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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32232-7-III

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

THE STATE OF WASHINGTON

Respondent

v.

DAVID EMORY MANLOVE

Petitioner/Appellant

BRIEF OF RESPONDENT

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I. ASSIGNMENT OF ERROR

1. Deliberate cruelty, as an aggravating factor is inapplicable to residential burglary.

II. STATEMENT OF CASE

The State accepts the Appellant's Statement of the Case.

III. ISSUE PRESENTED

1. Is the aggravating factor of deliberate cruelty limited to crimes against persons?

IV. ARGUMENT

1. Is the aggravating factor of deliberate cruelty limited to crimes against persons?

The aggravating factor of deliberate cruelty set forth in RCW 9.94A.535(3)(a) is not limited to crimes against persons. RCW 9.94A.535 provides specific limitations on the applicability of certain aggravating factors. However, the legislature did not provide any limitations on the applicability of the deliberate cruelty aggravator. No authority exists

which would support a finding that this aggravator is limited to crimes against persons.

Questions of statutory interpretation are reviewed de novo. *State v. Alvarado*, 164 Wash.2d 556, 561, 192 P.3d 345 (2008) (citing *Tingey v. Haisch*, 159 Wash.2d 652, 657, 152 P.3d 1020 (2007)). The purpose of statutory interpretation is to determine and carry out the intent of the legislature. *Id.* at 561–62, 192 P.3d 345 (citing *City of Spokane v. Spokane County*, 158 Wash.2d 661, 673, 146 P.3d 893 (2006)). If the words of a statute are clear, we end our inquiry. *State v. Gonzalez*, 168 Wash.2d 256, 263, 226 P.3d 131 (2010). “In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent.” *Alvarado*, 164 Wash.2d at 562, 192 P.3d 345 (citing *City of Spokane*, 158 Wash.2d at 673, 146 P.3d 893; *Skamania County v. Columbia River Gorge Comm'n*, 144 Wash.2d 30, 45, 26 P.3d 241 (2001)).

In *State v. Sweat* the Washington Supreme Court addressed issues of statutory interpretation involving RCW 9.94A.535. *See generally* 180 Wash. 2d 156, 322 P.3d 1213 (2014). While *Sweat* involved a challenge to an aggravating factor that pertains to allegations of domestic violence

the Court's discussion of the legislature's intent with respect to RCW 9.94A.535 is applicable to this case.

In *Sweat* the defendant was convicted of assaulting his girlfriend and the trial judge found that, "...there was an 'ongoing pattern of psychological, physical or sexual abuse of multiple victims' under RCW 9.94A.535(3)(h)(i) justifying a deviation from a standard range sentence." *Id.* at 158. The judge in *Sweat* ruled that the defendant's prior domestic violence and domestic violence-related convictions were sufficient to support the aggravating factor. *Id.*

On appeal the defendant argued, "that the definition of "victim" in the general definition section of the criminal code, RCW 9.94A.030(53)—i.e., 'any person who has sustained emotional, psychological, physical, or financial injury to person or property *as a direct result of the crime charged*' (emphasis added)—must control our interpretation of the phrase "a victim or multiple victims" in RCW 9.94A.535(3)(h)(i)." *Id.* The Supreme Court rejected this argument and held,

...had the legislature intended to limit the ongoing pattern to incidents involving only the victim of the current charged offense, it would have substituted "the" for "a" and not included the word "multiple" in front of victims. Based on the use of "the victim" and omission of "multiple victims" in subsequent subparts, it is clear that legislators understood the subtle distinction between articles and the breadth of the word "multiple" and chose to employ a

broader definition of “victim” in RCW 9.94A.535(3)(h)(i) than that in RCW 9.94A.030(53).

Id. at 162

Concededly *Sweat* involved a different aggravating factor than what was alleged in the present case. However, the Supreme Court recognized in *Sweat* that the legislature took great care in determining which words to use when delineating the applicability of the various aggravators found in RCW 9.94A.535.

The legislature did limit the applicability of a number of the aggravators. However, no limitation was placed on the deliberate cruelty aggravator. RCW 9.94A.535(3) provides, “Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.” RCW 9.94A.535(3)(a), the aggravator at issue in this case states, “The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.” *Emphasis added.* Under the plain reading of this statute it is clear that the legislature did not intend to limit the applicability of this aggravator to crimes against persons.

Had the legislature intended such a limitation it would have clearly stated this limitation. The applicability of other aggravators found in RCW 9.94A.535 has been limited by the legislature. RCW 9.94A.535(3)(c), which addresses crimes involving pregnant victims, limits the applicability of this aggravator to “violent crimes.” RCW 9.94A.535(3)(e) provides a list of aggravating circumstances that are only applicable to violations of RCW 69.50. RCW 9.94A.535(3)(h) lists four aggravating circumstances which only applies to domestic violence charges as defined by RCW 10.99.020. RCW 9.94A.535(u) limits the applicability of this aggravator to burglary offenses. RCW 9.94A.535(z)(i)(A) is limited to crimes involving theft and trafficking in stolen property. RCW 9.94A.535(bb) is limited to cases involving child pornography. RCW 9.94A.535(dd) was limited to a “felony crime against persons” which occur within a courthouse.

When RCW 9.94A.535 is read in its entirety it becomes evident that the legislature took great care in limiting when certain aggravating factors could be alleged. No such limitation was put on the deliberate cruelty aggravator. From the plain reading of the statute it is clear that the legislature intended this aggravator to apply to any “current offense.”

Mr. Manlove argues that since there is no authority regarding the use of the deliberate cruelty aggravator to a residential burglary then it

must not apply. It is equally true that there is no authority which prohibits the use of this aggravator for the offense of residential burglary.

This court's analysis of whether or not this aggravator applies to residential burglaries should not turn on whether it has been addressed on appeal before. Rather, this court's analysis should turn on whether the deliberate cruelty aggravator was appropriate given the facts of the case.

"Deliberate cruelty" has been defined as "gratuitous violence, or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304, 1332 (1996); *State v. Smith*, 82 Wn.App. 153, 162, 916 P.2d 960, 965 (1996); *State v. Strauss*, 54 Wn.App. 408, 418, 773 P.2d 898, 903 (1989). The conduct must also be significantly more serious or egregious than typical. *State v. Scott*, 72 Wn.App. 207, 214, 866 P.2d 1258, 1262 (1993), *aff'd* on other grounds sub nom. *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995). It must involve cruelty of a kind not usually associated with the commission of the offense in question. *State v. Crane*, 116 Wn.2d 315, 334, 804 P.2d 10, 20, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Payne*, 45 Wn.App. 528, 531, 726 P.2d 997, 999 (1986).

The defendant's behavior during the commission of this crime falls squarely within the definition of "deliberate cruelty." The defendant's

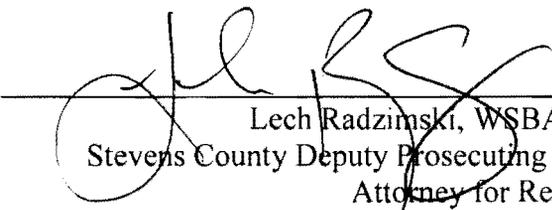
conduct during the commission of the crime was significantly more serious, egregious, and involved more cruelty than what is required to commit the offense of residential burglary.

V. CONCLUSION

The State respectfully requests that this court find that the deliberate cruelty aggravating circumstance can be alleged in a prosecution for the offense of Residential Burglary. The State further requests that this court deny the relief requested by Mr. Manlove.

Respectfully submitted this 15th day of September, 2014.

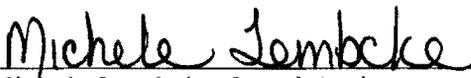
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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905 and to Dennis W. Morgan, Attorney at Law, P.O. Box 1019., Republic, WA 99169, and to David E. Manlove, #371952, PO Box 769, Connell, WA 99326, on September 15, 2014.



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