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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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DEPUTY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

THOMAS HARRY EATON, Respondent.

FROM THE COURT OF APPEALS, DIVISION II – NO. 34911-6-II  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02126-8

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in Section II of this petition.

II. COURT OF APPEALS DECISION

The State requests the Supreme Court to review the decision filed by Division II of the Court of Appeals under No. 34911-6-II designated State of Washington v. Thomas H. Eaton. The decision was filed on February 12, 2008, and was an appeal by the defendant from decision in the Clark County Superior Court. A copy of the decision from Division II is attached hereto and by this reference incorporated herein.

III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals in its decision determined that RCW 9.94A.533(5)(c), a zone enhancement dealing with introduction of drugs into a county jail, requires a showing of mens rea. The Court of Appeals went on to indicate that to not require this leads to an “unlikely, absurd, or strained consequence of punishing a defendant for his involuntary act.” (Court of Appeals Decision, Page 9). The State submits that this is an inaccurate reading of the legislation.

#### IV. STATE OF THE CASE

After arresting Eaton for DUI, a police officer transported Eaton to the Clark County jail, where another officer searched him. During this search, the officer observed “what appeared to be a plastic bag taped to the tope of [Eaton’s] sock.” (1 RP at 99). Inside this plastic bag, the officers discovered methamphetamine. The State charged Eaton with one count of DUI and one count of possession of a controlled substance, namely methamphetamine, under RCW 69.50.4013(1).<sup>1</sup> Because Eaton possessed the methamphetamine while in a county jail or state correctional facility, the State sought a sentence enhancement for this count under RCW 9.94A.533(5)(c).

Although Eaton disputed the applicability of the sentence enhancement, the trial court found that RCW 9.94A.533(5) “doesn’t make a distinction about inside the facility.” (2 RP at 157). The trial court explained:

As [the State] rightfully points out, he’s inside the jail. Whether he’s been admitted inside the jail or is walking through the jail, he’s inside the secure facility. He’s under arrest. And he has possession. And if you read the statute, it says, mere possession inside the facility gives rise to the enhancement.

(2 RP at 157). Thereafter, the trial court noted, “I’m going to have to go with the plain reading of the statute.” (2 RP at 159).

The jury found Eaton guilty as charged, specially finding that he possessed methamphetamine while in a county jail or state correctional facility. Based on this finding, the court added 12 months to his standard sentence range.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The defendant was charged with two crimes: Possession of Controlled Substance – Methamphetamine and Driving While Under the Influence (Amended Information (CP 14)). A jury convicted the defendant of both crimes. As part of count 1, the jury was asked, by special verdict, whether or not the defendant possessed the controlled substance – methamphetamine, in a county jail. The jury responded in the affirmative. (Special Verdict, Count 1 (CP 77)).

The jury instructions given to the jury (CP 56) included as Instruction No. 8 the elements of conviction of a Possession of a Controlled Substance. The instruction reads as follows:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 22<sup>nd</sup> day of September, 2005, the defendant possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The enhancement to this particular crime is found, as part of, RCW

9.94A.533(5)(c) and provides as follows:

(5) the following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. . . .

(c) twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

RCW 9.94A.533(5)(c)(in part)

If the language of a statute is clear and unambiguous, the appellate court applies the statute as written and assumes that the legislature means exactly what it says. In Re Custody of Smith, 137 Wn.2d 1, 8-9, 969 P.2d 21 (1998); State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). Statutes must be read to avoid absurd and strained interpretations. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). In interpreting a statute, the appellate court's primary objective is to ascertain and give

effect to the drafters' intent. When that language is clear, the courts cannot construe a statute contrary to its plain language. Simmerly v. McKee, 120 Wn. App. 217, 221, 84 P.3d 919 (2004); City of Kirkland v. Ellis, 82 Wn. App. 819, 826, 920 P.2d 206 (1996).

In our situation, the crime is possession of the controlled substance. The active component of that crime is the possession of the illicit drugs, whether actual or constructive. There are no definitions for intent or knowledge in the particular statute. Thus, the active crime is possessing of the drugs. If those drugs are possessed in an inappropriate area, then the jury is asked whether or not the State has proven beyond a reasonable doubt, an additional penalty element of the activity. For example, if the drugs are held within a 1,000 feet of a school zone or if the drugs are within close proximity to a minor child, or if the actor is in possession of a firearm while also possessing the drugs, or if the drugs are kept by the defendant in a jail setting, this does not require any type of strain interpretation of statutory language. It is meant to be a harsh penalty which can be imposed if the crime is committed in a specific way. The jury found that the defendant had committed this crime in a prohibited fashion and, as such, the trial court appropriately punished based on the jury's finding.

It is interesting to note that the defense spends a great deal of its argument on the statutory scheme in the State of Oregon concerning contraband being brought into a jail setting. There is a fundamental difference between the statutory scheme in Oregon and what we are faced with in the State of Washington. That fundamental difference is that the active crime in the State of Oregon is supplying contraband. That crime requires: (1) that the defendant either initiate the introduction of contraband into the jail or cause it to be introduced; and (2) that he does so consciously. ORS 161.095(1), 161.085(2). This is not a situation, as we have it, where the crime is the possession of a controlled substance and the possession of the drug in a jail is an enhancement. Rather, the possession in the jail is the actual crime itself. Thus, when we read State of Oregon v. Tippetts, 180 Ore. App. 350, 43 P.3d 455 (2002), it is obvious that the criminal intent of the crime is the voluntary act of possessing contraband in a jail. That is the criminal act. It is not for purposes of enhancement but the actual underlying criminal activity.

To use the analysis raised by the defendant in his brief in situations of a penalty enhancement, would lead to absurd results. For example, the defendant could argue that he had no intent and did not know he was possessing the drugs within the prohibited area within a 1,000 feet of a school. Or, he could argue that the police waited to stop his vehicle until

he got within a 1,000 feet of a school and thus were able to procure additional penalties. The crime remains the same (Possession of a Controlled Substance). It is unfortunate that he has chosen to voluntarily hold the controlled substance in a prohibited area or manner.

On page 4 of the decision by the Court of Appeals, it states the general proposition that every crime must contain two elements: an actus reus and mens rea. The appellate court then goes on to analyze the jail enhancement along those lines. The State submits that the enhancements are not the actual "crimes". The crime is possession of the controlled substance. To argue that the enhancement requires these additional elements (which are not in any of the legislation) would require, for example, a showing that the person knew that they were in a school bus zone or intended to be in a school bus zone before that type of enhancement can be imposed. This adds additional elements that were never contemplated by the legislature and clearly have never been contemplated by previous case law.

The State submits that this entire line of inquiry has direct consequences on any types of enhancements that have been authorized by the legislature, approved of by the courts repeatedly, and have consistently held up constitutional and statutory construction interpretations. The Court of Appeals is adding additional elements that were never

contemplated by anyone when this legislation was enacted or when it has been ruled upon previously.

VI. CONCLUSION

The State submits that the Court of Appeals was in error in adding additional elements to statutory enhancements. The State is requesting a reversal of the Court of Appeals and a reinstatement of the enhancements as found by the jury.

DATED this 11 day of March, 2008.

Respectfully submitted:

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Clark County, Washington

By:

  
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## **APPENDIX**

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STATE OF WASHINGTON

BY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

THOMAS HARRY EATON,

Appellant.

No. 34911-6-II

PUBLISHED OPINION

BRIDGEWATER, P.J. — A jury convicted Thomas Eaton of one count of driving while under the influence (DUI) and one count of unlawful possession of a controlled substance, namely methamphetamine. Eaton does not appeal either of his underlying convictions, but argues that the trial court erred in imposing a sentence enhancement under RCW 9.94A.533(5) for possessing methamphetamine while in a county jail. Because officers discovered the methamphetamine only after Eaton had been arrested for DUI, transported to the county jail, and searched in the county jail, we hold that Eaton committed no actus reus, i.e., the voluntary act of possessing methamphetamine in a sentence enhancement zone. Therefore, we vacate the sentence enhancement and remand for resentencing.

**FACTS**

After arresting Eaton for DUI, a police officer transported Eaton to the Clark County jail, where another officer searched him. During this search, the officer observed “what appeared to be a plastic bag taped to the top of [Eaton’s] sock.” 1 RP at 99. Inside this plastic bag, the

officers discovered methamphetamine. The State charged Eaton with one count of DUI and one count of possession of a controlled substance, namely methamphetamine, under RCW 69.50.4013(1).<sup>1</sup> Because Eaton possessed the methamphetamine while in a county jail or state correctional facility, the State sought a sentence enhancement for this count under RCW 9.94A.533(5)(c).<sup>2</sup>

Although Eaton disputed the applicability of the sentence enhancement, the trial court found that RCW 9.94A.533(5) “doesn’t make a distinction about inside the facility.” 2 RP at 157. The trial court explained:

As [the State] rightfully points out, he’s inside the jail. Whether he’s been admitted inside the jail or is walking through the jail, he’s inside the secure facility. He’s under arrest. And he has possession. And if you read the statute, it says, mere possession inside the facility gives rise to the enhancement.

2 RP at 157. Thereafter, the trial court noted, “I’m going to have to go with the plain reading of the statute.” 2 RP at 159.

The jury found Eaton guilty as charged, specially finding that he possessed methamphetamine while in a county jail or state correctional facility. Based on this finding, the State added 12 months to his standard sentence range. Thus, Eaton’s standard sentence range

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<sup>1</sup> RCW 69.50.4013(1) provides that “[i]t is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.”

<sup>2</sup> RCW 9.94A.533(5)(c) provides that 12 months “shall be added to the standard sentence range if the offender . . . committed the offense while in a county jail or state correctional facility and the offender is being sentenced for [an offense committed under RCW 69.50.4013].”

increased from 0 to 6 months to 12 to 18 months. And the trial court sentenced him to 12 months and one day of confinement.

#### ANALYSIS

Eaton claims that the sentence enhancement under RCW 9.94A.533(5)(c), a zone-enhancement, cannot stand because he did not voluntarily introduce the methamphetamine into the county jail. “The State should not be allowed to physically force a subject into an enhancement zone and then be permitted to choose whether he will be penalized for possessing contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established.” Br. of Appellant at 8. We agree.<sup>3</sup>

We initially note that Eaton does not challenge the lawfulness of his DUI arrest, the reasonableness of the warrantless search under either the United States Constitution or the Washington State Constitution, or his conviction for possession of methamphetamine under RCW 69.50.4013(1). Therefore, our inquiry is limited to determining whether the legislature intended RCW 9.94A.533(5) to punish a defendant for his *involuntary* possession of a controlled substance in a county jail or state correctional facility. Our holding is strictly limited to this enhancement statute, not RCW 9.94.041 (knowing possession of a narcotic drug or controlled substance by prisoners) or RCW 9.94.045 (knowing possession of a narcotic drug or controlled substance by a person not a prisoner).

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<sup>3</sup> Because nonconstitutional grounds ultimately dispose of this case, we do not need to “rule directly” on the constitutional issues that Eaton raises in his brief. See *Anderson v. City of Seattle*, 123 Wn.2d 847, 853, 873 P.2d 489 (1994); *State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992).

In interpreting a statute, our primary duty is to discern and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point is always "the statute's plain language and ordinary meaning." *J.P.*, 149 Wn.2d at 450 (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). If the statute's meaning is plain on its face, then we must give effect to that meaning as an expression of what the legislature intended. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Nevertheless, in interpreting a statute, we avoid unlikely, absurd, or strained consequences. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987); *Mortell v. State*, 118 Wn. App. 846, 851, 78 P.3d 197 (2003).

Furthermore, as a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971); see also *United States v. Apfelbaum*, 445 U.S. 115, 131, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980). The actus reus is "[t]he wrongful deed that comprises the physical components of a crime." BLACK'S LAW DICTIONARY 39 (8th ed. 2004). The mens rea is "[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY 1006 (8th ed. 2004).

Some crimes, though, including the crime of possession of a controlled substance, have no mens rea requirement. See RCW 69.50.4013(1). Our Supreme Court has "specifically construed the statute not to include knowledge." *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). Thus, the State simply has the burden of proving the nature of the controlled substance and the fact of possession. *Bradshaw*, 152 Wn.2d at 538.

Similarly, the sentence enhancement under RCW 9.94A.533(5) has no mens rea requirement. See RCW 9.94A.533(5). In fact, this sentence enhancement is not a separate sentence or a separate substantive crime. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 253, 955 P.2d 798 (1998). Rather, it presupposes that the defendant's behavior already constitutes a crime, such as possession of a controlled substance. See *State v. Barnes*, 153 Wn.2d 378, 385, 103 P.3d 1219 (2005).

But even strict liability punishments, i.e., those crimes and sentence enhancements having no mens rea requirement, require something of an element of volition. "There is a certain minimal mental element required in order to establish the actus reus itself. *This is the element of volition.*" *Utter*, 4 Wn. App. at 139 (emphasis added). At least one author has noted:

At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.

1 WAYNE R. LA FAVE, SUBSTANTIVE CRIMINAL LAW § 6.1(c), at 425-26 (2d ed. 2003) (footnote omitted).

Here, Eaton contends that his possession of methamphetamine in the county jail was not the result of a voluntary act. As his counsel notes, "Once arrested, Mr. Eaton no longer had control over his location or over any of his possessions. That control rested with [the arresting officer] and the corrections officers at the jail." Br. of Appellant at 8. In other words, Eaton attempts to distinguish his voluntary act of possessing the methamphetamine before he was arrested from his involuntary act of possessing the methamphetamine in the county jail.

On the other hand, the State argues that “the active crime is possessing of the drugs. If those drugs are possessed in an inappropriate area, then the jury is asked whether or not the State has proven beyond a reasonable doubt, an additional penalty element of the activity.” Br. of Resp’t at 3. The State continues, “[T]his does not require any type of strain[ed] interpretation of [RCW 9.94A.533(5)]. It is meant to be a harsh penalty which can be imposed if the crime is committed in a specific way.” Br. of Resp’t at 4.

But the State’s interpretation of RCW 9.94A.533(5) leads to an unlikely, absurd and strained consequence, imposing a strict liability sentence enhancement for *involuntary* possession of a controlled substance in a county jail or state correctional facility. *See State v. Tippetts*, 180 Or. App. 350, 43 P.3d 455 (2002) (decided under a statute codifying voluntary act requirement); *see also Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (1944) (holding that an accusation of public intoxication cannot be established where an intoxicated defendant was involuntarily and forcibly carried into the street by an arresting officer); *Fontaine v. State*, 135 Md. App. 471, 762 A.2d 1027 (2000) (holding that after a defendant was arrested in Delaware and taken to Maryland by the police, the evidence failed to prove that he intended to distribute marijuana in his possession while in Maryland); *but see State v. Winsor*, 110 S.W.3d 882 (Mo. Ct. App. 2003) (holding that willful possession of a controlled substance constitutes a voluntary act and that a defendant’s presence in county jail was not required to be voluntary); *Brown v. State*, 89 S.W.3d 630 (Tex. Crim. App. 2002) (holding that a defendant voluntarily possessed marijuana in a correctional facility when he was compelled to enter a correctional facility while in possession of marijuana).

In *Tippetts*, police officers formally placed a defendant under arrest and took him to the county jail. *Tippetts*, 43 P.3d at 456. After searching him at the county jail, the officers found a small bag of marijuana in his pants pocket. *Tippetts*, 43 P.3d at 456. Based on his possession of marijuana, the State charged the defendant with supplying contraband under ORS 162.185(1)(a), which provides that a person commits the crime of supplying contraband if “[t]he person knowingly introduces any contraband into a correctional facility, youth correction facility or state hospital[.]” *Tippetts*, 43 P.3d at 456 (alteration in original) (quoting ORS 162.185(1)(a)).

On appeal, the defendant argued that a voluntary act was a necessary prerequisite to proving criminal liability and that he did not voluntarily introduce the marijuana into the county jail. *Tippetts*, 43 P.3d at 456. He based his argument on ORS 161.095(1), which provides, “The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.” *Tippetts*, 43 P.3d at 456 (quoting ORS 161.095(1)).

The Oregon Court of Appeals examined ORS 161.095(1) and concluded that the statute requires that: (1) the act that gives rise to the criminal liability be performed or initiated by the defendant and (2) the act be voluntary. *Tippetts*, 43 P.3d at 457. The court also examined ORS 161.085(2) and concluded that a voluntary act means “a bodily movement performed consciously[.]” *Tippetts*, 43 P.3d at 457 (alteration in original) (quoting ORS 161.085(2)). Based on its statutory analysis, the court agreed that ORS 161.085(2) and 161.095(1) supported the defendant’s position. *Tippetts*, 43 P.3d at 457. Finally, the court concluded, “Defendant . . . did not initiate the introduction of the contraband into the jail or cause it to be introduced in the

jail. Rather, the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will.” *Tippetts*, 43 P.3d at 457.

Here, because of the lack of legislative history and case law addressing RCW 9.94A.533(5), Eaton relies almost exclusively on *Tippetts* for the proposition that the State cannot hold a defendant criminally liable for his involuntary act. Yet the State argues that there is a “fundamental difference” between RCW 9.94A.533(5) and ORS 161.085(2), ORS 161.095(1), and ORS 162.185(1)(a). Br. of Resp’t at 4. And as the State notes, “[*Tippetts*] is not a situation, as [in Washington], where the crime is the possession of a controlled substance and the possession of the drug in a jail is an enhancement.” Br. of Resp’t at 4.

While the State is correct, the underlying analysis in *Tippetts* is nevertheless persuasive to our analysis of whether under RCW 9.94A.533(5) Eaton *voluntarily* possessed methamphetamine in the county jail. After all, in this case, Eaton did not bring the methamphetamine into the county jail; a police officer brought Eaton and the methamphetamine into the county jail.

Thus, in *Tippetts*, the court stated that “a voluntary act requires something more than awareness. It requires an ability to choose which course to take — *i.e.*, an ability to choose whether to commit the act that gives rise to criminal liability.” *Tippetts*, 43 P.3d at 458. Relying on the commentary to the Model Penal Code, the Oregon Court of Appeals further stated:

[T]he mere fact that defendant voluntarily possessed the drugs before he was arrested is insufficient to hold him criminally liable for the later act of introducing the drugs into the jail. Rather . . . the involuntary act must, at a minimum, be a reasonably foreseeable or likely consequence of the voluntary act on which the state seeks to base criminal liability. On these facts, no reasonable juror could find that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it.

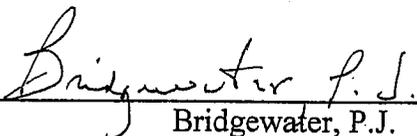
*Tippetts*, 43 P.3d at 459-60 (citations and footnote omitted); *see also State v. Gonzalez*, 188 Or. App. 430, 71 P.3d 573 (2003) (mere possession of drugs when a defendant was taken by police to a correctional facility is not legally sufficient to prove that he voluntarily introduced contraband into that facility); *State v. Delaney*, 187 Or. App. 717, 71 P.3d 93 (2003) (even assuming that a defendant's actions were so inept that her arrest and the discovery of the contraband were readily foreseeable consequences, she did not voluntarily introduce contraband into a detention center); *see State v. Cole*, 1007-NMCA-99, 142 N.M. 325, 164 P.3d 1024 (2007) (actus reus element of the crime of bringing contraband into jail was not met because a defendant did not voluntarily enter the detention facility); *see State v. Sowry*, 155 Ohio App. 3d 742, 2004-Ohio-399, 803 N.E.2d 867 (2004) (holding that a defendant's possession of contraband in a jail was not the result of a voluntary act because officers brought him into the jail under arrest); *but see State v. Thaxton*, 190 Or. App. 351, 79 P.3d 897 (2003) (a jury could find that, at the time a defendant hid some marijuana in his sock, he knew that the officers were likely to arrest him and take him to jail).

In conclusion, we presume that when the legislature enacted RCW 9.94A.533(5) it did not intend the unlikely, absurd, or strained consequence of punishing a defendant for his *involuntary* act. *See Stannard*, 109 Wn.2d at 36; *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981) ("The spirit or purpose of an enactment should prevail over the express but inept

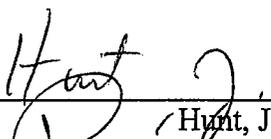
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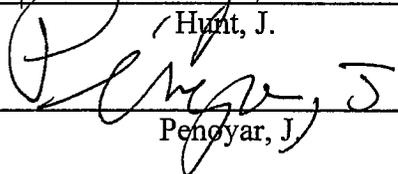
wording.”); *Mortell*, 118 Wn. App. at 851. We vacate the sentence enhancement imposed under RCW 9.94A.533(5)(c) for Eaton’s standard sentence range.<sup>4</sup>

We vacate the sentence enhancement under RCW 9.94A.533(5)(c) and remand for resentencing.

  
\_\_\_\_\_  
Bridgewater, P.J.

We concur:

  
\_\_\_\_\_  
Hunt, J.

  
\_\_\_\_\_  
Penoyar, J.

<sup>4</sup> Because we vacate the sentence enhancement, we do not address Eaton’s argument that the State improperly amended his judgment and sentence to reflect the sentence enhancement.