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NO. 20927-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**OCTAVIO GONZALES FLORES,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Octavio Gonzales-Flores (“Octavio”) of the crime of involving a minor in a drug transaction. (Counts II and IV).

2. The trial court erroneously admitted the statements of Sandra Flores, Octavio’s spouse, under the co-conspirator exception to the hearsay rule.

3. The accumulation of evidentiary errors requires reversal of the convictions on Counts I, III, V, VI and VII.

4. The trial court erroneously imposed an exceptional sentence.

## ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. What constitutes involving a minor in a drug transaction?  
RCW 69.50.401(f)

2. Should the case of *State v. Hollis*, 93 Wn. App. 804, 970 P.2d 813 (1999) be distinguished from the facts and circumstances of this case?

3. Was it error to admit Sandra Flores' statements under the co-conspirator exception to the hearsay rule? (ER 801(d)(2)(v))

4. Was it error to admit evidence of unrelated criminal activity by Arnulfo Flores and Sandra Flores which did not occur in the presence of Octavio?

5. Should the trial court have required more specific identification of the individuals who were speaking on the tapes when the confidential informant (CI) was wired (including the transcripts of those tapes)?

6. Was the trial court's imposition of an exceptional sentence proper?

#### **STATEMENT OF THE CASE**

The Gonzales-Flores family was the target of an intensive drug interdiction by the North Central Washington Drug Task Force ("Task Force"). The investigation occurred during the months of July, August and September 2001. (RP 96, ll. 8-10; RP 98, ll. 4-5; RP 122, ll. 2-23; RP 123, ll. 1-14; RP 135, ll. 7-8; ll. 14-21; RP 158, ll. 10-12; ll. 13-23; RP 221, ll. 4-22; RP 237, ll. 8-10)

The Task Force used a CI later identified as Lorin Hutton. (RP 88, ll. 16-20). Mr. Hutton was working off his own criminal charges pursuant to a CI agreement. (RP 94, ll. 3-8)

The CI made controlled buys on July 26, 2001, July 31, 2001, August 3, 2001, August 14, 2001, August 24, 2001 and September 25, 2001. Octavio was identified as being present at each of these buys. (RP 107, ll. 11-24; RP 124, ll. 17-20; RP 135, ll. 7-8; RP 158, ll. 10-12; RP 229, ll. 4-17; RP 241, ll. 20-25; RP 243, ll. 22-25)

The State filed an Information charging Octavio with six counts of delivery of a controlled substance, two counts of involving a minor in a drug transaction; and one count of possession with intent to deliver a controlled substance. The Information was filed on October 1, 2001. (CP 12-16).

The charge of involving a minor in a drug transaction (Counts II and IV) alleged dates of July 26, 2001 and July 31, 2001. (CP 13-14)

The surveillance conducted by the Task Force was incomplete. They never personally observed any of the transactions. (RP 99, ll. 4-8; RP 134, l. 12 to RP 135, l. 4; RP 159, ll. 10-18; RP 241, ll. 17-19; RP 261, ll. 1-11; RP 276, l. 8 to RP 277, l. 5; RP 280, ll. 1-2)

Octavio does not speak English. The CI did not speak Spanish. Octavio's wife, Sandra, acted as an interpreter during all of the charged transactions. (RP 451, ll. 15-18; ll.20-24; RP 453, ll. 13-14)

After the initial controlled buy on July 26, 2001, the CI was wired for sound. The tapes of the additional controlled buys from the Gonzales-Flores family were transcribed and read into evidence. The tapes were also played for the jury at Octavio's request. None of the taped

conversations identified Octavio by name. (RP 118, ll. 14-21; RP 133, ll. 24-25; RP 154, ll. 12-24; RP 308, ll. 12-16; RP 528, ll. 10-21; RP 531, l. 18 to RP 533, l. 21; RP 537, ll., 8-14; RP 538, ll. 19 to RP 539, l. 6; RP 540, l. 22 to RP 541, l. 3; RP 549, l. 25 to RP 550, l. 18; RP 551, ll. 10-22; RP 554, ll. 11-19; RP 557, l. 4 to RP 560, l. 5; RP 562, ll. 6-16; RP 563, ll. 12-20; RP 565, ll. 10-16; RP 569, ll. 4-24; RP 571, ll. 1-2; RP 572, ll. 9-10; RP 573, l. 18 to RP 574, l. 10; RP 576, l. 15 to RP 577, l. 16)

In addition to the testimony of the CI, the transcripts of the tapes, and the tapes, the State also introduced evidence of additional controlled buys by the CI when Octavio was not present. The buys occurred on August 10, 2001 and August 21, 2001. They involved Arnulfo Flores and Sandra Flores. Defense counsel did not object to the testimony concerning these buys. (RP 148, ll. 1-15; RP 149, ll. 6-20; RP 218, ll. 6-24)

The trial court ruled that statements made by Sandra Flores to the arresting officers and at a forfeiture hearing were admissible under the co-conspirator exception to the hearsay rule. ER 801(d)(2)(v). The statements implicated Octavio. The defense objected to the statements. (RP 252, ll. 12-25; RP 254, ll. 7-12; RP 254, l. 25 to RP 255, l. 3; RP 396, ll. 18-21; RP 399, ll. 6-12; RP 400, l. 9 to RP 402, l. 15)

Octavio testified at trial. He admitted one count of delivery of a controlled substance and the count involving possession with intent to deliver (Counts VIII and IX). (RP 61, ll. 10-18; RP 671, l. 22 to RP 672, l.

7; RP 692, l. 20 to RP 693, l. 24; RP 708, ll. 15-24; RP 708, ll. 15-24; RP 710, ll. 8-12)

A motion to dismiss Counts II and IV (involving a minor in a drug transaction) was made at the end of the State's case. The trial court reserved ruling on the motion. (RP 582, l. 17 to RP 583, l. 24; RP 584, ll. 1-2).

The defense gave its opening statement and presented testimony from Arnulfo Flores before the trial court entered its decision on the motion to dismiss Counts II and IV. (RP 587 to RP 642) The trial court questioned the decision in *State v. Hollis, supra*; posited that the statute contemplated accomplice liability; but then denied the motion. (RP 642, ll. 6-25; RP 644, ll. 15-20)

The jury found Octavio guilty on all nine (9) counts. The verdict was entered on February 12, 2002. (CP 108-110)

Octavio was sentenced on February 19, 2002. The trial court imposed an exceptional sentence. It ran the convictions on Counts II and IV consecutive to all the other counts which were to run concurrent. (CP 114, 124; CP 125-127)

A Notice of Appeal was filed on February 27, 2002. (CP 113)

## SUMMARY OF ARGUMENT

More than mere presence is necessary in order to convict a person of involving a minor in a drug transaction as defined in RCW 69.50.401(f).

*State v. Hollis, supra*, was wrongly decided. It does not support the trial court's ruling denying the motion to dismiss Counts II and IV at the end of the State's case.

There was insufficient evidence to convict Octavio of involving a minor in a drug transaction under Counts II and IV.

ER 801(d)(2)(v) did not authorize the admission of Sandra Flores' statements as a co-conspirator. Ms. Flores' statements occurred after the arrest of the Gonzales-Flores family and at a subsequent forfeiture proceeding. The statements were not made in furtherance of the conspiracy.

The admission of testimony about drug transactions which did not occur in Octavio's presence, and without objection by defense counsel, was improper in the absence of proof that he either had knowledge of the transactions or acquiesced in them. Defense counsel should have objected under ER 403 and ER 404.

The introduction of the transcripts from the CI tapes, and the playing of the tapes without specifically identifying Octavio's statements,

was error. The trial court should have conducted a balancing test under ER 403 prior to admission of the tapes and transcripts.

The cumulative effect of the various evidentiary errors, with and without objection, impacted Octavio's right to a fair trial. His convictions on Counts I, III, V, VI and VII should be reversed and remanded for a new trial.

No error is assigned on Counts VIII and IX since Octavio admitted them at trial.

Counts II and IV should be reversed and dismissed.

The trial court did not have a valid basis to impose an exceptional sentence. Octavio's sentence cannot exceed the maximum of one hundred twenty (120) months if Counts II and IV are dismissed and the remaining Counts are not remanded for a new trial.

## ARGUMENT

### I. RCW 69.50.401(f)

RCW 69.50.401(f) was enacted by LAWS OF 1987, Ch. 458, Sec. 4.

The statute provides:

It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. . . .

The only case interpreting the word “involve” is *State v. Hollis*, *supra*. The *Hollis* Court recognized that the Legislature did not define “involve.” It cited WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1191 (1969) at 811:

The ordinary meaning of “involve” is “to enfold or envelop so as to encumber ... to draw in as a participant ... to oblige to become associated (as an unpleasant situation)[.]”

The *Hollis* Court went on to hold at 812:

The involving a minor in a drug transaction statute does not require that the minor actually participate in the drug transaction. In fact, the minor’s culpability and actions – which are proscribed under other statutes – are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant’s affirmative acts. A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves – i.e., surrounds, encloses, or draws in – a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction.

The trial court questioned the validity of the *Hollis* case. However, it did not grant Octavio’s motion to dismiss. Instead, it reserved ruling on it until after the defense had presented its opening statement and one (1) witness.

Octavio contends that the *Hollis* case was erroneously decided. He asserts that the statute requires the adult to actively involve the minor in the drug transaction. Mere presence is not enough. He urges the Court to carefully scrutinize the statutory language.

The words selected by the Legislature to define the offense have a clear and definite meaning. Even though the Legislature did not define those words, individuals of common understanding know their meaning based upon everyday use.

“Compensate” means to pay.

“Threaten” implies force and/or duress.

“Solicit” means to request or ask.

Each of the words implies some type of action by the adult toward the minor. Common sense dictates that the word “involve” also requires some type of action by the adult toward the minor. See: *State v. VanWoerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998) (recognizing the continued validity of the doctrine of *noscitur a sociis*).

The definition of the word “involve” as contained in WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (Revised and updated 1996) supports Octavio’s argument:

involve ... 1. to include as a necessary circumstance, condition, or consequence;; imply; entail: ... 2. to engage or employ. 3. ... 4. ... 5. ... 6. ... 7. ... 8. to combine inextricably ... 9. to implicate, as in guilt or crime, or in any matter or affair. 10. ... 11. ... 12. to envelop or enfold, as if with a

wrapping. 13. to swallow up, engulf, or overwhelm. 14. a. *Archaic.* to roll, surround, or shroud, as in a wrapping. b. to roll up on itself; wind spirally; coil; wreath.

The correct application of the definition necessarily requires active participation of the adult toward the minor. The *Hollis* Court's decision indicates the minor's presence is all that is required.

A careful review of the testimony concerning the presence of Jessica Chapa, Sandra Flores' thirteen-year-old daughter, reveals that she was not involved in the transactions of July 26 or July 31, 2001. (RP 108, ll. 7-18; RP 109, ll. 18-22).

Detective Brown testified that the CI informed him that when he went to the Gonzales-Flores cabin on July 26 he observed Sandra Flores and her daughter standing together near the driveway. Octavio was standing off by himself. (RP 107, ll. 11-15) On the other hand, at trial, the CI testified that the July 26 transaction occurred inside the residence property. (RP 451, l. 25 to RP 452, l. 12)

The CI also indicated that Jessica Chapa was present at the July 31, 2001 controlled buy. (RP 455, ll. 18-20) His testimony indicated she was "in the general area." (RP 457, ll. 9-10)

On cross-examination the CI testified that the July 26 transaction occurred inside the residence. Octavio was in a bedroom. Sandra Flores went to the bedroom, obtained the drugs, and returned to give it to him.

The daughter was on a couch in the living room. (RP 483, ll. 3-20; RP 484, ll. 5-14)

The CI described the July 31 transaction as occurring inside the residence. Jessica was again on the couch. Octavio was in the kitchen. Sandra Flores went into the kitchen, then returned and handed the controlled substance to the CI who was in the living room. (RP 486, ll. 7-12; RP 487, ll. 8-12)

There was no direct testimony that Jessica Chapa knew what was occurring; though the CI testified that he thought Jessica Chapa was aware of what was going on. (RP 452, ll. 7-16)

There is no direct testimony that Jessica Chapa saw any controlled substance.

The law is clear that mere presence, in and of itself, does not make a person an accomplice to a crime. *State v. Landon*, 69 Wn. App. 83, 91, 848 P.2d 724 (1993). Even presence, combined with knowledge that a crime is occurring, is insufficient to establish accomplice liability. *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303, *review denied* 119 Wn. 2d 1003, 832 P.2d 487 (1992).

Furthermore, the law is well settled in connection with the fact that mere proximity, momentary handling, and knowledge are insufficient to establish constructive possession. *State v. Amezola*, 49 Wn. App. 78, 87, 741 P.2d 1024 (1987); *State v. Werry*, 6 Wn. App. 540, 548, 494 P.2d 1002 (1972); *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

In the absence of some activity on the part of Jessica Chapa during the course of the described transactions, there was insufficient evidence to establish that Octavio involved her in them. Octavio was not in the same room with her on either July 26 or July 31.

Octavio recognizes that a challenge to the sufficiency of the evidence, after the State rests its case-in-chief, is normally waived if testimony is presented by the defense. In this particular case, since the trial court reserved ruling until after the defense commenced its case, waiver should not apply.

... At the end of the State's case in chief, a court examines sufficiency based on the evidence admitted at trial so far. At the end of all the evidence, after verdict, or on appeal, a court examines sufficiency based on all of the evidence admitted at trial. Each succeeding basis is more complete, and hence better, than the one before.

Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available. For this reason, a defendant who presents a defense case in chief "waives" (i.e., may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief. ...

*State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996).

Furthermore, Octavio acknowledges that the role of the appellate court, upon a challenge to the sufficiency of the evidence, is limited to a determination of whether a rational trier of fact could have found all of the

essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980).

Since no additional testimony was presented concerning Jessica's involvement during either the defense case-in-chief or the State's rebuttal case, Octavio urges the appellate court to make its decision as of the time the State rested.

A challenge to the sufficiency of the evidence raises a question of constitutional magnitude. The State is required to prove its case beyond a reasonable doubt. *Personal Restraint of Tortorelli*, 149 Wn. 2d 82, 93 (2003) (citing *State v. Baeza*, 100 Wn. 2d 487, 488, 670 P.2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970))).

The evidence concerning the involvement of Jessica Chapa in either drug transaction, and particularly as to the July 26 buy, was so scanty as to barely merit consideration.

Interpreting all reasonable inferences from the evidence in favor of the State and most strongly against Octavio, it is evident that the State did not establish that he involved Jessica Chapa in any drug transaction. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992).

Octavio's convictions on Counts II and IV should be reversed and dismissed.

## II. Co-Conspirator Statements

ER 801(d)(2)(v) states:

A statement is not hearsay if –

...

(2) *Admission by Party-Opponent.* The statement is offered against a party and is ...  
(v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The trial court admitted statements made by Sandra Flores. The statements were made after her arrest on September 25, 2001. Octavio was arrested the same date.

The trial court also admitted statements made by Sandra Flores at a forfeiture hearing on November 29, 2001. Those statements were made over two (2) months after the date of arrest.

Before admitting the statement of a coconspirator under ER 801(d)(2)(v), the trial court must first determine whether the State has shown with substantial independent evidence a prima facie case of conspiracy. *State v. St. Pierre*, 111 Wn. 2d 105, 118, 759 P.2d 383 (1988). The trial court must also find that the statements were made during the course and in furtherance of the conspiracy. *St. Pierre*, at 118-19. ... However, statements made with the purpose of assisting the police, and not in furtherance of the conspiracy, are not admissible under the coconspirator exemption. *United States v. Alonzo*, 991 F.2d 1422, 1426 (8<sup>th</sup> Cir. 1993) ... .

*State v. Atkinson*, 75 Wn. App. 515, 519, 878 P.2d 505 (1994).

Sandra Flores' statements to the arresting officers on September 25, 2001 were made to assist the police. They were not made in furtherance of the conspiracy. Therefore, they were not admissible under the co-conspirator exemption to the hearsay rule.

The conspiracy was at an end following the arrest of the Gonzales-Flores family on September 25, 2001. The State established that a conspiracy existed. Unfortunately, none of the statements admitted were made in furtherance of that conspiracy.

Courts generally interpret the "in furtherance" requirement broadly. *State v. Baruso*, 72 Wn. App. 603, 615, 865 P.2d 512 (1993). A statement meant to induce further participation in the conspiracy or to inform a coconspirator about the status of the conspiracy is sufficient. [Citations omitted.]

On the other hand, casual, retrospective statements about past events do not fall within the coconspirator exception because they do not further the conspiracy. *Baruso*, 72 Wn. App. At 614-15 (citing *State v. Anderson*, 41 Wn. App. 85, 105, 702 P.2d 481 (1983), *rev'd in part on other grounds*, 107 Wn. 2d 745, 733 P.2d 517 (1987)). But statements relating past events are admissible under the rule as long as they facilitate the criminal activity of the conspiracy. [Citations omitted.]

*State v. King*, 113 Wn. App. 243, 280-81, 54 P.3d 1218 (2002).

The statements made by Sandra Flores were statements relating to past events. They were not statements made to facilitate the criminal activity of the conspiracy. Rather, they constituted a confession. They also implicated Octavio.

The trial court's ruling that the statements were admissible as co-conspirator statements was erroneous.

The statements were the only corroborating evidence of the CI's testimony that Octavio was involved in the activities charged in Counts I through VII of the Information. No law enforcement officer or other witness ever observed him in any of the activities described by the CI as to those Counts.

### **III. Other Evidentiary Error**

#### **A. Uncharged Misconduct**

ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The State presented testimony of drug transactions conducted by Arnulfo Flores and Sandra Flores. Octavio was not present at those buys on August 10 and August 21, 2001.

Octavio contends that the evidence may have been relevant if he had been charged with conspiracy. The State's conspiracy theory was

presented throughout the case. (RP 323, l. 22 to RP 324, l. 9) However, the State elected not to charge him with conspiracy. Rather, they charged him with delivery of a controlled substance.

The testimony concerning this collateral criminal activity of Arnulfo Flores and Sandra Flores unduly prejudiced Octavio's case. Since he was not present at those transactions, the jury could easily become confused on whether they constituted evidence of guilt. They also had the effect of misleading the jury by allowing them to infer that the existence of the conspiracy was sufficient to infer Octavio's guilt.

Defense counsel did not object to the testimony. Therefore, the question becomes whether or not Octavio has waived the right to challenge it on appeal. Prior to discussing the issue of waiver the Court must consider ER 404.

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Octavio's defense was that he was not involved in the controlled buys charged under Counts I, III, V, VI and VII.

It is anticipated that the State will argue that the evidence of the controlled buys from Arnulfo Flores and Sandra Flores on August 10 and

August 21 are indicative of the conspiracy and thus constituted proof of intent, plan, or knowledge on the part of Octavio. Yet, the testimony is unrelated to any conduct by Octavio on those dates and is not relevant to the charged offenses.

**B. Improper Opinion**

Additionally, Mr. Gonzales Flores contends that it was improper to allow Detective Brown to express an opinion that drug dealers don't usually keep the product at their own residence. Defense counsel did not object to a lack of proper foundation for either an expert or lay opinion. ER 701; ER 703. (RP 350, ll. 4-20)

**C. Lack of Foundation**

The CI was allowed to testify concerning a statement allegedly made by Octavio in Spanish. There was no objection even though the CI testified he did not understand Spanish. The statement: "Yes, it would be possible," related to the availability of a specified amount of cocaine. (RP 457, ll. 20-24; RP 458, ll. 10-23)

Finally, Octavio contends that an improper foundation was laid for the admission of the transcripts from the CI tapes.

While it is true that there must be some authentication of the conversation before it is admissible, the evidence used to identify the speaker need only be circumstantial.

*State v. Gallo*, 20 Wn. App. 717, 727, 582 P.2d 558 (1978).

Again, defense counsel did not object to the reading of the transcripts. Identification of Octavio's voice on the tapes lacked the requisite authentication to make them admissible. The mere fact that the CI indicated that Octavio was present, does not, without more, identify what statements were actually made by him. This is particularly true on those tapes where more than one male is speaking Spanish.

#### **D. Waiver**

Failure to object to inadmissible evidence "on the basis of hearsay, relevance, or lack of foundation," may constitute a waiver of such objection. *State v. Hancock*, 44 Wn. App. 297, 303, 721 P.2d 1006 (1986).

Octavio requests the Court to review each of the claimed errors. Even though defense counsel failed to object, no waiver should be inferred when the record is viewed in its entirety. It becomes obvious that defense counsel's failure to object impacted the outcome of the trial.

It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. [Citations omitted.] Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. [Citations omitted.] Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. [Citation omitted.] Non-

constitutional error requires a reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. [Citations omitted.]

*State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

The evidentiary errors did not amount to constitutional error. Octavio contends that the evidence against him was not overwhelming. It was the CI's word against his word. Octavio's credibility was at issue, especially since he admitted Counts VIII and IX. The failure of defense counsel to object to the various items of evidence enabled the State to flesh out its case against Octavio. The accumulation of evidentiary errors in this case requires reversal.

#### **IV. Exceptional Sentence**

An exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence. RCW 9.94A.120(2), (3); *State v. Halgren*, 137 Wn. 2d 340, 345, 971 P.2d 512 (1999). In order to reverse an exceptional sentence, the reviewing court must find that (1) under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence, (2) as a matter of law an exceptional sentence is not justified by the reasons, or (3) under an abuse of discretion standard an exceptional sentence is clearly excessive.

*State v. Gore*, 143 Wn. 2d 288, 315, 21 P.3d 262 (2001).

The trial court entered Findings of Fact and Conclusions of Law to support the exceptional sentence.

The maximum sentence on each count of delivery of a controlled substance, and the one (1) count of possession with intent to deliver, was one hundred twenty (120) months. Octavio's offender score was computed as eighteen (18). The trial court imposed the maximum sentence on each of these counts and directed that the sentences run concurrently.

The trial court also imposed the maximum sentence on Counts II and IV (involving a minor in a drug transaction). The maximum sentence was sixty (60) months in a State institution for each offense. The trial court directed that Counts II and IV run concurrently; but consecutive to the remaining counts. Thus, the exceptional sentence was one hundred fifty (150) months.

Octavio recognizes that:

Every offense has its own maximum sentence and its own presumptive sentence. Multiple offenses sentenced at the same time are not considered as a group; the statutory maximum is determined for each offense separately, not by an analysis of the total confinement for all offenses and enhancements.

*State v. Thomas*, 113 Wn. App. 755, 759, 54 P.3d 719 (2002).

It is Octavio's position that if his convictions on Counts II and IV are reversed and dismissed; then the exceptional sentence fails. His maximum sentence would then be the one hundred twenty (120) months ordered to run concurrent on the remaining counts.

## CONCLUSION

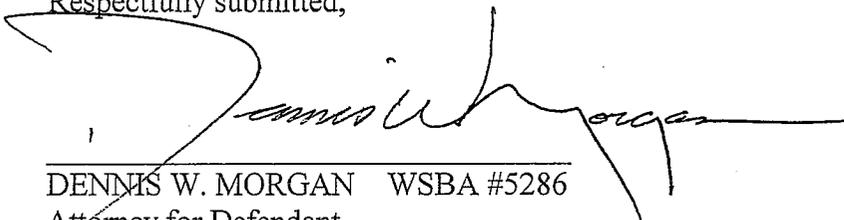
There was insufficient evidence to convict Octavio of involving a minor in a drug transaction. Counts II and IV should be reversed and dismissed.

The accumulation of evidentiary errors requires a new trial. The Court should reverse the other convictions, with the exception of Counts VIII and IX, and remand the case for a new trial.

Alternatively, if Counts II and IV are reversed and dismissed, and the Court finds no other error, the exceptional sentence should be reversed and a maximum sentence of one hundred twenty (120) months imposed.

DATED this 30<sup>th</sup> day of October, 2003.

Respectfully submitted,



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