

FILED

NOV 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28619-3-III

IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

ROY A. WELCH

Appellant

BRIEF OF RESPONDENT

Mr. Tim Rasmussen
Prosecuting Attorney
Stevens County

Shadan Kapri
Deputy Prosecuting Attorney
Attorneys for Respondent

Stevens County Prosecutors Office
215 S. Oak Street
Colville, WA
(509) 684-7500

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I.

APPELLANT'S ASSIGNMENT OF ERROR

- (1) The trial court erred in admitting Exhibit 48.
- (2) The trial court erred in failing to grant a motion for a mistrial or continuance in regards to Exhibit 49 and 50 during the trial proceedings.
- (3) The jury instruction regarding the aggravating factors related to the vacating of the enhancement was in error.
- (4) The trial court erred in sentencing Mr. Welch to a sentence enhancement pursuant to RCW 9.94A.535(3)(d).
- (5) The trial court erred by making conclusions of law beyond those allowed by the jury's findings of fact in imposing an exceptional sentence.
- (6) The trial court erred in imposing restitution in the amount of \$43,219.00

II.

ISSUES PRESENTED

- (1) The trial court did not abuse its discretion in admitting Exhibit 48.
- (2) The trial court did not abuse its discretion in denying a mistrial or a continuance.
- (3) The Appellant has waived the issue of jury instructions on appeal and failed to show any prejudicial error regarding the jury instructions connected to the aggravating factor.
- (4) Statutorily the court did not error in sentencing the Appellant to a sentence enhancement pursuant to RCW 9.94A.535(3)(d)(iv).

- (5) The trial court's findings of fact and conclusions of law supported the imposition of an exceptional sentence under statutory authority and Washington case law.
- (6) The trial court's imposition of restitution was in accordance to statutory authority vested in the trial judge.

III.

STATEMENT OF THE CASE

For the purposes of this appeal the State accepts the Appellant's Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT 48.

The Appellant argues on appeal that the trial court improperly admitted EX 48 as a business record exception to the hearsay rules under RCW 5.45.020. Mr. Welch further argues that the trial court violated the Appellant's right of confrontation by admitting EX 48 without calling the bookkeeper, Jennifer Payton, to testify. Mr. Welch argues this was not a harmless error.

Decisions regarding the admission of exhibits as evidence are within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997). "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *Castellanos*,

132 Wn.2d at 96 citing *State v. Huelett*, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979). The standard to find an abuse of discretion is when a trial court's reasoning is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Kleist*, 126 Wn.2d 432, 436, 895 P.2d 398 (1995).

The trial judge admitted EX 48 as a business record exception and provided ample legal justifications and case law supporting this decision. (Report of Proceedings, p. 143) On the record, the trial judge explains that he based his ruling on "*State v. Smith*, 16 Wn. App. 425 and *State v. Ben-Neth*, 34 Wn. App. 600." (RP 143) Specifically the trial judge stated that according to his own legal research conducted the night before he found that

'Computer printout data made under general supervision of witness.' Summary of certain data from printouts were admissible and copies of certain business records were admissible.

In a prosecution for issuance of false checks bank officials were qualified to lay a foundation for the introduction of computer printouts of the defendant's bank transactions. Even though the officials lacked a detailed understanding of the bank's computer system the court stated that potential errors in the record went to the credibility of the evidence, not its admissibility, a point I [the trial judge] made yesterday when we were talking.

So, I rule here, then, that Mr. Hoffman supervised the preparation of the report, and he then – the report itself would be a business record that could be admitted.

(RP 143)

Furthermore, Mr. Hoffman testified on the record that he was overseeing the people operating the QuickBooks system. (RP 162) Mr. Hoffman also testified that he was aware of or had knowledge regarding how

the information was entered and stored in QuickBooks. (RP 163) In *State v. Smith*, 16 Wash. App. 425, 558 P.2d 265 (1976), the trial court admitted an exhibit prepared by a bank employee from computer printouts. A bank vice-president and not the employee furnished the foundation testimony. *State v. Smith*, 16 Wash. App. 425, 558 P.2d 265 (1976). The vice-president was considered to have supervised the preparation and recordation of all the bank's records, and therefore to be a qualified foundation witness. *State v. Smith*, 16 Wash. App. 425, 558 P.2d 265 (1976).

In *State v. Kane*, 23 Wash. App. 107, 594 P.2d 1357 (1979), a bank branch officer who had prepared a trial exhibit from computer printouts of account records was considered to be their custodian and therefore a qualified foundation witness.

Therefore, case precedent demonstrates that Washington courts have shown that the confrontation clause is not an issue when a proper foundation is provided when admitting computer printouts or exhibits in such cases. See *State v. Kane*, 23 Wash. App. 107, 594 P.2d 1357 (1979); *State v. Smith*, 16 Wash. App. 425, 558 P.2d 265 (1976).

The trial judge also ruled in accordance with precedent when he explained that the U.S. Supreme Court case of *Mendez-Dias v. Massachusetts* did not apply. (RP 190 – 192) Specifically, the trial judge explained that this case did not fall under the type of legal proceedings dealt with by the U.S. Supreme Court in cases involving crime labs or DNA labs that fall under the

Mendez-Dias decision. (RP 191) Instead, this is a commercial real estate case where the information is purely non-analytical. (RP 192) In other words, the pertinent information is whether the checks were written or not. (RP 192) It is not an analytical interpretation of the evidence. (RP 192) Therefore, the confrontation clause problems do not arise in this type of fact-driven, non-analytical case. (RP 190 – 191) Based upon the record and the trial judge’s extensive reasoning it is clear that the court exercised its discretion based upon tenable grounds and reasons. (RP 143 – 192); *State v. Kane*, 23 Wash. App. 107, 594 P.2d 1357 (1979); *State v. Smith*, 16 Wash. App. 425, 558 P.2d 265 (1976).

**B. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING A MISTRIAL OR A
CONTINUANCE.**

The Appellant assigns error to the trial judge’s denial of a mistrial or a continuance based upon the admission of EX 49 and 50. A trial court’s decision to deny a motion for mistrial is reviewed for an abuse of discretion. *State v. Jackson*, 150 Wash.2d 251, 276, 76 P.3d 217 (2003). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. *State v. Allen*, 159 Wash.2d 1, 10, 147 P.3d 581 (2006).

Ironically, in the Report of Proceedings 148 and 149, the record shows that the State did not move to enter EX 49 and 50 into the record. (RP 148 – 149) **The Appellant’s attorney, Mr. Phelps, asked the court to enter these exhibits into the record.** (RP 148 – 149) The prosecutor did not seek to admit these exhibits as Mr. Phelps himself expressed on the record. (RP 149, Line 20 and 21)

The prosecutor clearly stated in the transcript:

“Now, to be clear, thought, I’m not moving to admit these as evidence. The only purpose I brought them in – and asked Mr. Hoffman to bring them in – is to address the concerns of Mr. Phelps as to his cross examination and having the right of confrontation, saying, ‘Is this persona a qualified witness to actually answer the questions of the veracity of these statements.’ And so I’m not asking to admit these statements, these – reports, I should say.”

Court: 49 and 50

Prosecutor: Yeah”

(RP 151 – 152)

The prosecutor had brought them for the purposes of allowing the witness to refresh his memory. (RP 151 – 152) The Appellant cites to no case law where a defense counsel asks for the admission of exhibits on the trial court level and then argues on appeal that it’s an abuse of discretion for the trial judge to grant defense counsel’s request, and then fail to give a mistrial or continuance resulting from his request to admit the exhibits.

The prosecutor clearly did not ask EX 49 or 50 to be entered. (RP 151 – 152) They were entered at defense counsel’s request. (RP 148 – 152) Therefore, the State believes that the issue is waived on appeal pursuant to RAP 2.5(a).

Nevertheless, the Appellant has failed to show that the trial judge abuse his discretion in granting defense counsel’s request and then ruling that EX 49 and 50 were based upon EX 48 (which defense counsel had adequate access to) and therefore, the motion for a mistrial and continuance where denied pending the hearing on the reliability of EX 48. (RP 152 – 153)

Specifically, the judge stated that

“I’m going to deny your motion for a mistrial, deny your motion for any remedy, other than to give you an opportunity to look at the report that’s been generated here, and we’re going to do that to address this question of reliability or trustworthiness of the exhibit. So, I think that’s only fair that we do that.

(RP 141)

C. APPELLANT HAS WAIVED THE ISSUE OF JURY INSTRUCTIONS ON APPEAL AND FAILED TO SHOW PREJUDICIAL ERROR REGARDING THE JURY INSTRUCTION RELATED TO THE AGGRAVATING FACTOR.

Our Washington Supreme Court has **consistently** held that “jury instructions not objected to become the law of the case.” *State v. Hames*, 74 Wash.2d 721, 725, 446 P.2d 344 (1968) (“The foregoing instructions were not excepted to and therefore, became the law of the case.’ ” quoting *State v.*

Leohner, 69 Wash.2d 131, 134, 417 P.2d 368 (1966)); *State v. Salas*, 127 Wash.2d 173, 182, 897 P.2d 1246 (1995).

This is a well-established “doctrine with roots reaching back to the earliest dates of statehood.” *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998) (quoting *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) and *Peters v. Union Gap Irr. Dist.*, 98 Wash. 412, 413, 167 P. 1085 (1917)).

It is important to note that no error is assigned to the instructions given the jury in this case. And the Appellant cites to no case law supporting his merit less claim that the failure to define a “major economic offense or serious of offense” or the meaning of a violation of trust requires the dismissal of the sentence enhancement. (See Appellant’s Brief, p. 41 – 42)

Furthermore, in accordance with statutory authority, the jury did make a finding that would allow the court to sentence Mr. Welch to an exceptional sentence pursuant to RCW 9.94A.535. The jury unanimously agreed that “the defendant used a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.” (RP 471 – 472; CP 40 – 55) This is one of the factors listed under RCW 9.94A.535(3) that may identify an offense as a “major economic offense or series of offenses.” RCW 9.94A.535(3)(d)(iv).

In addition, the Washington Supreme Court’s ruling in *State v. Bashaw* does not apply in this case because this case was decided before the *Bashaw*

opinion was filed. *State v. Bashaw*, 169 Wash. 2d 133, 234 P.3d 195 (July 1, 2010). There is no ruling that the decision in *Bashaw* is retroactive. *See Bashaw*, 169 Wash. 2d 133, 234 P.3d 195 (2010). When this case was tried, there was no way to know that *Bashaw* would stand for the proposition that jurors did not need to be unanimous to answer “no” to a special verdict. *Bashaw*, 169 Wash. 2d at 147 – 148. The Washington Supreme Court decided *Bashaw* over six months after this case was tried before a jury. Furthermore, no objection was made to the jury instructions on the trial court level.

D. STATUTORILY THE COURT DID NOT ERROR IN SENTENCING THE APPELLANT TO A SENTENCE ENCHANCEMENT PURSUANT TO RCW 9.94A.535(3)(d)(iv).

Statutory construction involves a question of law to be reviewed de novo. Courts have ultimate authority to determine meaning, discover legislative intent. *State v. Hansen*, 122 Wn.2d 712, 717, 862 P.2d 117 (1993). Where statutory language is clear and unambiguous, the meaning is derived from the language of the statute itself. *Spence v. Kaminski*, 103 Wn. App. 325 (Div.3, 2000) citing *State v. Chester*, 133 Wn.2d 15, 21, 1940 P.2d 1374 (1997).

RCW 9.94A.535 provides the statutory guidelines where a court may impose a sentence outside the standard range. RCW 9.94A.535. “Whenever a sentence outside the standard range is imposed, the court shall set forth the

reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.” RCW 9.94A.535.

Under RCW 9.94A.535(3) aggravating circumstances are considered by a jury but imposed by the court. RCW 9.94A.535(3). One of the circumstances that support a sentence above the standard range is if “the current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors: (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” RCW 9.94A.535(3)(d)(iv). Pursuant to this statute and the special verdict form returned by the jury found that Mr. Welch used his “position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime,” therefore, the court had the statutory authority to impose an exceptional sentence. RCW 9.94A.535(3)(d)(iv); (CP 53)

E. THE TRIAL COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTED THE IMPOSITION OF AN EXCEPTIONAL SENTENCE UNDER STATUTORY AUTHORITY AND WASHINGTON CASE LAW.

The Appellant argues on appeal that the trial court’s conclusions of law go beyond those allowed by the jury’s findings of fact in imposing an

exceptional sentence. As such, the trial court's findings of fact and conclusions of law do not support the exceptional sentence.

The legal issue in this case is very similar to *State v. Hale*. *State v. Hale*, 146 Wash. App. 299, 19 P.3d 829 (2008). Similar to this appeal, *Hale* was remanded back to the trial court for entry of findings of fact and conclusions of law regarding the exceptional sentence. (CP 91 – 92) *Hale*, 146 Wash. App. at 304. The Legislature requires that whenever the trial court imposes a sentence outside the standard range, “it shall set forth the reasons” in written findings of fact and conclusions of law.” RCW 9.94A.535.

Similar to *Hale*, the trial court here carefully worded its findings to reiterate the jury's special verdict and avoided entering any additional findings that would have violated Mr. Welch's right to have a jury find beyond a reasonable doubt “any factor used to increase his sentence.” *Hale*, 146 Wash. App. at 308. The trial court's findings of fact noted that the jury found Mr. Welch guilty of theft in the first degree and returned a special verdict, and recited verbatim the jury's special verdict that Mr. Welch used his “position of trust, confidence, or fiduciary responsibilities to facilitate the commission of the crime.” (CP 91 – 92) Based upon statute, RCW 9.94A.535(3)(d)(iv) this is adequate and a factor in identifying a “major economic offense” for purposes of sentence enhancement. RCW 9.94A.535(3).

The court then correctly concluded that “the facts found by the jury in the special interrogatory, or special verdict for, are substantial and compelling

reasons justifying an exceptional sentence.” (CP 91 – 92; Conclusion of Law B); *Hale*, 146 Wash. App. at 308. A sentence above the standard range was “in the interest of justice and consistent with the purpose of the SRA RCW 9.94A.010.” (Finding of Fact C; CP 91 – 92)

The court also concluded that the exceptional sentence imposed was “proportionate to the seriousness of the crime” and the “actual sentence of 60 months is one-half the possible statutory maximum sentence and is not clearly excessive.” (CP 90 – 91; Conclusion of Law D and E) The trial court’s reasoning for imposing an exceptional sentence was substantial and compelling and complied with statutory requirements under RCW 9.94A.535 and RCW 9.94A.537. *Hale*, 146 Wash. App. at 308; RCW 9.94A.535(3).

F. THE TRIAL COURT’S IMPOSITION OF RESTITUTION WAS IN ACCORDANCE TO STATUTORY AUTHORITY VESTED IN THE TRIAL JUDGE.

The Appellant assigns error to the trial courts decision to order restitution in the amount of \$43,219.00. The authority to impose restitution is not an inherent power of the court but is derived from statute. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). “When the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” *Davison*, 116 Wn.2d at 919.

An abuse of discretion occurs only when the decision or order of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). The amount of restitution must be established by substantial credible evidence; the court must not rely on speculation or conjecture. *State v. Kisor*, 68 Wash. App. 610, 620, 844 P.2d 1038 (1993).

However, damages need not be proven with specific accuracy for purposes of determining the amount of restitution but need to be easily ascertainable. *State v. Mark*, 36 Wash. App. 428, 434, 675 P.2d 1250 (1984). Under RCW 9.94A.142 trial courts have discretion to order restitution **up to double** the amount of a victim's loss. RCW 9.94A.142.

The trial judge clearly explained on the record that the restitution ordered for \$43,219.00 was based upon ascertainable amounts pursuant to the restitution statutes. (RP 526 – 533) Specifically the trial judge stated:

Well, counsel, what I'm going to do here is I'm going to order \$43,219, which would be the – *the amounts for the checks that come within the theft in the first degree charge, and so they are a part of the charged count, one large count.*

And furthermore they – as Mr. Enzler's been careful to do – *don't include those checks that for whatever reason the jury did not find Mr. Welch guilty of forgery, is how that worked.* And – kind of a mystery to me, but they would have gone through and carefully – they heard all of that evidence, and those – those few counts they didn't find the defendant guilty of, so those should be deducted.

And I here today will leave it at \$43,219.

(RP 532) (emphasis added)

From the record, it is clear that there was no abuse of discretion by the trial judge. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). The damages for purposes of restitution in this case are easily ascertainable and based upon the amounts for the checks that come within the theft in the first-degree conviction. (RP 526 – 527); *State v. Mark*, 36 Wash. App. 428, 434, 675 P.2d 1250 (1984). The trial court's decision to order restitution was based upon tenable grounds and reasons in accordance to Washington State case law and statutory authority. *Enstone*, 137 Wn.2d at 670-80; RCW 9.94A.750.

V.

CONCLUSION

For the reasons stated, the conviction of the Appellant should be affirmed.

Dated this 15th day of November, 2010.

Tim Rasmussen
Prosecuting Attorney


Shadan Kapri WSBA #39962
Deputy Prosecuting Attorney
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Respondent's Brief to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Mr. Douglas D. Phelps, Phelps & Associates, N. 2903 Stout Road, Spokane, WA, 99206 and to Mr. Roy Welch, P.O. Box 48801, Spokane, WA 99228 on November 1, 2010.

A handwritten signature in black ink that reads "Shadan Kapri". The signature is written in a cursive style with a long, sweeping tail on the letter "i".

Shadan Kapri,
Deputy Prosecuting Attorney