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NO. 51791-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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CITY OF AUBURN,

Respondent,

v.

TERESA A. HEDLUND,

Petitioner.

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ON APPEAL FROM  
THE AUBURN MUNICIPAL COURT  
C78961 AUP and IC7374 AUP  
Honorable Patrick Burns

AND

KING COUNTY SUPERIOR COURT  
03-2-00810-9-KNT  
Honorable James Cayce

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. RESPONSE TO ARGUMENTS RAISED BY RESPONDENT  
IN ITS REPLY TO APPELLANT'S OPENING BRIEF ..... 1

1. The correct interpretation of  
RCW 9A.08.020 is based on the  
statute's plain language ..... 1

2. Continuation of trial on dismissed  
charges violated constitutional  
prohibition against double jeopardy ..... 4

B. APPELLANT'S RESPONSE TO ADDITIONAL ARGUMENTS  
RAISED BY RESPONDENT IN ITS REPLY BRIEF ..... 6

1. Introduction ..... 6

2. The superior court properly held that the trial  
court's refusal to grant defense motion  
to sever charges for trial was erroneous ..... 8

3. The superior court correctly held  
that admission of a portion of  
the videotape was erroneous ..... 12

4. The superior court correctly held that  
admission of the 911 tape was erroneous ..... 13

5. Conclusion ..... 14

C. CONCLUSION ..... 18

TABLE OF AUTHORITIES

WASHINGTON CASES

Hansen v. Department of Labor and Industries,  
27 Wn. App. 223, 615 P.2d 1302 (1980) ..... 3

Seattle v. State,  
100 Wn.2d 16, 666 P.2d 359 (1983) ..... 7

State v. Bingham,  
105 Wn.2d 820, 719 P.2d 109 (1986) ..... 7

State v. Clark,  
139 Wn.2d 152, 985 P.2d 377 (1999) ..... 5

State v. Gatalski,  
40 Wn. App. 601, 699 P.2d 804 (1985) ..... 11

State v. Ross,  
98 Wn. App. 1, 981 P.2d 888 (1999) ..... 8

State v. Roybal,  
82 Wn.2d 577, 512 P.2d 718 (1973) ..... 8-9

State v. Sanders,  
66 Wn. App. 878, 833 P.2d 452 (1992) ..... 10

State v. Scott,  
110 Wn.2d 682, 757 P.2d 377 (1988) ..... 6

State v. Watkins,  
53 Wn. App. 264, 766 P.2d 484 (1989) ..... 10, 11

State v. Young,  
83 Wn. 2d 937, 523 P.2d 934 (1974) ..... 7

FEDERAL CASES

Crawford v. Washington,  
541 U.S. 36, 124 S.Ct. 1354,  
158 L.Ed. 2d 177 (2004) ..... 14

U.S. v. Parker,  
368 F.3d 963 (7<sup>th</sup> Cir 2004) ..... 4-5

STATUTES

RCW 7.68.020(3) ..... 2  
RCW 9.94A.030(47) ..... 2  
RCW 9A.08.020 ..... 1, 2, 3, 4  
RCW 9A.08.020(5)(a) ..... 2, 18

COURT RULES

CrRLJ 4.4(b) ..... 9, 11  
RALJ 2.1(a) ..... 17  
RALJ 2.2(a)(1) ..... 17  
RAP 2.5(a)(3) ..... 5

EVIDENCE RULES

ER 404(b) ..... 10, 12

WASHINGTON CONSTITUTION

Const., article I, section 22 ..... 17

**A. RESPONSE TO ARGUMENTS RAISED BY RESPONDENT**  
**IN ITS REPLY TO APPELLANT'S OPENING BRIEF**

**(1) THE CORRECT INTERPRETATION OF RCW 9A.08.020  
IS BASED ON THE STATUTE'S PLAIN LANGUAGE.**

Appellant's argument in her opening brief that she could not be an accomplice to Driving Under the Influence as a matter of law is based on the plain language of the accomplice liability statute, RCW 9A.08.020. In response, respondent urges this Court to adopt a strained interpretation of the statute by requiring the Court to engage in some sort of analysis based on the timing of the criminal acts of the principal and the injury suffered by the accomplice. Br. of Resp., at 8-11. The respondent cites no authority to support its position.

In its opening brief, appellant offered two statutory definitions of the word "victim." One states that a person's harm is a direct result

of the crime charged. RCW 9.94A.030(47). The other states that a person's harm is a proximate result of another's criminal act. RCW 7.68.020(3). By any definition of the word "victim," one is a victim as a consequence of the wrongful act of another. Thus, it is necessary that the harm suffered follows the commission of the crime. The respondent argues that one must suffer harm absolutely contemporaneous with the criminal act in order to be a victim. Br. of Resp., at 8. Respondent's claim that the Legislature's use of the word "is" (as opposed to "becomes") in RCW 9A.08.020(5)(a) is significant has no merit. In viewing the statute as a whole, it is clear the use of the word "is" in RCW 9A.08.020(5)(a) is simply consistent with the use of the present tense throughout the statute. See RCW 9A.08.020.

The respondent does not appear to dispute the fact that, under any definition of the word "victim," Ms. Hedlund was a victim of Tom

Stewart's drunken driving. The City only briefly asserts that Ms. Hedlund is "not entitled to victim status" and cites Hansen v. Department of Labor and Industries, 27 Wn. App. 223, 615 P.2d 1302 (1980) as authority for its claim. Br. of Resp., at 13. The issue in Hansen was whether the Board of Industrial Insurance Appeals correctly denied benefits to the plaintiff under RCW 7.68 (the crime victim's compensation act) in finding that she was not an "innocent victim" of an assault. Hansen, 27 Wn. App. at 224-226. RCW 9A.08.020 makes no distinction between a "victim" and an "innocent victim." The respondent's reliance on Hansen, therefore, is misplaced and unpersuasive.

In its reply brief, respondent does not address the merits of appellant's argument, nor the reasoning of the Superior Court in reversing the trial court's decision. Rather it offers the same argument that was rejected by the trial

court<sup>1</sup> and ignored by the Superior Court<sup>2</sup>. The argument is no more persuasive now. The appellant again urges this Court to find that under the plain language of RCW 9A.08.020, Ms. Hedlund was a victim of Tom Stewart's crime of DUI and, therefore, cannot be an accomplice to it.

**(2) CONTINUATION OF THE TRIAL ON DISMISSED CHARGES VIOLATED CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.**

The appellant believes that the issue of Double Jeopardy is properly before this Court and that an objection to the trial court was not necessary to preserve it for appeal. The City cites U.S. v. Parker, 368 F.3d 963 (7<sup>th</sup> Cir. 2004) for the proposition that the appellant had a duty to object on double jeopardy grounds to the trial court upon continuation of the trial. Br. of Resp., at 17. Among several issues raised

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<sup>1</sup> CP 585-595.

<sup>2</sup> RP 2/5/03 14-22, 28-30.

by the defendant in Parker was that the imposition of consecutive sentences by the trial court violated the Double Jeopardy Clause of the Constitution. Parker, 368 F.3d at 969. The double jeopardy argument was not offered to the trial court during sentencing. Id., at 969-70. Accordingly, the court held that "by explicitly disclaiming the double jeopardy argument, Parker deprived the district court of the opportunity to address the issue," and concluded that the argument was waived and not reviewable on appeal." Id., at 970. In the present case, in light of the Superior Court's reversal of the trial court's decision to grant the defense motion to dismiss, raising such an objection upon recommencement of the trial would have been futile. Further, as violation of the prohibition against double jeopardy is an issue of Constitutional magnitude, the appellant may raise it for the first time on appeal. RAP 2.5(a)(3); State v. Clark, 139 Wn.2d 152, 156,

985 P.2d 377 (1999); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 377 (1988). As review has been granted on the issue by this Court, the appellant stands by the arguments and authority advanced in her opening brief.

**B. APPELLANT'S RESPONSE TO ADDITIONAL ARGUMENTS**

**RAISED BY RESPONDENT IN ITS REPLY BRIEF**

**(1) INTRODUCTION**

The respondent presents several issues for this Court's consideration, although review has not been granted. In doing so, it is unclear what standard of review the respondent is asking this Court to employ. Respondent appears that to be asking this Court to engage in a de novo review of Judge Burns' pretrial and evidentiary rulings.

While the City states that "case law rightfully gives great deference to a trial court's determinations" it cites no authority

for such an assertion. Br. of Resp., at 24-25. The City then suggests that, under State v. Young, 83 Wn. 2d 937, 523 P.2d 934 (1974), a superior court has a heightened duty not to disturb lower court decisions. Br. of Resp., at 25. The Young opinion does not stand for such a proposition and, in light of the fact that it predates the promulgation of the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), the City mischaracterizes the precedential value of the case.<sup>3</sup> Further, in citing State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986), the respondent misstates the court's opinion<sup>4</sup> and offers an erroneous standard of review. Br. of Resp., at 28. There is no challenge to the sufficiency of the evidence at trial before this Court, therefore such a standard of review is inapplicable.

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<sup>3</sup> RALJ was adopted by the Washington Supreme Court in 1980. See Seattle v. State, 100 Wn.2d 16, 666 P.2d 359 (1983).

<sup>4</sup> The opinion cites the standard for reviewing sufficiency of "the evidence in a criminal case," not "sufficiency of a criminal trial." Bingham, 105 Wn.2d at 823.

In reviewing the trial court's pretrial and evidentiary rulings, the King County Superior Court did not engage in a de novo review. Rather, it employed the correct standard of review, which was abuse of discretion. The Superior Court's basis for remanding the case back to the trial court was clearly and correctly stated in its ruling. CP 1256-1259.

**(2) THE SUPERIOR COURT PROPERLY HELD THAT THE TRIAL COURT'S REFUSAL TO GRANT DEFENSE MOTION TO SEVER CHARGES FOR TRIAL WAS ERRONEOUS.**

In support of its argument that the trial court's refusal to sever the charges for trial was not erroneous, the City essentially argues that the charges were properly joined. Br. of Resp., at 42-44. The City cites to State v. Ross, 98 Wn. App. 1, 981 P.2d 888 (1999), which is a case addressing joinder in the context of the proper calculation of speedy trial time. Br. of Resp., at 42. Further, citation to State v.

Roybal, 82 Wn.2d 577, 512 P.2d 718 (1973), is similarly irrelevant when the tests set forth in the opinion are in the context of double jeopardy analysis. Br. of Resp., at 43. Regardless, there was never any dispute that all the crimes with which the defendant was charged occurred on the same date and arose from the same general series of events. Rather, the defendant sought severance so that she could receive a fair determination of her guilt or innocence on each charge. CP 1266-1273, 1292-95, 1296-99.

Under the applicable court rule, a motion to sever joined offenses shall be granted when the court determines that severance would promote a fair determination of defendant's guilt or innocence of each offense. CrRLJ 4.4(b). Prejudice may result if a defendant is embarrassed in the presentation of separate defenses, or if joinder of the multiple counts in a single trial invites the jury to cumulate

evidence to find guilt or infer a criminal disposition. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). Factors which may offset or neutralize the prejudicial effect of joinder include: (1) the strength of the State's evidence on each count; (2) the clarity of defenses on each count; (3) whether the court properly instructs the jury to consider the evidence of each crime separately; and (4) the admissibility of the evidence of one crime in the trial of the other if they had been tried separately. Sanders, 66 Wn. App. at 885. In the case at bar, the last factor, cross-admissibility of evidence, was most significant. In determining the admissibility of evidence of other crimes under ER 404(b), a trial court must: (1) determine that evidence is relevant to an issue such as identity or absence of mistake; (2) determine that any prejudicial effect is outweighed by the probative value; and (3)

properly limit the purpose for which the jury may consider the evidence. Watkins, 53 Wn. App. at 270 (citing State v. Gatalski, 40 Wn. App. 601, 607, 699 P.2d 804 (1985)). In twice considering the defendant's motion to sever, the trial court never engaged in any sort of analysis based on the factors set forth above concerning the City's proposed evidence in the case, nor any analysis of the cross-admissibility of the evidence as it related to each charge. CP 51-53, 113. The omission of the analysis was particularly problematic in light of the mandatory nature of the language in CrRLJ 4.4(b).

As the Superior Court correctly noted, a separate trial could have been held on the charge of furnishing tobacco to a minor with minimal inconvenience to the parties and Auburn Municipal Court. CP 1257. The fact that the trial court, during two separate hearings, neglected or refused to engage in an analysis of

the factors set forth above, clearly supports a finding that an abuse of discretion occurred.

**(3) THE SUPERIOR COURT CORRECTLY HELD THAT ADMISSION OF A PORTION OF THE VIDEOTAPE WAS ERRONEOUS.**

One brief portion of the videotape the City offered into evidence depicted Ms. Hedlund's minor child with a cigarette in her mouth and exposing her bare buttocks to the camera, which was not being operated by the defendant at the time. CP 573. While the video was rife with boorish behavior of many persons depicted, this was clearly the most inflammatory and prejudicial portion of the tape. While the image of the minor with a cigarette in her mouth was relevant to the charge of furnishing tobacco to a minor, it was not relevant to prove that Ms. Hedlund was an accomplice to the crime of DUI and should not have been admitted under ER 404(b). Further, it was clear that Ms. Hedlund was not operating

the camera during this particular episode, thus it was irrelevant to the City's theory that she encouraged other people to commit crimes by her use of the camera. The Superior Court ultimately agreed with this position. CP 1258-1259. The Superior Court was also correct in holding that this portion was minimally relevant to the City's theory of the case in light of the other depictions on the video. CP 1258. Accordingly, admission of this portion of the videotape by the trial court constituted an abuse of its discretion.

**(4) THE SUPERIOR COURT CORRECTLY HELD THAT ADMISSION OF THE 911 TAPE WAS ERRONEOUS.**

One of the first pieces of evidence the City offered in its case in chief was a tape recording of a 911 call from a citizen named Tina Rosselle who described, in partly erroneous detail, the aftermath of a traffic accident. CP 780-86. The caller's incorrect description of

her observations bore no relevance to any issue to be determined in the case. The suggestion that the recording of Ms. Rosselle's phone call was necessary to establish that Ms. Hedlund was in the front passenger seat or the recklessness of Mr. Stewart's driving is incredible in light of all of the other evidence offered by the City at trial. Br. of Resp., at 44-45.

Additionally, the respondent's anticipatory inclusion of hearsay analysis under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)<sup>5</sup> is irrelevant as Ms. Rosselle was offered as a witness at trial by the prosecution and was subjected to cross examination by the defense. CP 787-88. In fact, Ms. Rosselle's presence in court as a witness made the necessity of admitting the 911 tape that much more perplexing and lends credibility to the assertion that the tape was offered only for its dramatic effect. It was clear that this

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<sup>5</sup> Br. of Resp. at 46-47.

evidence was being offered to arouse a sense of horror in the jury from the outset of the case, and the Superior Court correctly so held. CP 1257.

**(5) CONCLUSION**

The City makes several references to the reckless driving charge,<sup>6</sup> despite the fact that Ms. Hedlund was acquitted of that charge and, thus, the issue of her accomplice liability for that crime was not an issue before the Superior Court, nor an issue before this Court. In fact, the jury's acquittal of Ms. Hedlund on the reckless driving charge would strongly suggest that it was not persuaded by the City's "crucial theory" of the case. The inconsistent jury verdict would also strongly suggest that the jury believed that Ms. Hedlund's mere presence at the scene was sufficient to make her an accomplice to Tom Stewart's act of driving while

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<sup>6</sup> Br. of Resp. at 12, 22, 26, 34-35, 38, 43.

intoxicated, while her use of a video camera did not solicit, aid or encourage Mr. Stewart to drive a car in a reckless manner.

The trial court record shows that the City's case in chief focused in large part on the tragic aftermath of the grizzly traffic accident as well as the crude and unsavory behavior of the vehicle's occupants in the hours immediately prior to the tragedy. This continues to be focus of the respondent's argument on appeal before this Court, particularly with its insistence that this Court view the videotape. Br. of Resp., at 26.

While the respondent urges appellate courts to defer to the decisions of trial court judges as a means of providing certainty to litigants and discouraging appeals<sup>7</sup>, there is no legitimate reason for a defendant, such as Ms. Hedlund, whose right to a fair trial is severely prejudiced by erroneous pretrial and evidentiary

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<sup>7</sup> Br. of Resp., at 26-27.

rulings, to forego her right to seek relief through appellate review. Indeed, Ms. Hedlund appealed her conviction to the King County Superior Court as is her right under Article I, section 22 of the Washington State Constitution and as permitted by RALJ 2.1(a) and RALJ 2.2(a)(1). Additionally, the City's pleas for unbridled deference to Judge Burns' decisions seem somewhat disingenuous in light of its own actions in seeking immediate judicial review of his adverse mid-trial decision. CP 598-600. Numerous issues were presented to the Superior Court for review on Ms. Hedlund's appeal, most of which the court resolved in favor of the City. CP 1256. Nevertheless, the Superior Court correctly ruled that the trial court abused its discretion in refusing to grant the defense motion to sever the charges for trial and in admitting a portion of the videotape and the 911 tape.

Review has not been granted by this Court on the issues presented by the respondent, who has offered no compelling basis for this Court to reconsider the superior court's opinion and order. Accordingly, the appellant respectfully requests that this Court not grant review and not disturb the ruling of the Superior Court on Ms. Hedlund's RALJ appeal.

**C. CONCLUSION**

The trial court's decision to grant the defense motion to dismiss the DUI charges against Ms. Hedlund was supported by the statutory language and the facts of the case. The King County Superior Court then erred in reversing the decision upon the respondent's interlocutory appeal. The language of RCW 9A.08.020(5)(a) is clear on its face, while respondent is urging this Court to employ a strained and unsupportable interpretation of the statute.

On Ms. Hedlund's RALJ appeal, the Superior Court correctly ruled that the trial court erred in failing to grant her motion to sever the charges joined for trial and admitting the 911 tape and portions of the videotape offered into evidence by the City at trial.

In light of the Superior Court's reasoned opinion and the absence of any compelling argument that the Superior Court acted outside of its authority, the appellant respectfully requests that this Court decline review on the issues presented by the respondent.

The appellant again respectfully requests that this Court set her conviction for DUI aside and dismiss the respondent's criminal complaint with prejudice.

DATED this 12<sup>th</sup> day of July, 2006.

Respectfully Submitted



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