

NO. 897425

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

LARRY ALAN HAYES, RESPONDENT

Court of Appeals Cause No. 43207-2
Appeal from the Superior Court of Pierce County
The Honorable Eric Schmidt, Pro Tem

No. 07-1-05967-1

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this court to accept review of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed on November 13, 2013, in the *State of Washington v. Larry Alan Hayes*, in COA Case No. 43207-2-II. See Appendix A.

C. ISSUE PRESENTED FOR REVIEW.

1. May a trial court impose an exceptional sentence based upon the jury returning special verdicts finding defendant's crimes to be major economic offenses under RCW 9.94A.535(3)(d), when the trial court's instructions to the jury permitted it to convict based upon accomplice liability?

2. As this Court's decisions in *McKim* and *Silva-Baltazar* instruct that a sentencing enhancement provision may sometimes be applied to an accomplice even though that term does not appear in the statute, did the Court of Appeals erroneously find that the absence of the term "accomplice" in RCW 9.94A.535 precluded

applicability of those aggravating circumstances to any accomplice?

3. When the "major economic offense" aggravating circumstance under RCW 9.94A.535(3)(d) is defined as one where a crime has additional factor beyond the elements that more fully describes the nature of the crime committed - as opposed to an aggravating circumstance that focuses on an aspect of the defendant's actions, motivation, or intent - may the jury's finding that the offense was a "major economic offense" be applied to any participant in the offense?

D. STATEMENT OF THE CASE.

This is the second time this case has been before the appellate courts.

Defendant Larry Hayes was convicted of with one count of identity theft in the first degree, two counts of possession of a stolen vehicle, five counts of identity theft in the second degree, five counts of possessing stolen property in the second degree, one count of unlawful possession of a personal identification device and one count of unlawful possession of a controlled substance and one count leading organized crime following a jury trial. *State v. Hayes*, 164 Wn. App. 459, 464-66. 262 P.3d 534

(2011). Additional information about the evidence used to convict defendant of these crimes can be found in the published decision in the first appeal. *Id.* The "to convict" instructions allowed the jury to convict based on accomplice liability. *Id.* at 466-67; CP 129-177. The jury also returned several special verdicts finding that the offenses were major economic offenses. *Id.* at 466. The trial court imposed an exceptional sentence of 180 months on the count of leading organized crime. *Id.*; CP 178-202. Defendant appealed; on review the Court of Appeals vacated his leading organized crime conviction, which vacated the exceptional sentence, and two convictions for possession of a stolen vehicle, then remanded the matter to the trial court. *Hayes*, 164 Wn. App. at 485.

On remand from the first direct appeal, defendant was brought before the court for re-sentencing on eleven¹ crimes; on each the jury had returned a special verdict finding the crime to be a major economic offense. CP 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 98-111. At his re-sentencing, the trial court imposed an exceptional sentence on Count 1 (identity theft in the first degree), based upon the jury's special verdict, and added an additional twelve months to the standard range for a total term of confinement of 96 months. CP 98-111; RCW 9.94A.535(3)(d).

¹ One count of identity theft in the first degree, five counts of identity theft in the second degree, and five counts of possessing stolen property in the second degree. CP 98-111.

Defendant again appealed challenging his exceptional sentence based upon the jury's finding that he committed a major economic offense under RCW 9.94A.535, arguing the jury could have found him guilty of this crime based upon accomplice liability and sentencing enhancement must be predicated on his own actions. In a published decision, the Court of Appeals held that the "major economic offense" aggravating circumstance found in RCW 9.94.535(3)(d) cannot be applied to accomplices because the Legislature did not use the term "accomplice" in that statute; it relied upon the decision in *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (2010), which held "triggering language" in a sentence enhancement is required to show a legislative intent to apply the enhancement to an accomplice. Appendix A. The court vacated defendant's exceptional sentence. *Id.*² The State now seeks review of this decision.

² After the issuance of the decision below, defendant successfully moved in the trial court for an order allowing his release pending further appellate review so that he would not be deprived of the fruits of his appeal. Thus, defendant's sentence has not been fully served.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. GUIDANCE IS NEEDED FROM THIS COURT AS TO HOW TO ASSESS WHETHER AN AGGRAVATING CIRCUMSTANCE FOUND IN RCW 9.94A.535 CAN BE APPLIED TO ACCOMPLICES; THE COURT BELOW INCORRECTLY RELIED UPON A COURT OF APPEALS DECISION RATHER THAN FOLLOWING THIS COURT'S JURISPRUDENCE AND, THEREFORE, CAME TO AN ERRONEOUS CONCLUSION AS TO THE APPLICABILITY OF THE MAJOR ECONOMIC OFFENSE AGGRAVATOR TO ACCOMPLICES.

As a general rule under Washington law, penalty enhancement provisions must depend on the accused's own misconduct rather than that of an accomplice's because the complicity statute found in RCW 9A.08.020(1) is "limited to accountability for crimes." *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). The Washington Legislature defined the nature of accomplice liability in RCW 9A.08.020.³ Criminal liability attaches to anyone who participates in a crime and there is no difference between principle and accomplice liability. *State v. McDonald*,

³ Under RCW 9A.08.020, a "person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1). "A person is legally accountable for the conduct of another person when he is the accomplice of such other person in the commission of a crime." RCW 9A.08.020(2)(c). An individual is "an accomplice" if he or she "solicits, commands, encourages, or requests" another person to commit a crime or aids in its planning or commission, knowing that his or her act will promote or facilitate the commission of the crime. RCW 9A.08.020(3).

138 Wn.2d 680, 688, 981 P.2d 443 (1999). The Washington Supreme Court has summarized the legislative intent behind RCW 9A.08.020(3) as:

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *disapproved on other grounds by*, *State v. Harris*, 102 Wn.2d 148, 153-54, 685 P.2d 584 (1984).

At issue in *McKim* was whether the deadly weapon statute, which increased punishment for an "accused [who] was armed with a deadly weapon, as defined by RCW 9.95.040, at the time of the commission of the crime" could be applied to a defendant who was not personally armed during the commission of an offense, but whose accomplice was armed. This Court determined that the accomplice liability statute, RCW 9A.08.020, makes a participant in a crime "equally liable [with other participants] only for the substantive crime." *McKim*, at 117. This court's analysis focused on the fact that under RCW 9A.08.020, there is no strict liability for the conduct of another in regard to a sentence enhancement provision; this contrasted with an earlier accomplice liability statute that

had imposed liability for punishment as well. *Id.* at 116-17.⁴ As liability for increased punishment did not flow from the general accomplice liability statute, the court then looked at the language of the deadly weapon statute itself. The court concluded that this language allowed for enhanced punishment upon a special finding that:

... an accused was either actually armed with a deadly weapon or was constructively armed with such a weapon. The phrase "constructively armed with a deadly weapon" means the accused's accomplice must have been actually armed with a deadly weapon and the accused must have had knowledge that the accomplice was so armed.

McKim, 98 Wn.2d at 117. In sum, the court in *McKim* found that the enhancement provision could be applied to accomplices under certain circumstances even though the statute did not specifically use the term "accomplice."

Under the principles set forth in *McKim*, liability for sentencing enhancement provisions does not flow automatically from RCW 9A.08.020. Thus, the question arises when construing any sentencing enhancement provision whether or not the Legislature intended to impose

⁴ *McKim* has been superceded by statutory changes made by the Sentencing Reform Act of 1981 to the deadly weapon enhancement provision. *State v. Bilal*, 54 Wn. App. 778, 776 P.2d 153, *review denied*, 113 Wn.2d 1020, 781 P.2d 1322 (1989).

strict liability for the enhancement on all participants⁵ of a crime or just upon certain participants.

Some sentencing enhancements expressly allow for punishment premised on accomplice liability. For instance, the firearm enhancement statute, RCW 9.94A.533, contains language demonstrating the legislature's intent to extend accomplice liability into the sentencing realm. RCW 9.94A.533(3) reads, "The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender *or an accomplice* was armed with a firearm as defined in RCW 9.41.010." (Emphasis added).

This Court has also found that the sentencing enhancement found in RCW 69.50.435, which increases punishment on certain controlled substance offenses committed in locations specified in the statute (hereinafter "drug free zones") could be applied to accomplices who were physically present in the "drug free zone." *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994). This Court noted that nothing in the language of RCW 69.50.435 required knowledge on the part of any of the participants in the controlled substance offense that they were in a "drug

⁵ The word "accomplice" accurately denotes a relationship between two or more participants in a crime, but is not a particularly useful term to denote the level of a person's participation in that crime. If a crime is committed by three persons- two of whom could be considered principals (or major participants) and the third is a minor participant, then legally each one is "an accomplice" of the other two.

free zone" for the enhancement to apply - an indication that the Legislature was intending to impose strict liability. *Id.* at 482. This Court did not find persuasive arguments that because the term "accomplice" was omitted from RCW 69.50.435 that the Legislature did not intend it to apply to accomplices. *Id.* at 483. The court expressly left open, however, "whether the enhancement applies to accomplices who are not themselves within the drug free zone, but are liable for a crime of another who does conduct the prohibited drug activity in a drug free zone." *Id.* at 474.

That issue was addressed by Division I of the Court of Appeals in *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (2010). It concluded that an accomplice who was not physically in the "drug free zone" at the time of the delivery of a controlled substance could not be subject to an increased sentence under RCW 69.50.435. It held "where there is no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendants' own acts must form the basis for the enhancement." *Id.* at 664.

At issue in the case now before the court is a portion of the aggravating circumstance found in RCW 9.94A.535(3)(d). That provision reads in its entirety:

(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). In this case the jury was instructed that if it were to find defendant guilty of any offense that it must also determine whether the crime was a major economic offense, under two of the four factors listed in the statute. CP 129-177, Instruction No. 44. Specifically, the jury was instructed that:

To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:

- (1) The crime involved multiple victims or multiple incidents per victim; or
- (2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

...

CP 129-177, Instruction No. 45 (in part). After remand from the first direct appeal in this case, defendant Hayes remained convicted of eleven crimes for which the jury had returned special verdicts finding the crimes

to be major economic offenses. CP 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 98-111. In the first appeal in this case, the Court of Appeals had vacated the leading organized crime conviction for which defendant has received an exceptional sentence at his original sentencing hearing. CP 47-61, 178-202. At his re-sentencing hearing following remand the court imposed an exceptional sentence on Count 1, based upon the jury's special verdict finding the offense to be a major economic offense. CP 98-111; RCW 9.94A.535(3)(d).

On review the Court of Appeals, Division II, vacated this exceptional sentence because it did not find any "triggering language" in RCW 9.94A.535(3)(d) specifically invoking accomplice liability for this aggravating circumstance as required by *Pineda-Pineda*. See Appendix A, Opinion at 7. The language of the opinion indicates that the Court of Appeals would not find any sentence enhancement provision applicable to accomplices unless the statute specifically mentioned accomplices. See Appendix A, Opinion at 7-8 ("if the Legislature wanted this major economic offense enhancement to apply to accomplices, it could have easily and clearly mentioned accomplice liability in RCW 9.94A.535 as it did the firearm enhancement"), and 8 ("nowhere in RCW 9.94A.535 did the legislature choose to reference accomplices."). The court below noted that there were differences in the language used in the various

enhancement provisions, but did not find that any of these differences relevant to its construction because the Legislature had not included an explicit reference to accomplices. *Id.*

In both *McKim* and *Silva-Baltazar*, the fact that the Legislature did not use the term "accomplice" in an enhancement provision was *not* determinative of whether the statutory provision could be applied to accomplices. Had the court below paid greater attention to the jurisprudence of this Court, it would have given greater consideration to the differences in language that the Legislature did use in enacting RCW 9.94A.535, rather than focusing solely on the absence of a word. To this extent the decision below conflicts with decisions of this court, which is a basis for review under RAP 13.4(b)(1).

This Court has yet to construe whether any of the aggravating factors in RCW 9.94A.535⁶ are applicable to accomplices. It is the State's position that that the correct answer to this question cannot be answered with a blanket "yes" or a "no," but will depend on which aggravating circumstance in RCW 9.94A.535 is being considered. A decision from this Court on even one subsection of RCW 9.94A.535 would provide an analytical framework for other courts to follow. As such this case raises a

⁶ See Appendix B for full text of statute.

issue of substantial public interest that should be determined by this Court, which is a basis for review under RAP 13.4(b)(4).

The aggravating circumstances set forth in RCW 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant's actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or the defendant uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant's actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim's pregnancy, RCW 9.94A.535(3)(i), or the victim's injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some quality of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p).

Close examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to

apply to any participant in the substantive crime while others must be attributed to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals an intent that the circumstance be assessed against an individualized defendant and not extended to accomplices or every participant in the offense. In contrast, the use of the term "the current offense" usually signals where the Legislature has identified when commission of a crime, in combination with an additional factor describing an aspect about the crime, results in an offense that is deserving of harsher punishment. The aggravating circumstances setting forth such factors are focused on the nature of the current substantive offense and not the motive, knowledge, or specific actions of any one participant. As these aggravating circumstances describe the resulting substantive crime, any participant in that crime should be subject to the enhancement. Such a result gives meaning to the varying language in RCW 9.94A.535 and is also consistent with general liability principles set forth in *McDonald* and *McKim*.

As mentioned above, at issue in this case is RCW 9.94A.535(3)(d). This provision provides four factors that define whether an offense (or series of offenses) qualifies as major economic offense. Three of the four factors describe the nature of the offense as involving: 1) multiple victims

or multiple incidents per victim; 2) attempted or actual monetary loss substantially greater than typical for the offense; or, 3) a high degree of sophistication or planning or occurring over a lengthy period of time. RCW 9.94A.535(3)(d)(i-iii). Under the State's analysis, since these factors describe the resulting offense and do not reference an actor, they should be applicable to any participant in the crime. The fourth factor that can define a major economic offense is that 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)(iv). Because the Legislature has focused on the attributes of a particular defendant in this subsection, this could not be applied to any participant in the crime, but only those participants who used a position of trust to facilitate the commission of the crime.

As noted earlier, subsection (iv) is not at issue in this case because the jury was not instructed upon it; only subsections (i) and (iii) are at issue. CP 129-177, Instruction No. 45. Both of these subsections describe the nature of the crime and not the person committing it. Neither of these subsections reference "the defendant" or even an make an indirect reference to the entity committing the crime. Because these factors describe the crime and not an aspect of the person committing the crime, the applicability of these factors does not change from one participant in

the crime to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a crime regardless of whether they are a minor or major participant.

Division I of the Court of Appeals reached a similar conclusion in an unpublished decision decided after *Pineda-Pineda*. See *State v. Webb*, 176 Wn. App. 1011, 2013 WL 4607805 (2013) (unpublished COA Case No. 70360-9-I, decided August 26, 2013). Webb committed a burglary with another person; he was convicted at trial and the jury returned a special verdict that the victim of the burglary was present in the building or residence when the crime was committed pursuant to RCW 9.94A.535(3)(u). Webb argued that the aggravating factor could not be applied to him because there was no evidence that he actually entered the residence and under *Pineda-Pineda*, his own acts must form the basis for the enhancement. 2013 WL 4607805 (Wn App. Div 1) at p.5. The Court of Appeals, Division I rejected this argument and distinguished *Pineda-Pineda*. It concluded:

In this case, liability under the aggravating factor does not depend on any conduct by Webb, or the conduct of the principal, for that matter, other than participation in the burglary. It does not require, as Webb argues, evidence that he personally was inside the residence at the time of

the commission of the crime. The statute only requires that the victim of the burglary be “present in the building or residence when the crime was committed.” See RCW 9.94A.535(3)(u).

Id. The decision in *Webb* is consistent with the State’s argument here and inconsistent with the decision below. This shows that Division II is reading Division I’s decision in *Pineda-Pineda* in a manner that conflicts with how that division is reading its own case. Although one case is unpublished, the decisions in *Webb* and *Hayes* show that different divisions of the Court of Appeals are issuing conflicting decisions and that guidance from this court is needed. This is another basis for taking discretionary review. RAP 13.4(b)(2).

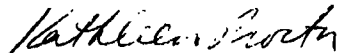
F. CONCLUSION.

This court should grant review to correct the error made by the Court of Appeals below, eliminate conflicting decisions among the divisions of the Court of Appeals and to provide guidance to inferior courts as to how to assess whether the aggravating circumstances in RCW

9.94A.535 may be applied to any participant in the crime or must pertain to a defendant's own actions.

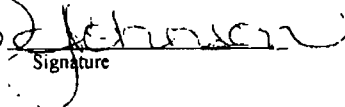
DATED: DECEMBER 13, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US-mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/13/13 
Date Signature

APPENDIX “A”

Published Opinion, State v. Larry Hayes

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STATE OF WASHINGTON

BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LARRY ALAN HAYES,

Appellant.

No. 43207-2-II

PUBLISHED OPINION

JOHANSON, A.C.J. — We are asked to decide whether a major economic offense sentence enhancement may be imposed when the trial court instructed the jury that the underlying conviction could be based on accomplice liability. Because the major economic offense sentence enhancement does not indicate legislative intent to extend the enhancement to accomplices, we vacate the sentence enhancement and remand for resentencing. We also direct the court on remand to correct the judgment and sentence consistent with this opinion.

FACTS

In May 2009, Larry Alan Hayes went to trial after police found evidence that he, or an accomplice, manufactured several false identifications and credit cards and failed to return vehicles rented under a false name. *State v. Hayes*, 164 Wn. App. 459, 464-66, 262 P.3d 538 (2011). The State alleged that Hayes, or an accomplice, committed several offenses, including but not limited to, leading organized crime and six identity theft counts. *Hayes*, 164 Wn. App. at

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463-64. Regarding the first degree identity theft charge at issue here, the court instructed the jury:

- (1) That on or about [the] period [between August 26 and September 11, 2007], *the defendant, or an accomplice*, knowingly obtained, possessed, or transferred a means of identification or financial information of Scott Mutter;
- (2) That the defendant acted with the intent to commit or aid or abet any crime;
- (3) That the defendant, or an accomplice, obtained credit, money, goods, or services that have in excess of \$1500 value from the acts described in element (1) and;
- (4) That any of these acts occurred in the State of Washington.

Resp't Suppl. Clerk's Papers (CP) at 146 (Jury Instruction No. 15) (emphasis added).

The court also defined accomplice liability: "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime." Resp't Suppl. CP at 142 (Jury Instruction No. 11).

The State alleged that each count, except for one drug charge, was aggravated by being a major economic offense. *Hayes*, 164 Wn. App. at 463. The trial court instructed the jury that to find that Hayes's crimes were major economic offenses, the jury had to find at least one of two factors beyond a reasonable doubt:

- (1) The crime involved multiple victims or multiple incidents per victim;
- or
- (2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

The above factors are alternatives. This means that if you find from the evidence that any one of the alternative factors has been proven beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. To return a verdict of "yes" the jury need not be unanimous as to which alternative has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proven beyond a reasonable doubt.

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Resp't Suppl. CP at 177 (Jury Instruction No. 45).

The jury found Hayes guilty of all counts except one and found that each count, except one, was a major economic offense. *Hayes*, 164 Wn. App. at 466. The trial court imposed a 180-month exceptional sentence on the leading organized crime conviction and concurrent sentences within the standard range on the other convictions. *Hayes*, 164 Wn. App. at 466.

On appeal, this court reversed the leading organized crime conviction and two stolen vehicle possession convictions. *Hayes*, 164 Wn. App. at 463. This court held in part that the trial court erred in permitting Hayes to be convicted of leading organized crime even if the jury found that Hayes was merely aiding and abetting the leader. *Hayes*, 164 Wn. App. at 463. Hayes also argued that the exceptional sentence could not stand because it was impermissibly premised on accomplice liability. *Hayes*, 164 Wn. App. at 483. This court declined to address the sentencing issue after reversing the organized crime conviction on which the exceptional sentence was based. *Hayes*, 164 Wn. App. at 483. This court affirmed the remaining convictions. *Hayes*, 164 Wn. App. at 485.

Hayes returned to superior court for resentencing. The State asked the court to impose an exceptional sentence again based on the jury's major economic offense aggravating factor finding for all the remaining counts and because the facts at trial showed that Hayes deserved an exceptional sentence. The trial court determined that an exceptional sentence was appropriate for the first degree identity theft charge based on the jury's special verdicts that all the crimes were major economic offenses. Hayes appeals his exceptional sentence.

ANALYSIS

I. EXCEPTIONAL SENTENCE AND ACCOMPLICE LIABILITY

Hayes argues that the trial court erroneously imposed an exceptional sentence because it did not have statutory authority to enter an exceptional sentence when his conviction was based on accomplice liability.¹ The State's sole argument is that the court may rely on accomplice liability as a basis for an exceptional sentence when the jury's special verdict findings support the exceptional sentence.² We agree with Hayes and hold that the trial court did not have statutory authority to rely on the major economic offense sentence enhancement to impose an exceptional sentence when the jury was instructed that guilt for the underlying offense could be based on accomplice liability. Accordingly, we vacate the sentence enhancement.

A. Standard of Review

A trial court may sentence a defendant to an exceptional sentence if (1) the jury finds by special verdict, beyond a reasonable doubt, one or more aggravating factors alleged by the State; and (2) the trial court determines that the facts are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535³; RCW 9.94A.537(3), (6); *State v. Stubbs*, 170 Wn.2d 117, 123-24, 240 P.3d 143 (2010). To reverse an exceptional sentence, we must find either that

¹ A party generally may not raise issues for the first time on appeal. RAP 2.5(a); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). But an illegal or erroneous sentence may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 477.

² The State does not argue that sufficient evidence exists to find that Hayes himself committed the conduct that would support the major economic crime enhancement. Accordingly, we do not address this issue.

³ RCW 9.94A.535 has been amended several times since 2009, but these amendments do not affect our analysis.

the trial court record does not support the sentencing court's articulated reasons, that those articulated reasons do not justify a sentence outside the standard range for that offense, or that the length of the exceptional sentence was clearly excessive. RCW 9.94A.585(4).

B. Analysis

The trial court's imposition of a sentence enhancement generally must depend on the defendant's own conduct. *State v. McKim*, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982). Thus a defendant's culpability for an aggravating factor cannot be premised solely on accomplice liability for the underlying substantive crime without explicit evidence of the legislature's intent to create strict liability. *McKim*, 98 Wn.2d at 117. In *McKim*, our Supreme Court held that an accomplice must have knowledge that another participant was armed with a weapon in order to apply the deadly weapon enhancement to the accomplice. 98 Wn.2d at 117. But the jury was not so instructed and the Supreme Court vacated the enhancement. *McKim*, 98 Wn.2d at 118. In response, the legislature amended the deadly weapon statute to specifically apply to "the defendant or an accomplice." *State v. Bilal*, 54 Wn. App 778, 780, 776 P.2d 153, *review denied*, 113 Wn.2d 1020 (1989).

In *State v. Pineda-Pineda*, Division One of this court explained that without explicit statutory authorization for accomplice liability to support a sentence enhancement, a defendant's own acts must form the basis for the sentence enhancement. 154 Wn. App. 653, 657, 226 P.3d 164 (2010). The issue there was whether the school bus zone enhancement could apply to an accomplice who was not physically present in the school bus zone. *Pineda-Pineda*, 154 Wn. App. at 660. Division One noted that the "accomplice liability statute does not contain a triggering device for penalty enhancement[s; thus] the authority to impose a sentence

enhancement on the basis of accomplice liability must come from the specific enhancement statute.” *Pineda-Pineda*, 154 Wn. App. at 661. As an example, the firearm enhancement statute, RCW 9.94A.533(3) contains language showing legislative intent to extend the firearm enhancement to accomplice liability by referring specifically to “the offender or an accomplice.” Division One concluded that the school zone enhancement statute did not contain a triggering device for accomplice liability. *Pineda-Pineda*, 154 Wn. App. at 664-65.

Similarly, we conclude that the major economic offense sentence enhancement statute does not contain a triggering device that would extend its application to a conviction based on accomplice liability. 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.

The State urges us not to follow *Pineda-Pineda* and argues that in *Pineda-Pineda* Division One misconstrued *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994), and *McKim*, 98 Wn.2d 111. The State also cites Division One’s opinion in *In re Pers. Restraint of*

Howerton, 109 Wn. App. 494, 36 P.3d 565 (2001), to support its argument to extend the major economic offense sentence enhancement to accomplices.

But the major economic offense enhancement is unlike the aggravating statutes in *Howerton* because there the pertinent statute actually mentioned accomplices, 109 Wn. App. at 499, and here RCW 9.94A.535 does not mention accomplice liability at all. Nonetheless, the State argues that the legislature intended for RCW 9.94A.535 to apply equally to accomplice liability because the applicable portion of the statute refers to the circumstances of “the current offense” rather than “the defendant.” Br. of Resp’t at 7. The State argues that this signals the legislative intent that the enhancement can be applied to any participant in the crime. The State is correct that three of the four alternatives in RCW 9.94A.535(3)(d) mention “the current offense” rather than “the defendant:”

- (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) (emphasis added). And the two that the court instructed Hayes’s jury on were (i) and (iii). But we are unpersuaded. Because *Pineda-Pineda* directs us to look for “triggering language” in a statute, we must look for language specifically invoking accomplice liability. We do not agree that using the term “the current offense” equates to legislative intent to apply the sentence enhancement to accomplices. Instead, if the legislature wanted this major economic offense enhancement to apply to accomplices, it could have easily and clearly

mentioned accomplice liability in RCW 9.94A.535 as it did in the firearm enhancement—“if the offender or an accomplice was armed with a firearm.” RCW 9.94A.533(3). The legislature also clearly provided for accomplice liability in the sentence enhancement for crimes committed while in jail or state correctional facility—“if the offender or an accomplice committed the offense while in a county jail or state correctional facility.” RCW 9.94A.533(5). Thus, the State’s argument regarding legislative intent is not persuasive.

Further, the State argues that *Pineda-Pineda* incorrectly made a sweepingly broad ruling by treating all enhancement statutes the same when it made its decision based on whether the enhancement statute mentioned accomplice liability and that instead we should read the particular enhancement statute as a whole to determine the legislature’s intent. But other than pointing to the language of “the current offense” rather than “the defendant,” the State does not argue how RCW 9.94A.535 applied as a whole supports accomplice liability. We disagree with the State because every time that “the defendant” is referenced, the legislature chose not to say “the defendant or an accomplice.” Also, we must read the entire RCW 9.94A.535 as a whole and nowhere in RCW 9.94A.535 did the legislature choose to reference accomplices.

Thus, the State rests its argument in support of the exceptional sentence solely on the basis that the major economic offense enhancement applies to Hayes even when the jury was instructed that Hayes could be found guilty of the underlying offense based on accomplice liability. We must reverse a sentence enhancement if the sentencing court’s articulated reasons do not justify a sentence outside the standard range for that offense. RCW 9.94A.585(4). Here the sentencing court based the exceptional sentence on the jury’s special verdict that Hayes’s crime was a major economic offense. But because Hayes’s conviction was based on accomplice

liability and the major economic offense sentence enhancement statute contains no triggering language for accomplice liability, the exceptional sentence was improper. We vacate the major economic offense sentence enhancement and remand for resentencing.

II. CLERICAL ERROR ON JUDGMENT AND SENTENCE

Next, Hayes argues that his judgment and sentence erroneously lists four offenses as current offenses in his criminal history. Hayes asserts that this court reversed counts 9 (unlawful possession of a stolen vehicle), 21 (leading organized crime), and 22 (unlawful possession of a stolen vehicle); and the resentencing court dismissed count 20 (second degree stolen property possession) on remand. The State concedes error and agrees that the error must be corrected. The State also argues that Hayes's first degree identity theft conviction was inadvertently omitted from the defendant's criminal history and should be added. We agree and accept the State's concession.

A clerical error is one that, if amended, "correctly convey[s] the intention of the court based on other evidence." *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). The record reflects the court's intention here that it did not consider the reversed and dismissed charges at resentencing.⁴ And the record reflects the court's intention to consider the first degree identity theft charge as a current conviction at resentencing.

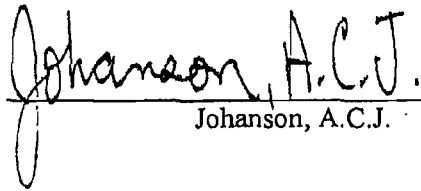
Because the error is clerical in nature, it does not provide an independent ground for resentencing. We remand to the trial court to enter a corrected judgment and sentence.

⁴ One unlawful stolen vehicle possession count was charged under a separate cause number and the court signed a dismissal order on the day of resentencing and indicated that it was doing so at the resentencing hearing.

No. 43207-2-II

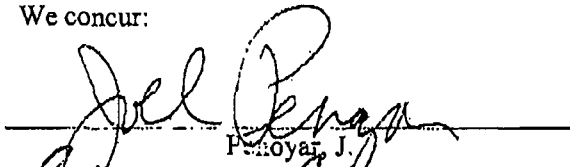
Reference to the two unlawful stolen vehicle possession counts, one second degree stolen property possession count, and one leading organized crime count should be stricken from Hayes's judgment and sentence on remand. And reference to one first degree identity theft count should be added to the judgment and sentence's criminal history section as a current charge.

We vacate Hayes's sentence enhancement and remand for resentencing. We also direct the court on remand to correct the judgment and sentence consistent with this opinion.

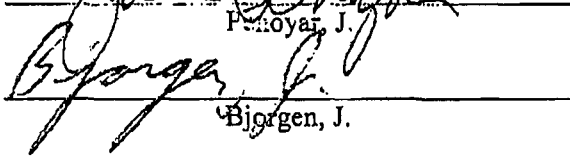


Johanson, A.C.J.

We concur:



Perroyer, J.



Bjorgen, J.

APPENDIX “B”

RCW 9.94A.535

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West's RCWA 9.94A.535

Page 1



Effective: September 28, 2013

West's Revised Code of Washington Annotated Currentness
 Title 9. Crimes and Punishments (Refs & Annos)
 Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)
 Sentencing
 →→ **9.94A.535. Departures from the guidelines**

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

- (c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
- (d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
- (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.
- (f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.
- (g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.
- (i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.
- (j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

- (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
- (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(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.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

- (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
- (iii) The current offense involved the manufacture of controlled substances for use by other parties;
- (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
- (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
- (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).
- (f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.
- (g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
- (h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:
- (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;
- (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or
- (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
- (i) The offense resulted in the pregnancy of a child victim of rape.
- (j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.
- (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural

or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

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

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

CREDIT(S)

[2013 2nd sp.s. c 35 § 37, eff. Sept. 28, 2013. Prior: 2013 c 256 § 2, eff. July 28, 2013; 2013 c 84 § 26, eff. July 28, 2013; 2011 c 87 § 1, eff. July 22, 2011; prior: 2010 c 274 § 402, eff. June 10, 2010; 2010 c 227 § 10, eff. June 10, 2010; 2010 c 9 § 4, eff. June 10, 2010; prior: 2008 c 276 § 303, eff. June 12, 2008; 2008 c 233 § 9, eff. June 12, 2008; 2007 c 377 § 10, eff. July 22, 2007; 2005 c 68 § 3, eff. April 15, 2005; 2003 c 267 § 4, eff. July 27, 2003; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4; prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

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