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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 35782-1

COURT OF APPEALS, DIVISION NO. III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Tyler Scott Fife,

Appellant.

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

COMES NOW Appellant Tyler Fife, by and through his undersigned attorneys of record, and Replies to the State's Response in this Matter.

Mr. Fife argues below that, first, he is not barred from appealing a sentence within the standard range where, as here, he raises an appeal predicated on impermissible sentencing procedures below. Next, in response to the State's assertion that the trial court properly considered the facts, Mr. Fife replies that the trial court considered facts outside the record, and thus, the conclusions drawn therefrom are an impermissible basis for denial of an exceptional downward departure. Finally, Mr. Fife argues that an appeals court may consider sufficiency of the evidence appeals (even subsequent appeals) in criminal matters where the trial court invites appeal of all stages of the trial proceedings.

B. ARGUMENT & AUTHORITY

1. Mr. Fife's Sentence is Appealable

The State's contentions on this point make little sense because Mr. Fife raises an appeal predicated on very similar issues as were raised previously. Whether Mr. Fife's subsequent appeal is barred is essentially a procedural matter – if the subject matter of the appeal is within this Court's power to consider, the appeal is not barred. As Mr. Fife argued previously

(*Appellant's Brief* at 8-9) and the State acknowledges (*Respondent's Brief* at 4), this Court may review the denial of a request for an exceptional sentence if the Court relied on an impermissible basis for the denial. *See State v. Knight*, 176 Wn.App. 936, 957, 309 P.3d 776 (2013) ; *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

Because Mr. Fife's appeal is predicated on the assertion that there was an impermissible basis for denial of his request for a downward departure, the matter is appealable. The State may argue the *merits* of the appeal, but the case is still *appealable*.

2. Denial of Mr. Fife's Request for Downward Departure based on Duress was Error.

The trial court erred in denying Mr. Fife's request for a downward departure based on duress because the trial court did not employ the proper procedure when considering this request, and ultimately denied the request on impermissible grounds.

RCW 9.94A.535 contains a non-exclusive list of mitigating factors. *See* RCW 9.94A.535(1). To mitigate a sentence, the court must find that the mitigating circumstance exists under a preponderance standard and that substantial and compelling reasons justify the exceptional sentence. *Id.* If an enumerated mitigating factor under RCW 9.94A.535(1) is established by this preponderance standard, then a substantial and compelling justification

for the exceptional sentence exists as a matter of law. *State v. Jeannotte*, 133 Wn.2d 847, 852, 947 P.2d 1192 (1997) (citing *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835 (1987)).

The Court's blunt finding on duress was limited to a recitation concerning whether Mr. Fife could have abandoned the criminal enterprise; this is not the appropriate procedure and results in the Court considering irrelevant information. *See RP2* at 43:19-44:6.

First, the Court should have inquired whether it was more likely than not that (1) duress, coercion, threat, or compulsion existed, insufficient to constitute a complete defense; and (2) whether this significantly affected Mr. Fife's conduct.

The record is clear that the first part of this inquiry is met. There were multiple threats made to Mr. Fife that persisted even after the initial episode at the Crandall residence. *See RP1* at 291:15-16; 291:22-25; 293:10-11; 294:1-2; 298:8-11.

The record is also clear that the second part of this inquiry is met. This is where the trial court focused and erred[1]. The trial court's focus on whether Mr. Fife could have *abandoned* the criminal enterprise is not relevant to the inquiry of whether he was compelled to *join* the enterprise.

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[1] The Court also considered the demeanor of Mr. Fife and Ms. Garcia (RP2 at 44:10-13), but their testimony is in agreement as to the existence of the elements of duress.

Moreover, the crime that Mr. Fife was sentenced for as the controlling charge (Burglary 1st Degree) was complete as soon as the parties involved left the Crandall residence. Thus, inquiry into whether Mr. Fife could have later abandoned the spree of crimes is additionally irrelevant to the Burglary charge, as Mr. Fife could not have abandoned a completed enterprise.

Rather, the record shows that Mr. Fife was "terrified" by Mr. Dahlquist's threats. *RP1* at 217:18-218:3. The record shows that Mr. Fife was compelled to participate in order to impair his ability to later testify against Mr. Dahlquist. *Id.* at 291:22-25. The record shows that Mr. Fife perceived the threats as mortal threats, and was "scared for [his] life" because of them. *Id.* at 331:4-7. The record shows that Mr. Fife did not want to participate in the burglary. *Id.* at 291:19-20. The record shows that Mr. Fife participated "so that… no one would get hurt." *Id.* at 293.10-13.

In sum, the record shows that Mr. Fife did not want to participate but did so to prevent grievous harm to both himself and others. His behavior was "significantly affected" by "duress, coercion, threat, or compulsion." The Court erred by concluding that his behavior must not have been affected because he did not abandon the criminal enterprise after its completion – a logical impossibility employing the wrong legal standard and requiring remand.

At this point, because Mr. Fife established both prongs of the

required analysis under RCW 9.94A.535(1)(c) by a preponderance of the evidence, the analysis is concluded. Under the cases cited above, once a statutory mitigating circumstance is established by a preponderance of the evidence, the "substantial and compelling reasons" threshold within the statute is met (statutory enumeration is a substantial and compelling reason), and an exceptional sentence is justified as a matter of law. *See Jeannotte* and *Nelson.*

3. Denial of Mr. Fife's Request for Downward Departure based on Lack of Predisposition was Error.

The State's Response on this point underscores why Mr. Fife is correct that the trial court erred. In response, the State asserts that it was Mr. Fife's "...chosen associates during his time in the County and his knowledge of their behavior." *Respondent's Brief* at 8. Neither of these factors is an appropriate basis to deny a request for downward departure and neither of those reasons is supported by the record. In fact, the State's argument that Mr. Fife chose to participate of his own volition was rejected in *Nelson.*

In *Nelson*, the defendant joined in a robbery with his co-defendant "...in order to support [his] family and drug problem." *Nelson*, 108 Wn.2d at 496. The defendant's agreement to testify against his co-defendant, the person who planned the crime, was also a factor in the trial court's ultimate

decision to grant an exceptional downward departure based on lack of predisposition. *Id.* The State appealed the sentence.

The Court of Appeals in *Nelson* concluded that Mr. Nelson participated of his own volition and was predisposed to do so because he had his own reasons – i.e. to support his family and drug problem. *Id.* The Supreme Court rejected this analysis stating that the Court of Appeals confused predisposition with motive. *Id.* at 497. The Supreme Court also noted that the Court of Appeals in *Nelson* apparently substituted its judgment for the trial court's because Mr. Nelson did not act under duress. *Id.*

A similar situation presents here, though Mr. Fife's reason for participation, duress, is more powerful than the reason given in *Nelson*. The reason for participation, however, "...does not establish criminal predisposition, **measured under the SRA by a history of prior convictions**." *Id.* at 497 (emphasis added)[2].

On this point, the trial court noted that Mr. Fife "... has minimal criminal history." *RP2* at 44:25-45:1. The Court then focused on Mr. Fife's association with Mr. Dahlquist, stating that Mr. Fife "... managed to become acquainted with, and apparently to some degree, befriended Mr.

[2] This is not to suggest that criminal history is the *only* relevant factor, and particularly not in light of *Nelson*, which is clear that history *and* inducement is the relevant inquiry.

Dahlquist." *Id.* at 45:3-5. The Court went on to state that it was a contradiction to say that Mr. Fife befriended Mr. Dahlquist, but "at the same time didn't know what was going on." *Id.* at 45:6-9.

Knowledge of a criminal offense is immaterial to predisposition, particularly for Burglary, which has a specific intent requirement. *See* RCW 9A.52.020. In other words, the question is not whether the defendant understands what acts constitute a criminal offense, but rather whether the defendant was induced to participate in those acts. Knowing participation does not establish or speak to predisposition.

Similarly, friendship with a co-defendant does not establish or speak to predisposition – to the contrary, it invites a decision to be made upon a basis no better than guilt by association. The record also does not establish that there was any friendship between Mr. Fife and Mr. Dahlquist.

The trial court erred by going beyond the facts in the record to speculate that Mr. Fife befriended Mr. Dahlquist and knew that Mr. Dahlquist planned to burglarize the Crandall residence. The record does not support this – there is no information as to the relationship between Mr. Fife and Mr. Dahlquist, nor as to whether Mr. Fife knew of Mr. Dahlquist's plans.

Testimony at trial was limited to the fact that Mr. Fife knew who Mr. Dahlquist was and that he is a few years older than Mr. Fife. *RP1* at

275:6-20. Mr. Fife could not recall the last time he had seen Mr. Dahlquist prior to the events of the case. *Id.* at 277:24-278:1. The record also shows that Mr. Fife did not know what Mr. Dahlquist had planned, if anything. Mr. Fife did not know to where Mr. Dahlquist was driving (*Id.* at 279:3-5); had never been to the Crandall's residence and did not know who they were (*Id.* at 282:22-283:6); and did not know what Mr. Dahlquist was doing at the residence until he heard a window break (*Id.* at 284:1-5 & 285:3-11). The record reflects that Mr. Dahlquist himself likely had no prior designs to burglarize the Crandalls' residence and instead seized on the opportunity after following some deer up their driveway and realizing the house was empty. *Id.* at 282:5-21.

The State argues, without supporting authority, that inquiry into whether the criminal enterprise originated in the mind of the defendant is erroneous. This argument is rebutted by the holding in *Nelson*. In that case, the Court was considering the State's appeal of a granted exceptional sentence. *Nelson*, 108 Wn.2d at 495. The same request as here for a departure on the basis of lack of predisposition was at issue in *Nelson*. *Id.* at 496 *et seq*. The Court was comparing inducement from others to inducement from the police – the former being a part of the statutory mitigating factor and the latter being a defense. *Id.* at 497. The Court made a distinct point of noting that "...the record provides unrefuted evidence

that the plan for the crime did not originate with [the defendant]." *Id.* Thus, the State's Response is in error; this factor is relevant, and the record in this case demonstrates that it was Mr. Dahlquist, not Mr. Fife, who planned the crime.

A lack of predisposition is not enough – the statutory factor requires inducement as well. In *Nelson*, the inducement factor was met because the co-defendant planned the robberies and Mr. Nelson "...joined in the crime...to support [his] family and drug problem." *Id.* at 496[3]. Here, Mr. Fife's inducement is clear – he was threatened and compelled to join. The analysis here is distinct from the duress analysis, and the Court of Appeals cautioned against collapsing the two in *Nelson*. In other words, even if this Court finds the duress argument to be insufficient, the same facts supporting the request under RCW 9.94A.535(1)(c) apply to the inducement factor of RCW 9.94A.535(1)(d).

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[3] Though rejected by the trial Court, the Appeals Court in Nelson clearly determined that Mr. Nelson was not the originator of the plan; thus, he was induced to join. The Court of Appeals went on to hold that the exceptional sentence was justified under the lack of predisposition and inducement prong as a matter of law.

Moreover, *Nelson* and another case, *State v. Baucham*, 76 Wn.App. 749, 887 P.2d 909 (1995) have glossed over the inducement portion of the requirement, suggesting that the analysis on the inducement factor is relaxed. In *Nelson*, mention of inducement is limited to recitation of the rule or statute, and receives little factual discussion. In *Baucham*, the only reference is in passing: "...veiled threats, innuendos and inducements were made..." *Baucham*, 76 Wn.App. at 751.

4. Mr. Fife's Asserted Constitutional and Sufficiency of the Evidence Challenges are Reviewable

The State asserts in Response that Mr. Fife's constitutional and sufficiency challenges are unreviewable because of the general rule forbidding new issues in a subsequent appeal that could have been raised before. Mr. Fife replies that his case differs from precedent in two important respects: first, the trial court directly informed Mr. Fife he had the right to appeal any errors of law from any stage of the trial proceedings. *RP2* at 47:6-9. Second, the cases the State relies upon have another remedy, or derive from civil matters where the penalties of criminal conviction are not at issue, and nor are the robust due process considerations in criminal matters at issue.

The State relies on *State v. Mandamas*, 163 Wn.App. 712, 262 P.3d 522 (2011), which cites to *State v. Sauve*, 100 Wn.2d 84, 666 P.2d 894 (1983); and *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970). In *Sauve*, the Court cited no authority for the pronouncement that the appeal process must stop at some point and pointed out that the Defendant had the alternative remedy of a Personal Restraint Petition. *Sauve*, 100 Wn.2d at 87. Mr. Fife does not have the alternate PRP remedy available due to the passage of time since conviction.

Jacobsen cites to *State v. Bauers*, 25 Wn.2d 825, 172 P.2d 279 (1946), which in turn cites to *Davis v. Davis*, 16 Wn.2d 607, 134 P.2d 467 (1943). The *Davis* case collects prior sources to the effect that new issues are barred, but the prior sources are exclusively civil. *Davis*, 16 Wn.2d at 609-10[4].

Furthermore, the issues raised on appeal are reviewable under RAP 2.5(a) and (c). The constitutional challenge involves RAP 2.5(a)(3), while the sufficiency of the evidence challenge invokes RAP 2.5(a)(2) and (3) and RAP 2.5(c)(1). Under these rules, a party may raise errors for the first time in the Court of Appeals if the record is sufficiently developed. *See* RAP 2.5(a). Similarly, a party may raise errors of other trial court decisions, even though not disputed in an earlier review of the same case. *See* RAP 2.5(c).

Mr. Fife is cognizant of the Court's policy against endless appeals. Indeed, such a policy makes good sense. However, Mr. Fife argues that this policy, or "general rule," as the State puts it, should not insulate review of legitimate claims; particularly here, Mr. Fife's sufficiency of the evidence claim.

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[4] *Wilkes v. Davies*, 8 Wash. 112, 35 P. 611, 23 L.R.A. 103; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 62 Wash. 436, 113 P. 1104; *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 145 P. 438; *Collins v. Terminal Transfer Co.*, 98 Wash. 597, 168 P. 174; *McGill v. Baker*, 157 Wash. 414, 288 P. 1062; *Fleming v. Buerkli*, 164 Wash. 136, 1 P.2d 915; *Peabody v. Pioneer Sand & Gravel Co.*, 172 Wash. 313, 20 P.2d 15; *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090; *Miller v. Sisters of St. Francis*, 5 Wash.2d 204, 105 P.2d 32.

C. CONCLUSION

The trial court erred by declining Mr. Fife's request for an exceptional sentence on an impermissible basis. Regarding the duress-and-quasi-duress factor, the court erred because the trial court based its decision on factors irrelevant to analysis under RCW 9.94A.535(1)(c). Notably, the trial court's decision had nothing to do with whether (a) there was a threat; or (b) the threat significantly affected Mr. Fife's behavior. Instead, the Court focused on whether he could have abandoned the enterprise, which is not relevant to the factors under the SRA. To do so was error.

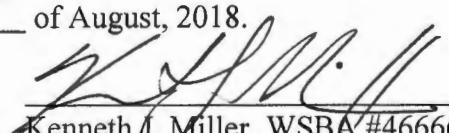
Similarly, the trial court based its denial of the request for an exceptional sentence for lack of predisposition on irrelevant factors. Instead of focusing on whether (a) Mr. Fife's criminal history and (b) who planned the crime, the trial court focused on who Mr. Fife chose to associate with, and whether he knew of their planned behavior. Additionally, there was insufficient information in the record to use those factors as a basis for denial, even if they were relevant.

Finally, as regards the constitutional and sufficiency of the evidence challenges, Mr. Fife rests on prior briefing, as the State only attacked the procedural aspect of the claims and not the merits. Regarding the procedural aspect, Mr. Fife asserts that his claims are reviewable under the Rules of Appellate Procedure, which do not appear to limit his right to raise new

claims in the same way that the State asserts prior case law does. Further, the case law the State relies upon is distinguishable for the facts that the prior caselaw is drawn from civil cases with no danger of criminal conviction or involves a situation where the defendant had a remedy not available to Mr. Fife. While all appeals must end at some point, Mr. Fife respectfully urges that a Court policy not reduced to Rule or Statute should not insulate review of legitimate claims.

For the reasons articulated herein, Mr. Fife respectfully requests that this Court remand his case for resentencing. Specifically, he requests that this Court find that there was insufficient evidence to support his conviction for Burglary 1st Degree either as principle or accomplice and remand for resentencing on the next controlling charge. In the alternative, he requests that the case be remanded for resentencing based on the erroneous denials of his requests for an exceptional downward departure.

Respectfully submitted this 24th of August, 2018.



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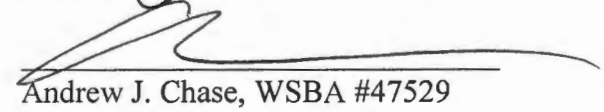

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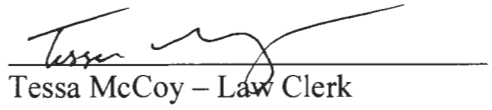
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

THE STATE OF WASHINGTON Respondent, v. TYLER FIFE, Appellant.	No.: 357821 Okanogan Co. Sup. Ct. No. 14-1-00423-9 DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, CR 5, and RAP 5.4(b) the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the dates below, the Appellant's Reply Brief were delivered to the following persons in the manner indicated:

Branden Platter, Prosecuting Attorney PO Box 1130 Okanogan, WA 98840	[ ] U.S. Mail on [X] Hand Delivery on: August 24th 2018 [ ] E-Mail [ ] Other: _____.

DATED this 24th of August, 2018 at Okanogan, WA.



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COURT OF APPEALS OF THE STATE OF WASHINGTON
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THE STATE OF WASHINGTON Respondent, v. TYLER FIFE, Appellant.	No.: 357821 Okanogan Co. Sup. Ct. No. 14-1-00423-9 DECLARATION OF SERVICE

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Tyler Fife Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326	[X] U.S. Mail on 8/24/18 [ ] Hand Delivery on:_____ [ ] E-Mail [ ] Other: _____.

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