiency in the court's instructions, the jury's verdict did not authorize the enhanced penalty imposed by the sentencing court. *Id.*

The exceptional sentence must be vacated, and the case remanded to the trial court. If the State wishes to pursue an exceptional sentence, it

must ask the court to empanel a jury for a new trial on the “sight or sound” aggravating factor. *See* RCW 9.94A.537(2).

### **CONCLUSION**

Before an exceptional sentence may be imposed under RCW 9.94A.535(3)(h)(ii), the State must prove that the offense occurred within sight or sound of the victim’s or the offender’s “minor children.” Here, the State relied on the presence of a single child to prove the aggravating factor. The evidence was insufficient to prove that the offense occurred within sight or sound of minor children. Because of this, Mr. Marjama’s exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

In addition, the court’s instructions relieved the State of its burden to prove that the offense occurred within sight or sound of “minor children.” The exceptional sentence must be vacated, and the case remanded to the trial court. If the Court of Appeals determines that the evidence would have been sufficient under proper instructions, and the State elects to seek an exceptional sentence, the court must empanel a new jury and provide proper instructions in the language of the statute.

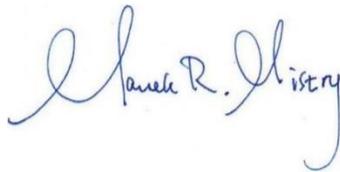
Respectfully submitted on July 22, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on July 22, 2019.



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## Transmittal Information

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