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Supreme Court No. 89742-5
(COA No. 43207-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LARRY HAYES,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

The Court of Appeals relied on settled law and established principles to construe a statute and there is no conflict or constitutional infirmity requiring review 5

1. Settled law requires express triggering language to impose an enhanced sentence premised on accomplice liability..... 5

2. Settled principles of statutory construction underlie the Court of Appeals opinion 8

3. Because the jury’s verdict rested on a series of offenses and several convictions were reversed, the verdict no longer authorizes an exceptional sentence, showing that this case is the wrong vehicle for a general review of the exceptional sentence statute..... 13

F. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Foreclosure of Liens, 117 Wn.2d 77, 811 P.2d 945 (1991)..... 9

In re Swanson, 115 Wn.2d 21, 793 P.2d 962 (1990)..... 10

State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000) 9

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792, 795 (2003) 9

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 9

State v. McAlpin, 108 Wn.2d 458, 740 P.2d 824 (1987) 13

State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982).... 5, 6, 7, 8, 9, 12

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) 8, 12

State v. Silva-Baltazar, 125 Wn.2d 472, 886 P.2d 138 (1994). 6, 7, 9, 15

Washington Court of Appeals Decisions

In re Pers. Restraint of Howerton, 109 Wn.App. 494, 36 P.3d 565
(2001)..... 7

State v. Hayes, 164 Wn.App. 459, 262 P.3d 538 (2011) 4

State v. Pineda-Pineda, 154 Wn.App. 653, 226 P.3d 164 (2010) 7

Statutes

RCW 9. 94A.535 10

RCW 9.35.020 14

RCW 9.94A.030	9
RCW 9.94A.533	11, 12
RCW 9.94A.535	8
RCW 9A.08.020	6

Court Rules

RAP 13.3(a)(1)	1
RAP 13.4(b).....	1

Other Authorities

13A Wash. Prac., Criminal Law § 104 (2013-2014 ed.)	6
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A. IDENTITY OF RESPONDENT

Larry Hayes, respondent here and appellant below, asks this Court to deny the request to review the Court of Appeals decision terminating review pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

The Court of Appeals decision was issued on November 13, 2013, and neither party filed a motion for reconsideration. A copy is attached to the State's petition for review.

C. ISSUES PRESENTED FOR REVIEW

1. Settled law dictates that when a person is convicted under a theory of accomplice liability, a sentencing enhancement must be based on the accused person's own conduct unless the controlling statute explicitly authorizes increased punishment for an accomplice. The Court of Appeals and prosecution agree that the exceptional sentence statute generally, and the major economic offense factor in particular, contain no express language allowing an increased sentence for an accomplice. Did the Court of Appeals correctly apply established legal principles to rule that an exceptional sentence based on a major economic offense requires an individualized determination that the

accused was involved in the commission of the additional element justifying an exceptional sentence?

2. A person may not be sentenced based on offenses for which he has not been convicted. Several of Hayes's convictions were reversed on appeal, yet the aggravating factor used to justify an exceptional sentence included the finding that the "series of offenses" constituted a major economic offense. Does the fact that the jury's verdict authorizing an exceptional sentence was premised on allegations that were overturned on appeal make this case the wrong vehicle to parse the court's authority to impose an exceptional sentence in other circumstances?

D. STATEMENT OF THE CASE

When police officers searched Larry Hayes's home, they found a silver briefcase that contained over 800 credit card receipts from Great Clips, a hair salon. 3RP 46, 72, 78; 4RP 100.¹ These receipts had been stolen from a storage unit. 3RP 90, 93.

¹ The transcripts from Mr. Hayes's direct appeal from his trial were transferred to the case at bar, which is strictly a sentencing appeal. The volume of the report of proceeding (RP) is based on court reporter's designations on the cover page of each trial transcript. Any other transcripts are referred to by the date of proceeding.

Benny Epstein testified for the prosecution in exchange for a grant of immunity and in hope that his cooperation would reduce his pending federal court sentencing in another matter. 7RP 27-28; 8RP 8, 75-76. Epstein claimed Hayes had stolen the receipts, but numerous witnesses testified that the briefcase was Epstein's. 10RP 108, 125, 142; 11RP 38, 92, 121. Epstein had rented the storage unit next to the unit from which the credit card receipts had been stolen and Epstein was distraught when he saw that the police were searching Hayes's home because he was afraid they would take "his briefcase." 3RP 90; 10RP 97-100, 125, 147; 11RP 93-94. Epstein had bragged of stealing from other storage units. 10RP 50, 130; 11RP 39, 98. Also, Epstein was found in possession of several Great Clips receipts when he was arrested. 10RP 27.

The prosecution charged Hayes with one count of leading organized crime; one count of identity theft in the first degree for using Scott Mutter's credit card number; as well as five counts of identity theft in the second degree and five related counts of possession of stolen property in the second degree – each based on the same five Great Clips receipts listing credit card account numbers for the same five people. CP 13-22.

At the prosecution's request, the court instructed the jury that Hayes could be convicted if he acted as an accomplice. 12RP 17; *see* CP 67 (defining accomplice liability for all charged offenses). The State also submitted an aggravating factor of "major economic crime" to the jury. COA 66646-1-I, CP 101-02 (Instruction 45).²

The Court of Appeals reversed several convictions. *State v. Hayes*, 164 Wn.App. 459, 483, 262 P.3d 538 (2011). It held that accomplice liability is not a valid basis of a leading organized crime conviction because the offense is designed to punish the leader of a criminal enterprise and not a person who aids the leader. *Id.* at 471. It also reversed two convictions for possession of a stolen vehicle and a third conviction for possession of stolen property in the second degree was dismissed by the State on remand. 3/16/12RP 7.

On remand, the prosecution did not attempt to retry Hayes as a principal. Instead, it asked the court impose the same exceptional sentence for the remaining convictions. 3/16/12RP 8-10.

The court imposed an exceptional sentence of 96 months for Count One based on the aggravating factor of a major economic

² The court instructions to the jury were transferred from the Court of Appeals COA 66646-1-I to the case at bar.

offense. 3/15/12RP 16. In Count One, Hayes was convicted of first degree identity theft for the unauthorized use of Scott Mutter's credit card account. CP 13. There were four unauthorized charges on Mutter's account, totaling \$2047. 10RP 9. The court imposed standard range terms for the remaining offenses. 3/16/12RP 16.

On appeal from this sentence, the Court of Appeals reversed the exceptional sentence because the jury's verdict rested on accomplice liability and the statute governing the imposition of an exceptional sentence did not contain the necessary triggering language to authorize an exceptional sentence for conduct of another person. Slip op. at 6. The State seeks review.

E. ARGUMENT.

The Court of Appeals relied on settled law and established principles to construe a statute and there is no conflict or constitutional infirmity requiring review

1. *Settled law requires express triggering language to impose an enhanced sentence premised on accomplice liability.*

The State concedes that the imposition of an enhanced penalty must depend on the accused's own conduct. *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). This principle is well-settled. "Absent explicit evidence of a contrary legislative intent, an accomplice's

liability extends only to the substantive crime, not sentence enhancements.” 13A Wash. Prac., Criminal Law § 104 (2013-2014 ed.).

The complicity statute that permits accomplice liability for a substantive offense does not apply to sentencing statutes. *McKim*, 98 Wn.2d at 116; *see* RCW 9A.08.020(1). “Instead of relying on the complicity statute as the triggering device for penalty enhancement . . . , we must look to the operative language” of the sentencing provision at issue. *Id.*

In *McKim*, this Court concluded that a prior version of the deadly weapon enhancement statute did not authorize an enhanced penalty for an accomplice where another participant possesses a deadly weapon. *Id.* After *McKim*, the Legislature changed the deadly weapon enhancement statute to include express triggering language – the revised statute directs additional punishment when “the offender or an accomplice was armed with a deadly weapon.” *See State v. Silva-Baltazar*, 125 Wn.2d 472, 481, 886 P.2d 138 (1994) (quoting former RCW 9.94A.125 and discussing statutory change following *McKim*).

The Legislature has not changed the complicity statute since *McKim*. RCW 9A.08.020 continues to define when a person may be

liable for a substantive offense based on another person's conduct and does not authorize increased punishment under the Sentencing Reform Act. *See, e.g., In re Pers. Restraint of Howerton*, 109 Wn.App. 494, 501, 36 P.3d 565 (2001) (*McKim*'s analysis "is sound" regarding the complicity statute's inapplicability to sentence enhancements).

In *Silva-Baltazar*, this Court applied *McKim* to an enhancement imposed for a drug sale that occurs within 1000 feet of a school bus zone. 125 Wn.2d at 480. The school bus zone enhancement increases punishment for "[a]ny person" who commits a specified drug offense "within one thousand feet of a school bus stop route." *Id.* at 476 (citing RCW 69.50.435). This Court construed the statute to authorize added punishment when the defendant was personally present within the school bus zone during the specified drug offense. *Id.* at 483. Persons who "are themselves participating in this criminal activity within a drug free zone are subject to the enhancement." *Id.*

In *State v. Pineda-Pineda*, 154 Wn.App. 653, 661, 226 P.3d 164 (2010), the Court of Appeals applied *McKim* and *Silva-Baltazar* to a drug zone enhancement when the defendant was not personally present within the zone at the time of the offense. Consistent with prior cases, *Pineda-Pineda* explained, "the accomplice liability statute does not

contain a triggering device for penalty enhancement.” *Id.* at 661. Consequently, “the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute.” *Id.* Because the school zone enhancement at issue had “no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendant’s own acts must form the basis for the enhancement.” *Id.* at 664; *Cf. State v. Roberts*, 142 Wn.2d 471, 501-2, 505, 14 P.3d 713 (2000) (individualized determination of “major participation by a defendant” necessary to convict person of aggravated first degree murder, not “[m]erely satisfying the minimal requirements of the accomplice liability statute”).

2. *Settled principles of statutory construction underlie the Court of Appeals opinion.*

Applying *McKim* and related precedent to the exceptional sentence statute at issue, the Court of Appeals concluded that “Nothing in RCW 9.94A.535(3)(d) explicitly extends responsibility to an accomplice.” Slip op. at 6. “[T]he major economic offense enhancement does not contain a triggering device that would extend its application to a conviction based on accomplice liability.” *Id.*

In its petition for review, the State asks this court to speculate about whether some use of the passive voice within the statute listing aggravating factors implies the possibility of imposing an exceptional sentence upon an accomplice. Petition for Review, at 12-15. But this argument is contrary to settled principles of statutory construction.

When interpreting a criminal statute, courts “give it a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003) (construing SRA provision RCW 9.94A.030). A penal statute must be construed in the defendant’s favor when ambiguous. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

“The Legislature is presumed to know existing case law in areas in which it is legislating.” *In re Foreclosure of Liens*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991); see *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000) (“when our Legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes”). The Legislature has not included express triggering language in the exceptional sentence statute, as it did with the deadly weapon enhancement statute after *McKim*. “Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *Silva-Baltazar*, 125 Wn.2d at 487 n.1 (Madsen, J.,

concurring, quoting *inter alia In re Swanson*, 115 Wn.2d 21, 27, 793 P.2d 962 (1990)).

There is no dispute that the exceptional sentence statute at issue contains no triggering language authorizing accomplice liability. As the Court of Appeals explained:

Hayes's exceptional sentence was based on the major economic offense enhancement as defined in RCW 9.94A.535(3)(d). It provides, in pertinent part, that [T]he following circumstances are an exclusive list of factors that can support a sentence above the standard range[:]

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(d). Nothing in RCW 9.94A.535(3)(d) explicitly extends responsibility to an accomplice.

Slip op. at 6.

Unlike the exceptional sentence statute, other provisions of the SRA direct the imposition of enhanced penalties for an accomplice's

acts. *See* RCW 9.94A.533(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”); RCW 9.94A.533(3) (“The following additional times shall be added to the standard sentence range ... if the offender or an accomplice was armed with a firearm”); RCW 9.94A.533(4) (adding punishment “if the offender or an accomplice was armed with a deadly weapon”). The State offers no explanation why the Legislature did not insert triggering language into the exceptional sentence statute as it did in other provisions of the SRA. *See Delgado*, 148 Wn.2d at 728-29 (under doctrine of *expressio unis est exclusio alterius*, court presumes use of clear language in one statute, and its absence in related statute, was intentional).

Here, the jury was not directed to make any individualized determination of Hayes’s culpability for purposes of the aggravating factor. The jury was instructed that it may convict Hayes as an accomplice for each offense. CP 67 (Instruction 11). To find the aggravating factor of major economic offense in the special verdict form, the jury was asked, “Was the crime a major economic offense or series of offenses?” CP 25 (Special Verdict Form Count I). At trial, the

prosecution argued that Hayes should be found guilty of all charged offenses by aiding or abetting Epstein. 6/23/09p.m.RP 38. The prosecution said,

if Larry Hayes aided, abetted, or assisted Benjamin Epstein as an accomplice then you can return a verdict of guilty on any charge where you find that he has acted as an accomplice.

6/23/09p.m.RP 38. Based on these arguments, the jury instructions, and in the absence of special interrogatories, the court presumes the jury's verdict may have rested on accomplice liability. *Roberts*, 142 Wn.2d at 509.

The State asks this Court to view the exception sentence statute as ambiguous and find that the Legislature implied the availability of an exceptional sentence for a person convicted as an accomplice when the aggravating factor does not expressly require "the defendant" committed the necessary acts. But this request turns principles of statutory construction on their head.

In *McKim*, this Court explained that a statute must expressly impose added punishment for an accomplice and that dictate has not changed. The Legislature revised the deadly weapon statute to add liability for an accomplice. *See* RCW 9.94A.533(3), (4). It has not

amended the exceptional sentence statute to extend liability to an accomplice. It has not signaled that punishment should be increased for a minor participant to the same degree as a major participant. Case law as well as common sense and fundamental fairness support the established notion that a person should receive increased punishment only for his individual conduct.

3. *Because the jury's verdict rested on a series of offenses and several convictions were reversed, the verdict no longer authorizes an exceptional sentence, showing that this case is the wrong vehicle for a general review of the exceptional sentence statute.*

The State's petition for review does not address additional reasons why the exceptional sentence was not validly imposed on remand after the Court of Appeals reversed several of Hayes's convictions. A defendant may not be punished for offenses for which he or she was not convicted. *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987) ("The Sentencing Reform Act bars the court from considering unproven or uncharged crimes as a reason for imposing an exceptional sentence").

The initial jury finding that authorized an exceptional sentence was that "the current offense or series of offenses" constitute a major economic offense. CP 25. But by reversing several convictions,

including the most serious charge against Hayes, the Court nullified the jury's special verdict. The jury never specified which "series of offenses" it relied upon. The prosecution pressed the court to impose an exceptional sentence based on the sheer volume of credit card receipts in the briefcase, without regard to Hayes's ownership of or use of those receipts as found by the jury. 3/16/12RP 9. A person may not be sentenced for allegations that were not proven to a jury and a reversal of convictions underlying an exceptional sentence also undermines the exceptional sentence.

Additionally, the sentencing court limited its imposition of the exceptional sentence to Count One. But the prosecution did not present sufficient evidence that Count One was a "major economic offense" on its own. This conviction involved the use of Scott Mutter's stolen credit card, which someone used to amass \$2047 in unauthorized charges. 10RP 9. Hayes was convicted of first degree identity theft as either accomplice or principle. CP 13. Since first degree identity theft requires the perpetrator obtain property over \$1500, the \$2000 theft is hardly an extraordinary departure from acts contemplated by the statute and the standard range. RCW 9.35.020(1),(2)(a). This offense does not meet the

criteria of the major economic offense aggravating factor. RCW 9.94A.535(3)(d).

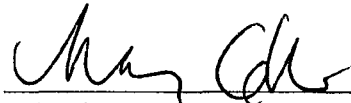
In sum, there is no conflict or constitutional infirmity that merits granting review. The Court of Appeals relied on settled legal principles. The State's effort to concoct a conflict by citing an unpublished Court of Appeals opinion should be disregarded. Petition for Review, at 16. Unpublished decisions are not precedent. GR 14.1 ("A party may not cite as an authority an unpublished opinion of the Court of Appeals."). Moreover, the case cited is similar to *Silva-Baltazar*, where the defendant received an exceptional sentence based on his own conduct and the manner in which the offense occurred, not based on the accumulation of ill-gotten gains by another person, as in the case at bar. The Court of Appeals decision rests on firm reasoning and settled law and this Court should deny review.

F. CONCLUSION.

Based on the foregoing, Respondent Larry Hayes respectfully requests that the Court deny review.

DATED this 9th day of January 2014.

Respectfully submitted,



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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89742-5**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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- appellant
- Attorney for other party



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