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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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



State of Washington,

Respondent,

v.

Tyler Scott Fife,

Appellant.

APPELLANT'S BRIEF

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A. INTRODUCTION

COMES NOW Appellant Tyler Fife, by and through his undersigned attorneys of record, and appeals his sentence in Okanogan County Superior Court Cause 14-1-00423-9. Mr. Fife raises a similar issue as was raised in his prior appeal to this Court in Cause 34442-8, as well as a challenge to the sentencing mechanism whereby a deadly weapon *qua* mechanism of duress becomes an aggravating factor increasing punishment for the offense.

B. ISSUES FOR REVIEW

- (1) Whether the Superior Court abused its discretion in denying Defendant's request for an exceptional downward departure based on duress;
- (2) Whether the Superior Court abused its discretion in denying Defendant's request for an exceptional downward departure based on lack of criminal predisposition;
- (3) Whether the conjunction of the Residential Burglary, Burglary 1st Degree, and Sentencing Reform Act statutes is a constitutional statutory scheme where it requires the Defendant to supply the State with a critical element of the offense or forgo raising a complete defense;

- (4) Whether there was sufficient evidence of the requisite mental state to support a conviction for Burglary 1st Degree.

C. STATEMENT OF THE CASE

On December 4, 2014, the State charged Mr. Fife with several assorted property crimes committed December 1 and 2, 2014, in a thirteen-count Information. *Clerk's Papers ("CP")* at 262-67. These crimes included Burglary 1st Degree; Residential Burglary; Burglary 2nd Degree; Theft 1st Degree (non-firearm); Theft 2nd Degree (non-firearm); Possessing Stolen Property 1st Degree; Possession of a Stolen Motor Vehicle; Theft of a Motor Vehicle; Theft of a Firearm; PCS Hydrocodone; PCS Ecstasy; Malicious Mischief 3rd Degree (two counts). *Id.*

At trial, Mr. Fife and his girlfriend, Ms. Garcia both testified as to the presence of duress from Mr. Sean Dahlquist. The testimony of Ms. Garcia was that Mr. Dahlquist was acting "angry" and "aggressive" at the time of the commission of this series of crimes. *Report of Proceedings (RP1)*¹ at 217:18-218:3. She also testified that Mr. Fife was "terrified" at the time. *Id.* at 219:19-20. Mr. Dahlquist was armed with a firearm and a knife. *Id.* at 220.

¹ "RP1" refers to the Report of Proceedings in Superior Court prior to Mr. Fife's first appeal, cause number 34442-8-III. "RP2" refers to the Report of Proceedings in subsequent proceedings before Okanogan County Superior Court that are the subject of this appeal.

Mr. Fife's testimony was that he and Ms. Garcia were uninvolved until Mr. Dahlquist arrived at the side of the truck with a knife in his hand. *Id.* at 290:17. He then threatened both Ms. Garcia and Mr. Fife, stating, "If you guys don't get out I'm going to make you." *Id.* at 291:15-16. The conversation quickly turned to the threat necessary to establish duress: Mr. Dahlquist came around and opened the door of the truck and stated, "If you don't get out I'm going to fuckin' stab you 'cause I'm not going down for this..." *Id.* at 291:22-25. Then, Mr. Dahlquist grabbed Mr. Fife, attempting to force him from the vehicle. *Id.* at 292:12-15. Mr. Fife went into the house "so that... no one would get hurt" and Mr. Dahlquist began "screaming at [him] to grab things." *Id.* at 293:10-11, 294:1-2.

Later, Mr. Dahlquist sent Mr. Fife into the 76 Gas station with Ms. Chantelle Mendivil to get beer and a scratch off lottery ticket for Mr. Dahlquist. *Id.* at 297:12-16. Mr. Dahlquist threatened to "get rid of" Mr. Fife if he tried to signal the clerk or otherwise didn't "act right" in the store. *Id.* at 298:8-11. While at the Nichols Motel, Mr. Dahlquist demonstrated how he might "get rid of" Mr. Fife by playing with the pistol that had been in his possession since the entry into the first house. *Id.* at 309:12-25. In fact, Mr. Fife later testified that he was "scared for my life" because Mr. Dahlquist "had a gun, and... threatened my life." *Id.* at 331:4-7.

Mr. Fife also directly testified that he “did not want to be a part of it [the burglary].” *Id.* at 291:19-20. Moments later, he testified that he was “so scared and felt so threatened” by Mr. Dahlquist that he “just sat there in shock.” *Id.* at 292:12-15. He also testified that he got out to help Mr. Dahlquist “so that... no one would get hurt.” *Id.* at 293:10-13.

Furthermore, at trial, Mr. Dahlquist did not testify. In fact, the only other participant who testified was Ms. Garcia, who supported Mr. Fife’s claim of duress. The investigating officers and the victims of the offenses were not reported to be present for the making of the threat; thus, they all would lack personal knowledge as to the circumstances of duress. In effect, Mr. Fife’s compelling testimony on the duress issue was unchallenged by the only witnesses with knowledge of those circumstances. To the contrary, it was supported.

However, the jury rejected Mr. Fife’s duress defense, finding him guilty on all thirteen counts. *CP* at 83-85. At sentencing, Mr. Fife’s defense attorney requested an exceptional sentence under two statutory mitigating factors: duress, coercion, threat, or compulsion; and lack of criminal predisposition. *Id.* at 70. The sentencing Court mistook the appropriate standard as “substantial and compelling evidence that there was duress” instead of “substantial and compelling *reasons*” for a departure shown by a preponderance of the evidence. *Id.* at 24-26. The sentencing Court also

failed to address the request for an exceptional sentence on the basis of lack of criminal predisposition. *Id.* at 24.

Mr. Fife appealed, and this Court remanded for resentencing. *State v. Fife*, No. 34442-8-III (*CP* at 21-29). At resentencing on November 22, 2017, Defense counsel again requested an exceptional downward departure from the standard range based on mitigating factors of duress and lack of criminal predisposition. *RP2* at 12:25 *et seq.* The Court recognized the error from the previous sentencing hearing and posed a question to the parties:

It seems to me that looking at the jury instruction, regardless of what this Court said, the jury had the same standard when it considered the duress instruction, as the Court's now being asked to apply, in deciding whether or not to impose an exceptional sentence and I think that's the point I was trying to make all these years ago... If the jury didn't find, by a preponderance, okay, and it had the same evidence that the Court has, then how can the Court really substitute its judgment for the judgment of the jury?

Id. at 27:4-14. Following this, the Court took the matter under advisement for a later decision. *Id.* at 29:6-10.

On November 30, 2017, the Parties returned for the Court's decision. The Court indicated that it was mindful of the request for an exceptional sentence and had considered the matter at length. *Id.* at 40:3-20². The Court again rejected Mr. Fife's request for an exceptional

² The Court also included a direct response to this Court's ruling. *Id.* at 41:2-43:19

downward departure based on both duress and lack of predisposition. *Id.* at 44:18-25. The Court did, however, amend the sentence on Count 1 (the controlling Burglary 1st Degree Charge) to the low end of the standard range – 77 months. *Id.* at 45:18-25.

Another issue raised by the Defense at re-sentencing is a subject of this appeal. Mr. Fife was subject to a controlling charge of Burglary 1st Degree, RCW 9A.52.020. From the record, it does not appear that Mr. Fife was armed with a deadly weapon or assaulted any person. Thus, as argued in his sentencing brief, the reason Mr. Fife was charged with Burglary 1st Degree instead of Residential Burglary is that Mr. *Dahlquist* was armed with a deadly weapon – i.e. the mechanism of duress. *See CP* at 18.

D. SUMMARY OF ARGUMENT

Mr. Fife raises three arguments before this Court:

First, he argues that the trial court erred at sentencing by applying the wrong analytical framework to the question of duress. The Court focused on whether the Defense established duress by a preponderance of the evidence. The relevant question is not whether *duress*, specifically, was shown by preponderance of the evidence. The relevant inquiry is whether the Defendant shows by a preponderance of the evidence that “duress, coercion, threat or compulsion... significantly affected his... conduct.” In other words, while the Parties speak of mitigation because of “duress,” the

inquiry is whether any of the disjunctive criteria affected the Defendant's behavior. The record is replete with indicia that the Defendant's behavior was affected by coercion, threat or compulsion, even if not duress. The trial court abused its discretion in denying a downward departure.

Second, Mr. Fife argues that the trial court erred at sentencing by failing to apply the appropriate test to the question of whether a lack of criminal predisposition was present. The Court noted that Mr. Fife had minimal criminal history, but anomalously concluded that Mr. Fife had "befriended" Mr. Dahlquist. This conclusion is not supported by the record; in fact, the record contradicts this conclusion. The relevant test is whether the criminal enterprise originated in the mind of the Defendant or in some other person's mind. Here, the record is clear that Mr. Dahlquist was the originator of the criminal enterprise. Again, the trial court abused its discretion in denying a downward departure.

Finally, Mr. Fife raises an as-applied constitutional challenge to his sentence. The only distinction between Residential Burglary, RCW 9A.52.025, and Burglary First Degree, RCW 9A.52.020, is whether the actor *or another participant* is armed with a deadly weapon or assaults any person. This poses a curious circumstance where a person who commits residential burglary under compulsion from a deadly weapon is instead up-charged with first degree burglary. Thus, to combat the burglary charge and

raise a duress defense, a Defendant in this position is forced to forgo his 5th Amendment rights against self-incrimination in order to preserve his 6th Amendment right to present a defense. In other words, a defendant charged as Mr. Fife was must admit to the existence of the deadly weapon in order to present a duress defense. The statutory scheme that allows this to occur is fundamentally unfair and results in manifest injustice.

E. ARGUMENT & AUTHORITY

Despite the uncompromising language of RCW 9.94A.585, a defendant may appeal the procedure the trial court followed when imposing a standard range sentence. *State v. Knight*, 176 Wn.App. 936, 957, 309 P.3d 776 (2013). While no defendant is *entitled* to an exceptional downward departure, every defendant is entitled to ask the trial Court to consider such a sentence and to have the proposal taken under actual consideration; failure to do so is reversible error. *State v. Grayzon*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

In making a review of the decision to deny a request for an exceptional sentence, this Court may review whether the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

A court refuses to exercise discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstance. *Id.* A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range where, for example, the court determines no drug offender should receive an exceptional sentence or it denies the exceptional sentence based on a protected class identifier. *Id.*

In this case, the trial Court did not exercise discretion in considering the remaining language of RCW 9.94A.535(1)(c). Similarly, the trial Court relied on an impermissible basis in denying an exceptional sentence pursuant to RCW 9.94A.535(1)(c). Additionally, the trial Court relied on an impermissible basis in denying an exceptional sentence pursuant to RCW 9.94A.535(1)(d).

1. The Trial Court Erred and Abused its Discretion in Denying a Downward Departure Based on Duress.

Duress is a defense to a crime if the proponent of the defense can establish that the participation in the crime was committed (1) under compulsion by another by threat or use of force; that (2) created an apprehension in the mind of the actor that in case of refusal he would be liable to immediate death or grievous bodily injury; (3) that the apprehension was reasonable; and (4) that the actor would not have

participated but for the duress. RCW 9A.16.060(1). But duress is not the only relevant criteria for mitigating circumstances based on duress-like factors. *See* RCW 9.94A.535(1)(c).

The Sentencing Reform Act expressly authorizes trial Courts to consider a “failed defense” as a mitigating factor justifying an exceptional sentence below the standard range. *State v. Jeannotte*, 133 Wn.2d 847, 858-59, 947 P.2d 1192 (1997). When considering a failed defense as a mitigating factor, the Court must find “substantial and compelling reasons” to justify a departure from the standard range other than those reasons which are necessarily considered in computing the presumptive range for the offense. *Jeannotte*, 133 Wn.2d at 857 (citing *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). Where the proffered reason is a statutorily-enumerated mitigating factor, this criterion is met. *Id.*

RCW 9.94A.535(1)(c) is the statute related to exceptional mitigating circumstances from reason of “duress, coercion, threat, **or** compulsion” that significantly affects the defendant’s conduct. *See Id.* (emphasis added). In interpreting a statute, the Court avoids construction thereof that would render a portion of a statute meaningless. *John Doe A. v. Washington State Patrol*, 185 Wn.2d 363, 381-82, 374 P.3d 63 (2016). Here, the trial Court impermissibly focused only on the issue of duress, a term of art subject to

its own statutory definition, to the exclusion of “coercion, threat, or compulsion.”

Because RCW 9A.16.060 (defining duress) includes consideration of both “compulsion” and “threat,” then for purposes of RCW 9.94A.535(1)(c), the other statutory criteria must mean something different, and less than, duress. *See* RCW 9A.16.060(1)(a)³. Collapsing the four criteria of RCW 9.94A.535(1)(c) in this fashion renders a portion of the statute meaningless, contrary to the holding in *John Doe A*.

At sentencing, the relevant inquiry is whether the Defendant showed, by a preponderance of the evidence: (1) that duress, coercion, threat, **or** compulsion was present; and (2) that it significantly affected the Defendant’s conduct. RCW 9.94A.535(1)(c).

These two factors are shown in the record. Duress, coercion, threat, or compulsion was present. *See RPI* at 291-92; 298. Mr. Fife would not have participated in the crime spree but for this threat – the threat significantly affected his conduct. *Id.* at 291-93. Notably, Mr. Dahlquist did not testify at trial to rebut the existence of the threat.

³ The actor participated in the crime under **compulsion** by another who by **threat** or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; (emphasis added).

The sentencing Court's error is in ignoring the statutory factors relevant to the first prong. The Court focused on whether Mr. Fife could have abandoned the criminal enterprise during the commission thereof. *RP2* at 43:19-44:6. The Court also stated: "Defense counsel writes that Mr. Fife's testimony was unchallenged. That may be true, but that doesn't take into account other factors affecting credibility and including those factors previously mentioned as observed in the courtroom by the trial Court." *Id.* at 44:13-17. Court did not expound on these factors, other than that they included "the demeanor and appearance" of the witnesses and the opportunity to "weigh their testimony against other evidence." *Id.* at 44:10-13.

The Court also erred in considering the second prong above. The Court focused again on whether Mr. Fife could have abandoned the criminal enterprise. This is not the relevant inquiry for purposes of whether the threat "significantly affected the defendant's conduct." The Court's focus on abandoning the enterprise could perhaps be taken as indicia that the defendant's conduct was *not* affected, but the record does not support this. Mr. Fife was asked why he did not abandon the enterprise, and he responded that there was not a way to leave because Mr. Dahlquist threatened him, and he still felt threatened through the completion of the enterprise. *RPI* at 332:4-17.

The Court ultimately concluded that it was “arguable” whether the Defendant had made a showing sufficient to establish a mitigating circumstance, but held that the Court “cannot conclude by a preponderance that the defendant acted under duress or threat, even an amount less than necessary to establish the legal defense of duress.” *RP2* at 44:3-6. The Court’s determination that the existence of duress, coercion, threat, or compulsion was not present is unsupported by the record – this is an impermissible basis for refusing the request for an exceptional sentence because reliance on unsupported facts runs afoul of the constitutional and statutory procedures that protect defendants from being sentenced on the basis of untested facts. *Grayson*, 154 Wn.2d at 338. Under the SRA, a trial judge may only sentence based on facts that are admitted, proved, or acknowledged. *Id.* at 339.

The Court seems to have relied heavily on the State’s closing argument, which mentioned abandoning the enterprise (i.e. “leaving”) on thirteen⁴ occasions. But a lawyer’s remarks, statements, and arguments are not evidence. *CP* at 146; *See also* WPIC 1.02. The evidence is the testimony and exhibits. *Id.* The testimony and exhibits only touch on Mr. Fife’s

⁴ *RP* at 408:13; 409:1; 409:3; 409:9; 411:11; 411:17; 411:25; 412:1-2; 412:11; 412:21; 413:18; 414:2-3; 414:7.

testimony that he felt threatened through the completion of the enterprise.
RP1 at 332:4-17.

Moreover, abandonment of a criminal enterprise is relevant to a defense to conspiracy to commit an offense – i.e. that the enterprise was abandoned prior to the commission of a substantial step in furtherance thereof. Abandonment of the criminal enterprise is not a component of duress analysis or the quasi-duress mitigation analysis. *See* RCW 9A.16.060; RCW 9.94A.535(1)(c).

Finally, the Court’s analysis of the mitigating duress and quasi-duress factors reveals another error. In sentencing, the Court stated: “Yet, the evidence presented at trial showed opportunities where [Mr. Fife] might have left or ceased participation.” *RP2* at 44:1-3. Such analysis, specifically regarding “ceased participation” presumes that the Defendant’s conduct in fact *was* influenced by Mr. Dahlquist’s threats. The Court’s *sub rosa* finding is substantially that Mr. Fife’s behavior was influenced, but that he had opportunity to remove himself from such influence. This error requires remand to determine which of the offenses would be subject to mitigation under RCW 9.94A.535(1)(c).

2. The trial Court Erred and Abused its Discretion in Denying a Downward Departure Based on Lack of Criminal Predisposition.

Criminal predisposition is best determined by a two-pronged inquiry examining the defendant's criminal history and whether the defendant was the source of the criminal impetus. *See State v. Nelson*, 108 Wn.2d 491, 497-98, 740 P.2d 835 (1987). The central inquiry is "whether the criminal activity originates in the mind of the defendant." *Id.* (noting the similarities in the predisposition regard between the SRA and entrapment defenses). But lack of predisposition is itself not enough – this must be combined with evidence that the defendant was "induced" to commit the offense. *Id.*; *See also* RCW 9.94A.535(1)(d).

Because of the overwhelming evidence of a threat discussed above in relation to the duress issue, Defendant does not regurgitate the same facts for the Court herein. Suffice to say that the "inducement" requirement of the statute is met and exceeded by the threats above.

Here, as in *Nelson*, the record demonstrates that the criminal enterprise at issue originated in the mind of Mr. Dahlquist; not the Defendant. He was the driver of the vehicle when the enterprise began. *See RPI* at 200:22-23. Ms. Garcia was not familiar with where he was driving, and had never before seen the house that Mr. Dahlquist selected. *Id.* at 201:11-16. Similarly, Mr. Fife, who was familiar with the general area, was not familiar with the Crandalls, nor their residence. *Id.* at 283:3-6. Mr. Fife describes sitting in the truck with Ms. Garcia while Mr. Dahlquist broke

into the Crandalls' residence. *Id.* at 285:10-287:25. In the spirit of candor, this was contested by Ms. Garcia, who stated that Mr. Fife approached the house with Mr. Dahlquist and Ms. Mendivil. *Id.* at 202:10-15.

The relevant question is whether the plan to approach the house originated in the mind of Mr. Fife. It did not. He was not aware of where he was or whose house he was at. Testimony also established that the entire reason they were there at the Crandalls' residence was because Mr. Dahlquist had followed some deer up their driveway. *Id.* at 282:7-21. By all impressions, Mr. Dahlquist seized upon the opportunity and masterminded the string of property crimes. Mr. Fife's involvement in the subsequent offenses is not a question of predisposition, but rather of duress.

The reason the Court erred on this point is that the Court relied on an impermissible basis for declining to impose a downward departure; again, the error is in going beyond the SRA mandate that a trial judge may only sentence based on facts that are admitted, proved, or acknowledged. *Grayson*, 154 Wn.2d at 339. In other words, denying a request for an exceptional downward departure is reversible error if the judge relied on facts outside the record, as was done here.

The Court acknowledged that Mr. Fife only has "minimal criminal history." *RP2* at 44:25-45:1. However, the Court then noted that Mr. Fife "... had only been in Okanogan County for a very short period of time and

in that time managed to become acquainted with, and apparently to some degree, befriended Mr. Dahlquist.” *RP2* at 45:2-5. This “befriending” is not found in the Court’s record. In fact, the only similar evidence deals with Ms. Garcia being friends with Ms. Galloway (*RPI* at 200:3-4) and picking up another of her friends while driving. *Id.* at 212:3 *et seq.* There is some evidence that Mr. Fife was possibly friends with Ms. Galloway, but this does not address Mr. Dahlquist. *RPI* at 276:3-4.

The relevant factors on this point demonstrate the Court erred. The Court properly took note of Mr. Fife’s minimal (misdemeanor) criminal history, but improperly denied his request for an exceptional sentence based on assumptions about facts outside the record. The record amply demonstrates the presence of inducement to commit the offenses; the only remaining question is predisposition. On this issue, the record demonstrates that Mr. Fife has minimal history and that the criminal offenses did not originate in his mind. The Court’s foray outside this record was error.

3. As Applied to Mr. Fife, the Statutory Scheme At Issue Herein is Unconstitutional.

In this case, one thing is clear: Mr. Fife was not himself armed with a deadly weapon. The State made mention of this in closing argument at trial, discussing the same statutory mechanism Mr. Fife now challenges. The State argued to the jury that the first degree burglary charge was

supported because Mr. Dahlquist, *after entering the victim's house*, armed himself with a firearm that he stole therein. *RPI* at 388:20-389:4; 397:3-4.

But the uncontested testimony at trial from Mr. Fife showed that this weapon, along with a knife, were the mechanisms of duress, coercion, threat, or compulsion. *See* RCW 9.94A.535(1)(c). Mr. Fife's similarly uncontested testimony showed that he would not have participated but for the threat, thus showing his behavior was influenced thereby. *RPI* at 291:18-20 *et seq.*

There are two constitutional issues at play here, both dealing with due process in the context of the 5th, 6th, and 14th Amendments, as well as the related provisions of the Washington Constitution: Art. 1 § 3, 9, and 22. Both the State and Federal constitutions mandate that due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Burden*, 104 Wn.App. 507, 511, 17 P.3d 1211 (2001).

First, as here, a person charged with Burglary 1st Degree who wishes to advance a duress defense predicated on a threat with a deadly weapon must put forth evidence of the threat or use of force; the apprehension of grievous harm in the mind of the Defendant; and that the Defendant would not have participated but for the threat. *See* RCW 9A.16.060(1). To produce this information, such a defendant faces a choice: either the defendant must

waive his 5th Amendment right and testify. Where the other witnesses lack personal knowledge as to the defendant's state of mind (i.e. the apprehension of grievous harm), this becomes a Hobson's choice: testify, or forgo the right to present a defense.

Second, a defendant charged with Residential Burglary or, as here, charged with the same as a lesser included of Burglary 1st degree, and who wishes to advance a duress defense predicated on a threat from a deadly weapon opens themselves to a guilty finding on the greater offense. The choice is similar – to prove the defense by a preponderance of the evidence, the defendant must either testify or elicit the information from other witnesses. In effect, this requires a defendant to admit to the aggravating factor (the presence of the deadly weapon) in order to present his defense. In this circumstance, because the defense to the lesser included offense also impacts the greater offense, the Defendant opens himself to cross examination on the greater offense, despite the applicability of ER 611. *See also State v. Epefanio*, 156 Wn.App. 378, 387, 234 P.3d 253 (2010); *State v. Hart*, 180 Wn.App. 297, 320 P.3d 1109 (2014).

This impacts due process because of the effect at sentencing. In a situation where the Defendant's actual conduct meets the elements of Residential Burglary, but not Burglary 1st Degree, and a failed duress defense is advanced predicated on a threat from a deadly weapon, the

presence of the mechanism of duress becomes in effect an aggravator. At 0 points, this disparity is only 11 months; at 6 points and above, the disparity is 32 months, or nearly three years.

The problem is thus: Mr. Fife, and similarly situated defendants, are forced to forgo either their right to present a defense or the right to remain silent. In doing so, such persons *also* open themselves not only to conviction of a greater offense, but *additionally* imposition of a firearm or deadly weapon enhancement under RCW 9.94A.533(3) or (4). This expands the relevant statutory ranges by *five years* if the relevant offense is a Class A Felony (as is Burglary First Degree). By way of another example, a similarly situated defendant with an offender score of 0 who is convicted of Residential Burglary following a failed duress defense is subject to a sentencing range of 3-9 months. However, if the defense fails, and the defendant is convicted of Burglary 1st Degree, *and* the threat is from a firearm, the effective sentencing range is 75-80 months, including the enhancement.

The fundamental issue here is that it is not *possible* to raise a duress defense to either Burglary 1st Degree or Residential Burglary without opening oneself to increased penalties. This is an unusual circumstance, and this Court's consideration thereof is necessarily highly fact-bound. In this

case, it was fundamentally unjust to force Mr. Fife to choose between his 5th and 6th Amendment rights in order to present a complete defense.

4. The Evidence is Insufficient to Show the Requisite Mental State to Support a Conviction for Burglary 1st Degree.

At re-sentencing, the Court informed Mr. Fife that he has the right to appeal “any errors of law that you feel were committed *at any stage of any of the proceedings at the trial Court level.*” *RP2* at 47:7-9. Mr. Fife now avails himself of this opportunity to challenge the sufficiency of the evidence relating to his Burglary First Degree conviction.

Mr. Fife’s challenge is direct, and involves much of the same evidence discussed above, which we do not repeat here in the interest of judicial economy.

The requisite mental state for Burglary 1st Degree is clear, and found within the statute defining the offense: “A person is guilty of burglary in the first degree if, **with intent to commit a crime against a person or property therein**, he or she enters or remains unlawfully in a building...” RCW 9A.52.020 (emphasis added). This intent may be “inferred from the facts and circumstances surrounding the commission of the act and from conduct which plainly indicates such intent as a matter of logical probability.” *State v. Kilponen*, 47 Wn.App. 912, 919, 737 P.2d 1024 (1987).

This type of inference, however, cannot relieve the State of its burden to prove the elements of the offense, including the mental state, beyond a reasonable doubt. *State v. Sandoval*, 123 Wn.App. 1, 4, 94 P.3d 323 (2004); *See also CP* at 120. In *Sandoval*, this Court wrestled with the permissive inference issue in the context of Burglary 1st Degree in a highly fact-bound opinion. The defendant therein drunkenly broke into a house and was surprised to discover the victim inside. *Id.* at 3. When the victim confronted him, a short scuffle ensued. *Id.* However, Mr. Sandoval did not have the requisite mental state for Burglary 1st Degree because he did not enter with the intent of committing the assault, and he did not break and enter with any hallmarks of a burglar, such as tools, burglar-like apparel, or a surreptitious manner. *Id.* at 5-6.

Here, Mr. Fife did not have the requisite mental state. There is no evidence in the record to support an inference that he entered the residence with the intent to commit a crime therein. Instead, he was compelled to both enter the residence and commit the crimes therein by way of Mr. Dahlquist's deadly threat. The only persons with personal knowledge of the events at the house testified that Mr. Fife was physically removed from the vehicle and taken into the house at knife-point.

The State may argue that Mr. Fife is still guilty under the accomplice liability theory that was raised because of his presence. But accomplice

liability is not a well-taken theory either. To be guilty as an accomplice, a person must solicit, command, encourage, request, aid, or agree to aid another in committing **the crime** (i.e. Burglary 1st Degree) with knowledge that their act will facilitate the commission thereof. RCW 9A.08.020(3). Here, only the aid or agree to aid prong is at issue.

Mr. Fife does not meet this criteria either. He did not “aid” Mr. Dahlquist as an accomplice. He was compelled to act. Nor is his mere presence enough:

This Court has repeatedly stated that one’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in the commission of the crime, will not subject an accused to accomplice liability. To prove that one present is an **aid**er, it must be established that one is **ready to assist** in the commission of the crime.

State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) (emphasis added, internal quotations omitted). Mr. Fife was not standing by “ready to assist.” He was sitting in a vehicle, not participating in Mr. Dahlquist’s crime, until Mr. Dahlquist physically removed him from the vehicle and compelled him to assist at knife point.

Because Mr. Fife was not ready to assist, and because no evidence in the record supports the inference that he intended to commit a crime inside the residence, Mr. Fife does not have the requisite mental state to be convicted of Burglary 1st Degree.

F. CONCLUSION

The trial Court erred at sentencing by denying Mr. Fife's request for an exceptional downward departure. In regard to the statutory mitigating factor of duress or quasi-duress, the Court erred by failing to exercise any discretion regarding the quasi-duress elements of RCW 9.94A.535(1)(c). The Court also erred in denying the exceptional request under this statute by relying on amorphous "demeanor and appearance" factors and analyzing whether Mr. Fife could have abandoned the criminal enterprise; these are impermissible bases upon which to deny an exceptional sentence.

The Court erred in regard to the statutory mitigating factor of lack of criminal predisposition by relying on facts outside the record and the Court's own inferences therefrom. Additionally, the Court applied the wrong analysis, failing to consider whether the criminal enterprise originated in the mind of Mr. Fife. The Court cannot actually consider an exceptional sentence request within the meaning of *Grayson* where the Court applies the wrong standard.

Finally, Mr. Fife argues that the statutory mechanism herein that transforms mitigation into aggravation is unconstitutional as applied. The uncontroverted testimony from trial is that Mr. Fife was threatened, and that he perceived this threat as a deadly threat against him. But in order for him to present a complete defense, including the affirmative defense of duress,

he is forced to make a Hobson's Choice between his 5th and 6th Amendment rights. This mechanism offense due process because it is fundamentally unfair to require a criminal defendant to supply the State with aggravating facts that would elevate Residential Burglary into Burglary 1st Degree and open the defendant to a possible firearm aggravator in order to present a *mitigating* circumstance.

The SRA evidences clear legislative intent that mitigating circumstances remain such even where these circumstances are insufficient to constitute a complete defense. In the context of RCW 9.94A.535(1)(c) and the SRA writ large, the mechanism of duress should never function as a sentence enhancement.

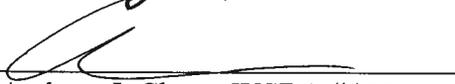
Finally, without the requisite mental state to support Burglary 1st Degree, and without the requisite factual support to make Mr. Fife an accomplice, he cannot be convicted of Burglary 1st Degree.

For the reasons above, Mr. Fife respectfully requests that this Court remand his case for re-sentencing.

Respectfully submitted this 1st of June, 2018



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