NO. 44726-6-II

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

STATE OF WASHINGTON, Respondent

v.

JEFFREY WAYNE WELLER
and
SANDRA DOREEN WELLER,
Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.
11-1-01678-1 and 11-1-01679-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT CORRECTLY DENIED THE CrR 3.6 MOTION TO SUPPRESS.

II. THE INFORMATION WAS NOT MISSING AN ESSENTIAL ELEMENT ON THE CHARGE OF UNLAWFUL IMPRISONMENT.

III. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD.

IV. THE EXCEPTIONAL SENTENCE IS NOT UNLAWFUL.

V. THE TRIAL COURT DID NOT ENGAGE IN JUDICAL FACT FINDING.

B. B. STATEMENT OF THE CASE

I. THE TRIAL

On October 7, 2011, Kim Karu of Child Protective Services was dispatched after hours to the home of Jeffrey and Sandra Weller because another CPS worker, Margie Dunn, had been out to the home earlier in the day to investigate a complaint and was concerned the for the safety of the children. RP 581-82. Ms. Dunn had made contact with the family during business hours and was very concerned and said the children exhibited fear. Id. Karu and Dunn met up with Officers Aldridge and Jensen of the Vancouver Police Department prior to going to the Weller home, with the understanding that law enforcement was going to assess the safety of the children. RP 582. After being let into the home by Sandra Weller, Ms.

Karu observed Officer Aldridge's interview of a female teenage child, C.G. RP 586-87. C.G. was talking rapidly and was skittish and fearful. RP 587. She saw that C.G. was "very, very thin," and "her bones were sticking out." RP 588. C.G. had a darkness around her eyes and was wearing a cap on her head. RP 588. C.W., C.G.'s twin brother, was also very thin. RP 589. He also had a darkness around his eyes and they were sunken in. Id. He also was wearing a cap. Id. Ms. Karu saw two other children in the home, the two youngest, and they appeared to be a healthy weight. RP 589-90. These were the natural children of Sandra Weller. RP 624. C.G. and C.W. were adopted. Id. They were the only children in the home who did not have a biological connection with either Jeffrey or Sandra Weller.

The home was nice looking. RP 590. There was an entry foyer with stairs that go up to the right and a living room as you walk in. Id. The kitchen had bicycle padlocks on the cabinets and pantry, as well as on the refrigerator. RP 591. One of the cabinets that was opened at the request of law enforcement was full of food. RP 592, 633. Upstairs, Ms. Karu saw empty food cans that appeared to have been opened with an implement other than a can-opener. RP 593. The handle on C.G.'s bedroom door was missing on the inside, and a wire hanger was jimmied inside the door with a lock on the outside of the door. RP 594. There was no electricity in the

room and they had to use flashlights to look around. Id. The room was filthy. RP 595. The bottom bunk of the bunk bed was broken with no mattress; the floor had exposed floorboard and scraps of carpeting, and there was a padlock on the closet. RP 595. There was a bowl full of white substance on the floor. Id. The other kids' bedrooms did not have fragmented carpeting, padlocks, or missing door handles, and they had electricity. RP 596.

Officer Sandra Aldridge accompanied Ms. Karu and Ms. Dunn to the Weller house. RP 643. She testified the first floor of the home looked clean and like an average home. RP 649. She interviewed C.G. Id. She noticed that C.G. was very thin. RP 650. C.G. was very hard to keep focused and she seemed scattered. Id. She spoke very matter-of-factly. Id. C.G. mentioned "the stick." RP 651. Aldridge saw the stick as they were speaking in the garage. RP 651. C.G. provided a lot of information in a short period of time. RP 655. Aldridge inspected C.G.'s room and found it to be filthy, shockingly so. RP 656. She testified it was the worst bedroom she had seen in sixteen years of law enforcement. RP 697. The bedroom door had an alarm on it. Id. The window had an aftermarket lock on it as well. RP 656, 660. There was nothing in the room for the twins to pass the time. RP 662. Another bedroom, Eli and Ian's, had an alarm chime on the door. RP 698. In the kitchen, Officer Aldridge asked for the refrigerator to

be opened and Jeff Weller opened it with a key on his belt loop. RP 667. The refrigerator was fully stocked. RP 669. Jeffrey Weller also had to unlock the pantry so Aldridge could look in it. RP 670. It, too, was fully stocked. RP 671. Officer Aldridge recovered the stick from the garage and it was admitted as exhibit 1A. RP 688-690. There were surveillance cameras in the house, garage, and facing outside. RP 700. The video cameras were working on that day. RP 701. One of the cameras was trained on the kitchen. RP 715. The refrigerator had pictures of the other children but not C.G. or C.W. Id.

E.W. is the biological son of Jeffrey Weller. RP 720. He was thirteen at the time of trial. RP 719. Sandra Weller is his step-mother. RP 720. E.W. and his brother, I.W., had been living with the Wellers full time for four months prior to being removed from the home on October 7, 2011. RP 721, 723. E.W. described a bizarre life in which he would sleep until about 5:00 p.m. on days he was not in school, and would not go to bed until 6:00 or 7:00 in the morning. RP 727-28. This schedule was evidently necessary because Jeffrey Weller worked the night shift at his job. RP 727. It was not explained why Jeffrey Weller's night shift necessitated a twelve-year old boy keeping the same schedule.

E.W. testified that they would eat around Jeffrey Weller's schedule, that they would "sometimes" get a reasonable amount of food,

and "sometimes" get dinner. RP 729. If they were being punished they sometimes would not be permitted to eat any meals. Id. The type of things they would get in trouble for included sneaking downstairs to watch television. RP 730. If they were caught watching television when they were supposed to be upstairs, they might get hit with "a board or a belt." Id. He, specifically, was hit with a belt. Id. He would get about fifteen to twenty strikes from the belt. RP 733. Getting beaten with the belt caused him pain and made him sad. RP 732. After one beating, E.W. had a bruise and a red mark on his buttocks. RP 733. On another occasion, Jeff Weller hit E.W. in the face after catching him sneaking food to C.G. and C.W. RP 735. It left a red mark on his face and chipped one of his teeth. Id. E.W. snuck food to C.G. and C.W. because they were hungry, and they normally would not be allowed dinner. Id. Jeff and Sandra would eat better food than they would give their kids, when they provided food at all. RP 738. If C.G. and C.W. were allowed to come to dinner, they were required to stand against the wall. RP 739. They would be fed things like moldy bread and spinach in a can. RP 740. The bread was blue with hairs on it. RP 740. The spinach was not heated. Id. C.G. and C.W. had to eat out of the same bowls which never got washed. RP 741. C.G.'s was pink and C.W.'s was green. Id. E.W. could tell they were hungry because they were provided with disgusting food and they ate it anyway. RP 741. If

they complained, they were told to shut up and eat their food. RP 742. E.W. never said anything because he did not want to get hurt. Id.

All of the brothers (E.W., I.W. N.W. and little E.W.) used to help C.G. and C.W. by stealing the key to the cabinets from under Sandra's pillow as she slept and stealing food. RP 743. Since there was only junk food in the cabinets, that is what the twins would get. RP 744. One day they got caught and C.G. and C.W. got hit with the board. RP 745. E.W. got hit with a belt. RP 746. Little E.W. did not get hit except for the time he was thrown across the room. RP 746. E.W. and C.W. actually cut a hole in the wall between their rooms so that the younger brothers could sneak food to C.G. and C.W. RP 798.

After getting caught stealing food, E.W. saw C.G. and C.W. get beaten with the board in the kitchen. RP 747. The children were required to remove their pants and underwear and lie down on the kitchen floor. RP 747-48. Prior to the beating, the surveillance camera trained on the kitchen was turned off. RP 748. E.W., I.W. and N.W. witnessed several beatings. RP 749.

Jeffrey and Sandra discovered the hole in the wall and the children "got in trouble, like in a lot of trouble." RP 798. E.W. was not permitted to eat for two days. RP 795. C.G. and C.W. were denied food as well, and got beaten with the board. RP 799.

E.W. testified that the board was kept behind the laundry room door and it had blood on it. RP 752. Sometimes it was broken. Id. The board was a few feet long and a couple of inches wide. RP 753. The red coloration on the board was only on one end. RP 754. When C.G. would be assaulted with the board (on her bare buttocks), Jeffrey would inflict the blows and Sandra would stand right next to him. RP 754-55. Sandra would direct the number of blows to be inflicted, and E.W. believed that C.G. possibly endured as many as 100 blows in a session based on Sandra having instructed Jeffrey to inflict that number of blows. RP 755-56. Jeffrey would swing the board over his shoulder the way a person swings an axe. RP 756. C.G. would scream and beg Jeff to stop, saying that it hurt. RP 757. She also cried, but Jeff just kept going. Id. E.W. saw that the twins' buttocks would bleed as a result of the beatings. RP 758. Jeff would continue to beat C.G. even as her buttocks bled. Id. E.W. would at some point just go upstairs because he did not want to think about it and he could not stop it. RP 758. He did not try to stop it because he did not want to get hit. Id. E.W. said these beatings were frequent, and he could hear them from his bedroom. RP 759. He could hear the board going "smack." Id. E.W. also saw Jeffrey punch C.G. in the face. RP 761. Jeff would use the same board until it would break and he would get a new one. RP 773-

74, 795. There were at least four or five prior boards. RP 795. One board had staples in it where Jeff tried to repair it. RP 795-96.

E.W. saw C.W. suffer the same beatings as C.G., but his were less frequent. RP 760. He also saw Jeff punch C.W. in the face, bloodying it. RP 762. Sandra would watch. Id. When E.W. was finally examined by Dr. Kim Copeland after being removed from the home, he admitted that he withheld much of the information about which he was testifying because he was "embarrassed." RP 762-63.

E.W. testified there were alarms on several rooms, as well as an alarm on the stairs. RP 770.

C.W. was seventeen at the time of trial. RP 807. He was adopted by Timothy Graf and Sandra Weller when he was two. RP 807. When he was six, Graf and Sandra divorced. RP 808. N.W. is the biological child of Timothy Graf and Sandra, and he is seven years younger than C.W and C.G. RP 809. C.W. and C.G. are twins and were adopted together. RP 810. The twins were eight or nine when Jeff Weller came into the family and they moved in with him. RP 811. Although Sandra used to beat her children, it was far more "peaceful" before Jeff. RP 812-13. For most of the year prior to being rescued from the Weller home, C.W. shared a room with C.G. RP 814. Sometimes he would sleep in E.W. and I.W.'s room, but he would have to go back to C.G.'s room as punishment. RP 815. The

outlets in the twins' room had been "capped off," and the light bulbs removed. RP 816.

C.W. also recalled cutting the hole in the wall with E.W.'s help. RP 817. When they got caught, they were beaten and the hole was covered with plywood. RP 818. The handle on the inside of the door was removed so they could not open the door. RP 817. They put a hanger in the mechanism to be able to open the door, but Jeff or Sandra would remove it if they saw it and throw the hanger at them. RP 819-20. There was a lock on the window that he and C.G. figured out how to circumvent, but it was replaced with a new lock when they were found out. RP 821. The new lock had an actual key, and they could not open it. RP 821-22.

For meals, C.W. and C.G. would be fed items like a bowl of Crisco and a can of collard greens, spinach, or sauerkraut. RP 823. Sandra said the Crisco was to "fatten them up," and the canned vegetables were to "detoxify" them if they got caught eating food they were not supposed to have. RP 823. They would typically be fed once per day, unless they were being punished for stealing food. RP 823. In that event, they would not get food for a day. RP 823. This would happen about two to three times per week. RP 824. On stealing food, C.W. described using a screw driver to pop a lock at the top of the cabinet and he would reach down through the top and grab whatever he could reach. RP 825. They might get lucky and

find cans with different foods than the ones they were rationed, like corn and beans. RP 825. He would use a screwdriver to cut into the can. RP 825. At least that way they could get the juices. Id. He learned how to twist the screwdriver to widen the hole to access the contents of the can. RP 826. When they were permitted to eat, they were required to stand in the dining room next to the laundry room door. RP 826. They were told they had to do this because they were "filthy." RP 827. The rest of the family was allowed to eat at the dining room table. RP 827. On rare occasions, when family would come over or on a holiday, they would eat at the dining room table. RP 827.

They were routinely given moldy food. RP 827-28. Jeff kept the key to the refrigerator on his keychain, which would sometimes be locked in his bedroom. RP 828. C.W. was never able to break into the refrigerator and access fresh food. Id. C.W. also described the key stealing/food stealing routine, testifying that sometimes they would have to steal several sets of keys from several different places to make it work. RP 830. Asked why it was worth the effort, C.W. testified "we were hungry." RP 830. He described the hunger as "sharp," like a stomach ache all the time. RP 830-31. The hunger was constant. RP 831. Since being removed from the Weller home, C.W. eats a full diet with all kinds of foods. RP 833. He testified he has never had an allergic reaction to the new foods he is

allowed to eat—despite having been told by Sandra that he had a "gluten sensitivity."[1] RP 833-34. Getting caught stealing food was worth it because they "had to eat." RP 835. Jeff and Sandra would beat them and demand to know how they got the food, but they would lie because telling the truth "would have affected our ability to get food." RP 836. Sandra would sometimes hit them with the bike lock when they got caught. RP 836. C.W., like E.W., was asked to describe the board and he said it was about four feet long and two inches wide. RP 836-37. There have been about three or four boards used. RP 837. They would break and need to be replaced. Id. C.W., like E.W., confirmed that Jeff stapled one board together after it broke. RP 837. C.W. also testified the current board had a groove in it that ran the length of the board. RP 838.

Regarding the beatings, Jeff would have them lie on the kitchen floor and remove their pants and underwear. RP 838. The beatings would happen multiple times per week. RP 839. C.W. saw Jeff hit C.G. with the board in her head and her back. Id. Jeff would swing the board like a sledgehammer. RP 840. The whippings caused indescribable pain, and C.W. would try and focus on something else and grit his teeth to keep from screaming. Id. C.W. believed screaming was what they wanted. Id.

[1] It is interesting to note that if Sandra Weller actually believed C.W. had a gluten sensitivity, such that it justified denying him food and making him eat canned vegetables, moldy bread is not part of a gluten free diet.

Jeff would ask Sandra how many blows to inflict, and she would give him a number. RP 841. She would say "give him 25 or 50" and he would count the blows. RP 840-41. Sandra was always present for the whippings, but she never wielded the stick. RP 841. She would direct Jeff to do it and tell him how many blows to inflict. Id. She would either watch the whipping or go relax in front of the television. Id. Sandra was "most often" the one who initiated and directed the beatings. Id. Jeff would only initiate them when they had done something to personally offend him, like eat his lunch food. Id. Although his jeans were baggy, C.W. would occasionally get severe swelling, making it painful to put on his jeans. RP 842. Although most of the blood was drawn from C.G., C.W. would occasionally bleed and his buttocks would be raw. Id.

Jeff was a lot more physical with C.G., and she was a lot smaller than C.W. RP 844, 848. He would occasionally take a key off his belt loop and place it between his fingers with the sharp point sticking out, and then punch her in the back with the key. RP 844. C.W. personally witnessed this. Id. Jeff would do it to cause physical pain. RP 845. C.W. and C.G. had an unspoken agreement that she would take most of the blame when they got caught stealing food. RP 845-46. This was so that C.W. could continue to be let out of the room for the privilege of doing chores, which

in turn gave him the freedom necessary to keep stealing the food. RP 845-46.

Sandra would slap C.G., and Jeff once punched her in the face so hard her head smacked into the doorframe, knocking out a piece of the frame and cutting C.G. in the head. RP 847. C.G. has numerous scars on her head, also from being hit with a belt buckle. Id.

C.W. got hit with the board on his back a couple of times, and was also jabbed with it. RP 848. Jeff was always the one inflicting the blows, with Sandra directing the extent of the whipping. RP 849. Sandra would tell him to make sure there were no marks if they had an upcoming appointment. RP 849. She would say "nothing in the head" to avoid leaving marks. RP 850. C.G. would whimper or scream during the whippings. RP 850-51. The whippings always lasted until "the due amount was to be given," unless a few extra blows were administered as punishment for screaming, squirming or trying to escape. RP 851.

C.W. and C.G. eventually found a pencil and a piece of paper and decided to write a plea for help to their therapist. RP 851. Although C.W. wrote it, they signed C.G.'s name. RP 851-52. C.W. recalled that the letter mentioned the beatings and the starving. RP 852. The twins did not seek help before because they were scared. Id. Social workers had been to the home before and nothing ever happened. Id. Sandra would engage them in

conversation in the tidy formal living room, and the social worker would never go upstairs. RP 852-53. They could not verbally tell their therapist because Sandra was always in the room during the session. RP 853. All of the children suffered degrees of abuse, but none as severe as C.W. and C.G. RP 854. C.W. recalled an incident where Jeff grabbed N.W. by his shirt and threw him across the room because his room was messy. Id. It ripped N.W.'s shirt and he cried. RP 855. He has heard E.W. get whipped with a belt. RP 857. C.W. identified exhibit 1A as one of several boards that had been used as a weapon against him. RP 858. Jeff would swing the board down fast, like a baseball bat. RP 861.

On one occasion during a beating with the board, C.W. reached his arm back to protect himself and it broke his arm. RP 891. When he was freed from the Weller home, C.W. weighed about 110 pounds. RP 897. At the time of trial he weighed 145 pounds and was still fairly thin. RP 898.

Jeff also strangled C.G. RP 900. C.W. saw Jeff's hands gripped around the front of C.G.'s neck. Id. C.G. was squirming and trying to breath. RP 901. She was not making any sound. Id. After releasing her, Jeff punched C.G. in the head. RP 902.

Dr. Kim Copeland is a child-abuse physician who works for Legacy Health. RP 926. She works at the Child Abuse Assessment Clinic. RP 928. She worked on the case involving C.W, C.G., E.W., I.W., and

N.W. RP 930. The twins came in to see her on October 24, 2011. RP 950. She saw the other boys on November 3, 2011. RP 941. E.W. described having been punched in the head by his dad and pushed and thrown into the refrigerator. RP 934. He also described being whipped with a belt. RP 935. He also reported having been punched under his chin by Sandra Weller and having loose teeth as a result. RP 935. E.W. also talked about the board having been used on C.W. and C.G. RP 936. He described it as three and half feet long and said it was stored behind the laundry room door. RP 937. He confirmed the assault on N.W. where N.W. was grabbed by his shirt and thrown to the ground. RP 937. He described never getting any sleep and rarely getting to bathe. RP 937. They would get a bath with only one or two inches of water and all the children had to share the same water. RP 937-38. He would eat twice a day, rarely more than that. RP 938. E.W. had decreased weight and height for his age. RP 940. He also had a scar on his lower back. RP 940. Dr. Copeland indicated it was not unusual that she did not see more injuries given the amount of time E.W. had been out of the home. RP 940.

I.W. also told Dr. Copeland about being whipped with a belt. RP 942. He also talked about C.W. and C.G. being beaten with the board, describing how they would have to lie down on the kitchen floor and how he could hear the smacks from his bedroom. RP 942. He also confirmed

the assaults on E.W. and N.W. Id. N.W. also spoke of the infrequent baths, stating that Jeff and Sandra did not want to waste water. RP 943. I.W. also had decreased weight and height for his age. RP 944.

N.W. told Dr. Copeland about three kinds of punishments: spanking with the hand, spanking with a belt, and whipping with the "ultimate belt," which apparently had metal pieces on it. RP 945. Both Sandra and Jeff would spank him, but only Jeff used the belt. Id. N.W. said he was particularly scared of "the board." RP 946. He described it as three and a half feet long and said it had a crack or split down the middle. Id. He also recounted the twins lying on the floor with their pants off, getting the board. Id. He said the twins would get blisters and blood spots on their backsides after the board. RP 947. Jeff once grabbed I.W. by the head and threw him into a wooden chair, causing him a bloody nose and swollen lip. Id. He also described Jeffrey stomping on him with metal cleats. RP 947-48. He was bruised and sore from this beating. RP 948.

N.W. told Dr. Copeland about the bizarre schedule in which he would wake at about two o'clock in the afternoon, have dinner at midnight, and go to bed at 8:00 a.m. RP 949. He told Dr. Copeland that the twins had to eat moldy food. Id. N.W. had a marking on his right lateral thigh consistent with his account of the stomping. RP 949-50.

C.W. confirmed for Dr. Copeland the same abuse with the board that he described in his testimony. RP 950-52. She confirmed that C.W. did, in fact, have a healed broken arm. RP 959. It had healed abnormally, meaning it was not correctly set after being broken. RP 959-60. An x-ray confirmed this. 960-61. C.W. described that he would get punished for pulling out his hair, or if C.G. pulled out her hair. RP 954-55. He also told Dr. Copeland that C.G. had both urinated and defecated in her room before due to not being let out to use the bathroom. RP 955. In that event, the Wellers would clean the soiled floor by pouring a large bottle of bleach on the floor and making the twins stay in the room for fifteen minutes with the bleach. RP 956. He recounted having a hard time breathing and choking from the fumes. RP 956. C.W. said they were in their room for almost the entire 24-hour day. RP 955. He described being forced to eat canned spinach or sauerkraut with lard on top. RP 956. If he finished eating before C.G., he was required to force feed her the rest of her food. RP 957.

Dr. Copeland found that C.W. was very thin, "impressively thin." RP 958, 961. On the day she examined him, he weighed 119 pounds, and was below the 25th percentile for weight. RP 975. He had a vertical mark near the crease of his buttocks that was hyper-pigmented and appeared to be old. RP 959. This can be caused by frequent and recurrent bruising and

breaking down of blood cells. RP 959. This injury is consistent with C.W.'s account of having been repeatedly beaten with the board. Id. Dr. Copeland testified that vertical marks on the buttocks are "very suggestive" of physical abuse. RP 993. The mark was in the "exact location" she would expect. Id.

C.G. was hesitant to talk with Dr. Copeland. RP 962. She eventually described being beaten with the board while lying naked on the kitchen floor. RP 964. She would get as many as forty or fifty blows. RP 964. C.G. described blood on her back and buttocks from the whippings, as well as swelling and bruising. RP 965. During the beatings she felt scared and embarrassed, and her teeth would clatter and she would shake. Id. She also described getting hit on her back with the bike lock. RP 966. C.G. described being forced to eat spices, peppers, and salt. RP 966. She would be forced to hold them in her mouth and then swallow without being provided any liquid. RP 966-67. It would leave her mouth swollen and bleeding. RP 967. C.G. described being forced to eat moldy fold with both dead and alive flies added to it, as well as bacon grease. RP 967. She confirmed having to eat sauerkraut and spinach with shortening. Id. C.G. described being in her room all day and night. RP 968. She also confirmed the hole in the wall in which food was passed for a time. Id. C.G. was hesitant to allow Dr. Copeland to examine her. RP 969. C.G. weighed 89

pounds on the day Dr. Copeland examined her, and she was five foot, five inches tall. RP 976. She was well below the fifth percentile for her weight, and was at the seventh percentile for height. Id.

C.G. testified. She confirmed the bizarre schedule wherein they would not get up until 2:00 p.m. or so. RP 1020. She was provided with rotten food. RP 1021, 1029. Her hunger made her feel sick. RP 1034-35. She would take the blame for food stealing because she did not want her brothers to get hit. RP 1035. She described a roughly three foot board. RP 1036-37. She would be beaten with the board by Jeff, and Sandra would keep track of the blows, reminding him to inflict more if he had not reached the set amount. RP 1039-40. She described the occasion where Jeff strangled her. She said it lasted about a minute and she could not breathe. RP 1046. Sandra stopped it, because she did not want to get caught by the police or CPS. Id. C.G. pulled her hair out due to stress. RP 1085. At the time of trial, C.G. had gained 49 pounds, weighing 138 pounds. RP 1087.

The board was tested for DNA, and the blood on the board was C.W.'s. RP 1151.

During closing argument, the State told the jury that Sandra Weller had been an accomplice to the charges of assault in the second degree under counts 1, 2, 5 and 6. RP 1528. The jury convicted Jeffrey Weller of

counts 1 and 2 and 5 and 6 for the assaults with the wooden board against C.W. and C.G., and count 3 for the strangulation of C.G. CP 150-177 (Jeffrey Weller). Jeffrey was also convicted of counts 4, 8, 13, 15, and 16. CP 150-177. Sandra Weller was convicted of counts 1 and 2 and 5 and 6 for her role as an accomplice to assault in the second degree with the wooden board against C.G. and C.W. CP 105-123 (Sandra Weller). She was also convicted as a principal of count 4, unlawful imprisonment. Id. The jury returned special verdicts on each of the felony counts finding that each defendant acted with deliberate cruelty and that the crime was an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time. CP 151-175 (Jeffrey Weller) and CP 116-122 (Sandra Weller). This timely appeal followed. CP 44 (Jeffrey) 167 (Sandra).

II. CrR 3.6 MOTION

The defendants moved to suppress the board prior to trial. CP 79 (Jeffrey) and CP 41 (Sandra). They argued in the joint briefing that the initial entry into the home had been unlawful under *State v. Schultz,* 170 Wn.2d 746, 248 P.3d 484 (2011) because it was allegedly pre-textual and because there supposedly was no imminent threat of substantial injury to persons or property inside the Weller residence. CP 81-86. During the hearing on the motion to suppress, however, both defendants abandoned

and waived the claim that the initial entry into the home was unjustified, agreeing that it was lawful under the emergency aid exception to the warrant requirement. However, they argued that the scope the investigation became primarily a criminal one at some point before the board was discovered in plain view in the garage. RP 232-38.

An evidentiary hearing was held, in which Sandy Aldridge of the Vancouver Police Department testified. Aldridge testified that on October 7, 2011, she responded to a call for service with CPS. RP 144. She and her fellow officer, David Jensen, met up with CPS workers Kim Karu and Margie Dunn, and they explained that a mandatory reporter had received a note from two sixteen year-old twins claiming physical abuse from their parents. RP 144-45. Aldridge's role was to determine whether these two children needed to be taken into protective custody. RP 145. The purpose of going to the home was to determine if the children were in imminent risk of danger, to check the safety of their environment, and to provide medical attention. RP 146. The police are required to make this decision, not CPS. RP 146. Aldridge testified this was not a criminal investigation but a welfare check. RP 147. She testified that the vast majority of the cases of this nature she has responded to do not result in criminal investigations. RP 147. There was no discussion of searching the home prior to contacting the Wellers. RP 148. Aldridge wanted to

investigate the situation with an open mind, but was provided with enough information before going to the home to believe the children may be in imminent risk from physical abuse and not being fed. RP 149, 155, 192. When they arrived at the home, Sandra Weller opened the door, and the twins were behind her. RP 151. Aldridge spoke with C.G. while Jensen spoke with C.W. RP 156-58. Aldridge noted the presence of other children and wanted to find a private place to talk with C.G. RP 158. They ended up in a laundry room, but it was too tiny to have any kind of interview, so they moved through the next door which turned about to be the garage. RP 158-59. They were in the laundry room for only three to four seconds. RP 161. In the garage, she was able to speak to C.G. alone. RP 159. Prior to entering the garage, C.G. had begun mentioning a "stick." Id. C.G. had been looking for something in the laundry room. Id. Aldridge had not yet begun the interview, but C.G. communicated that the stick was related to the abuse. RP 160. Aldridge did not know what type of stick C.G. was talking about. Id. She needed to interview C.G. to determine if she was in danger. Id. In the garage, C.G. was very "scattered," talking about and to the animals in the cages, and throwing out bits of information about being hit with a stick. RP 162. At one point she got an animal out of the kennel. Id. All the things C.G. was saying were interchangeable. RP 163. There was so much information being thrown out in a random order. RP 163.

Aldridge spent most of her time trying to get C.G. to focus. Id. She eventually asked C.G. to take her (Aldridge) up to her bedroom, thinking it would be a good tactic to get C.G. to talk. RP 164. After going upstairs (where there was no light in C.G.'s room) Aldridge decided to confer with Jensen about what they were seeing. RP 165. She wanted to go back to the garage because there was freedom to talk there as it was quiet. RP 165. Jensen told her that C.W. had mentioned not getting enough food and abuse from a stick. RP 166. The four of them (Aldridge, Jensen, C.W. and C.G.) went into the garage. Id. While there, both C.W. and C.G. seemed scattered. RP 167. They were walking around the garage, they had walked out a main door and come back in, and C.G. was continuing to distract herself with the animals. Id. They were making random statements like "it's not here," "it's not there." RP 167. At this point Aldridge and Jensen still had not made a decision about whether the children were at imminent risk because they had not yet determined if they were credible. RP 168. Aldridge noted that she did not know if these were two teenagers who were just disgruntled over not getting a car, or what. RP 168. They did not know why the food is locked up or what was going on. RP 168. Officers Jensen and Aldridge were just standing there, and they did not direct the kids to search. RP 170. The twins were continuing to look for the stick and Aldridge was becoming frustrated because she could not get them to

focus. RP 170. She looked around as well from where she was standing, and saw a stick next to a file cabinet. RP 170-71. She said "is that it?" Id. C.G. looked down and said "yeah." RP 170-71. It was in plain view, and Officer Jensen retrieved it. RP 171-72. They had been at the home about twenty minutes at this point. RP 185. The house was not searched for evidence of a crime. RP 186. The stick was not obtained through a search. Id. Aldridge had no idea, at the time the kids were looking for the stick, whether it was a paddle or something of that nature, and noted that the stick might have been well within acceptable limits for parental discipline. RP 192. She reiterated that at that time she still had not determined whether the children were being truthful, or possibly exaggerating, or whether she was going to find that the spankings were reasonable. RP 194.

The trial court denied the motion and made detailed oral findings of fact and conclusions of law on the suppression motion. The court did not enter written findings and conclusions as required by CrR 3.6. The court found the facts in the matter to be undisputed and testified by Officer Jensen, Officer Aldridge, and Social workers Dunn and Karu. The court's oral findings were as follows:

> 1. Social Worker Margie Dunn was assigned to the case to start an investigation of allegations of child abuse which was reported by a mandatory reporter. After initial contact with children and family,

another social worker and Vancouver Police Department were called in for assistance.

2. The decision at that time was a child-welfare issue initiated by a complaint to Children's Protective Services. Once the matter was brought to whether or not to place the children in protective custody, the decision was to be determined by Vancouver Police Department Officers.

   Officer Aldridge was lead officer with respect to that issue. In her experience, she worked on a number of similar types of cases, familiar with the process, has never previously had a case go from an issue of placing children into custody that resulted in criminal investigation. She at all times considered it to be an issue of protective custody or taking the children into CPS care due to neglect or abuse, a non-criminal matter.

3. Statutory authority for such investigation, RCW 26.44.050 – The actions of the officers, together with the social workers, also came within the community-caretaking function, as it has been referred to in the case law, which includes United States Supreme Court case law, and is referred to as the Health and Safety Emergency.

4. There was no basis to believe that Vancouver Police Department Officers went into home with a pretextual purpose. They were at all times engaged in the community-caretaking function. The officers took care to enter with an open mind. They had been provided information that the children complained of assaults, and a stick had been described as a weapon.

5. Officer Aldridge interviewed the girl, C.G. Officer Jensen interviewed the boy, C.W. They ended up in the garage. The children were looking for a stick they said had been used in the assault.

The officers within the first twenty to thirty minutes in the home in their investigation observed a stick in the garage they thought might be the stick. A portion of the stick was in plain view. They asked the children if it was the stick. They said yes. The stick was placed into evidence.

6. Two doctrines come into play. First, the statutory authority and community-caretaking function of the children. This was the purpose of coming into the home. The issue of consent to have officers come into the home was not raised as a disputed issue. The officer had authority to be there. They were not asked to leave or refused admittance to the home. The scope of their interviews with the children was to be expected within the community-caretaking function and purpose of being there to start with.

7. There is also the plain view doctrine, where if officers have a right to be where they were and observe evidence in plain view, they have a right to seize the evidence. The evidence was in plain view and identified by the children as being relevant to their complaint.

   With respect to what happened at the time, the seizure of the stick was also evidence of the civil childcare proceedings and therefore would not have been seized by the officers in connection, was noticed by the officers, identified by the children, and seized by the officer.

   Within the scope of their community-caretaking function, they were trying to assess the credibility of the children

The Court entered the following conclusion of law:

1. The stick would be admissible into evidence under the finding that the stick was in plain view where

> the officer had a right to be within their scope of their community-caretaking function and the interviews that they were conducting.

RP 285-290.

C. ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE CrR 3.6 MOTION TO SUPPRESS.

In this consolidated appeal, both defendants challenge the trial court's ruling denying their CrR 3.6 motion to suppress. Sandra Weller does not join in the issues raised by Jeffrey Weller, but Jeffrey Weller joins in the issues raised by Sandra. The State will address the joint issues first.

a. The failure to enter findings of fact and conclusions of law on the CrR 3.6 hearing is harmless.

Both defendants argue that the trial court erred in failing to enter findings of fact and conclusions of law on the CrR 3.6 hearing. They do not argue that they have been thwarted in raising their suppression assignments of error as a result of the failure to enter findings and conclusions, nor do they argue that remand is necessary to enable them to better develop their arguments. Rather, they argue that they should be awarded reversal of the trial court's ruling and suppression of the stick, as well as a new trial on *all counts*, not just the four in which the stick

formed the basis of the charge . The State disagrees. While the failure to enter findings of fact and conclusions of law on a CrR 3.6 hearing is error, such error is harmless where the trial court's oral findings and conclusions are sufficient to permit appellate review." *State v. Riley*, 69 Wn.App. 349, 353, 848 P.2d 1288 (1993); *State v. Hos,* 154 Wn.App. 238, 245, 225 P.3d 389 (2010). In this case, the error is harmless. The sole basis for suppression argued below was that the officers' lawful entry into the home to render emergency aid at some point, prior to the discovery of the stick, morphed into a criminal investigation. The defendants abandoned and waived their claim that the initial entry into the home was unlawful, arguing instead that the welfare investigation morphed into a criminal investigation prior to the stick's discovery in the garage. Likewise, they did not seek suppression of any piece of evidence but the stick. The court's oral findings and conclusions are more than sufficient to review this discrete issue on appeal--the only issue that has been preserved. This Court should not reverse the defendants' convictions, most of which had *nothing* to do the with beatings with the stick, to slap the wrist of the State. The error is harmless.

b. Assignments of error not preserved for review

As noted above, each defendant filed a written motion to suppress. CP 79-86 (Jeffrey Weller) and CP 41 (Sandra Weller). Sandra Weller, in

her written motion, merely joined Jeffrey Weller's motion. CP 41. Jeffrey Weller argued in his written motion that the initial entry into the home was unlawful under *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). However, while presenting argument to the trial court at the CrR 3.6 hearing, counsel abandoned that argument and conceded that the initial entry into the home was proper. RP 232-233. Counsel for Jeffrey Weller said:

> And I think, probably, even though there is no case that is directly on point saying a welfare check is an emergency, I think that we can assume that a welfare check is an emergency, given that it is the welfare of the kids.
>
> So, they went in. Do I believe they went in solely for the purpose of determining whether or not the kids were safe? Yeah, I think they did initially.
>
> The issue becomes whether or not, at some point, they have to stop.

RP 232-33.

Sandra Weller likewise abandoned her claim that the initial entry into the home was unlawful, challenging only the officers entry into the garage. RP 238.

Thus, the current claim that the initial entry into the home was unlawful was waived below. Both defendants induced the trial court *not* to engage in an analysis, or make legal conclusions, about whether the initial

entry into the home was lawful under *State v. Shultz*, supra. Indeed, neither defense attorney even mentioned *Schultz* during their oral argument on the motion to the court. Thus, to obtain review of this waived claim, the Wellers must show that the claim is reviewable under RAP 2.5 (a), or that they were denied effective assistance of counsel when their attorneys chose to waive this claim. They make neither of these showings.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). But if there is a manifest error affecting a constitutional right, it can be raised for the first time on appeal. RP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). Not every constitutional error can be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To raise it for the first time on appeal, it must be a "manifest" error. *Id* (citing *State v. Scott, supra* at 688). To show an error is manifest, actual prejudice must be shown. *Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn.App. at 346.

When a defendant raises a suppression issue for the first time on appeal, he must show the trial court likely would have granted the motion if it was made. *McFarland*, 127 Wn.2d at 333-34. It is not enough that a defendant allege prejudice, he must show actual prejudice from the record. *Id.* at 334.

As noted here and below, the Wellers did not move to suppress the stick on several of the bases they now allege require suppression, or specifically waived the claim. The trial court was denied the opportunity to rule upon the questions this Court is now being asked to review. The Wellers cannot show actual prejudice, nor have they even tried, and in the absence of a showing of actual prejudice, the error is not "manifest" and is therefore not reviewable under RAP 2.5(a)(3). *See McFarland*, 127 Wn.2d at 334.

c. The discovery of the stick

In general, warrantless searches and seizures are per se unreasonable under the Fourth Amendment. *State v. Hendrickson,* 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser,* 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). However, warrantless searches and seizures may be permitted within the confines of "a few specifically established and well-delineated exceptions" to the warrant requirement. *State v. Evans,* 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (quoting *State v. Chrisman,* 100 Wn.2d 814, 817, 676 P.2d 419 (1984)). The burden is on the State to prove the presence of such an exception. *Id.* (quoting *Hendrickson,* 129 Wn.2d at 72, 917 P.2d 563).

The community caretaking function is one such exception to the warrant requirement and arises when police are serving in their role as

community caretakers. *State v. Kinzy,* 141 Wn.2d 373, 394, 5 P.3d 668 (2000). This exception, which is divorced from a criminal investigation, recognizes that "local police have multiple responsibilities, only one of which is the enforcement of criminal law." *State v. Acrey,* 148 Wn.2d 738, 748, 64 P.3d 594 (2003) (quoting *State v. Acrey,* 110 Wn.App. 769, 773, 45 P.3d 553 (2002)).

Under the community caretaking exception, a warrantless search may be permissible when necessary for the purpose of rendering aid or performing routine checks on health and safety. *State v. Thompson,* 151 Wn.2d 793, 802, 92 P.3d 228 (2004). In *Kinzy,* the Supreme Court said observed that the community caretaking exception encompasses situations involving either emergency aid or routine checks on health and safety. *Kinzy* at 386. The court noted that "compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion." *Kinzy* at 386. "[T]he emergency doctrine does not involve officers investigating a crime but arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." *State v. Leupp,* 96 Wn.App. 324, 330, 980 P.2d 765 (1999). "For example, when premises contain persons in imminent danger of death or harm; objects likely to burn, explode or otherwise cause harm; or

information that will disclose the location of a threatened victim or the existence of such a threat, police may search those premises without first obtaining a warrant." *State v. Lynd,* 54 Wn.App. 18, 20, 771 P.2d 770 (1989).

In determining whether an officer's encounter for the purpose of performing a routine check on health and safety is reasonable, the court must balance "the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *Kalmas v. Wagner,* 133 Wn.2d 210, 216–17, 943 P.2d 1369 (1997). As such, whether an encounter made for noncriminal, noninvestigatory purposes is reasonable does not depend on the presence of probable cause or reasonable suspicion. *State v. Chisholm,* 39 Wn.App. 864, 866–67, 696 P.2d 41 (1985). Rather, the court balances the competing interests involved, in light of all the surrounding facts and circumstances. *Id.* at 867.

The defendants do not assign error to any of the trial court's very clear and detailed findings of fact, which the State has reprinted in full in the Statement of the Case, above. As such, they are verities in this appeal. "The rule in Washington is that challenged findings entered after a suppression hearing that are supported by substantial evidence are binding,

and, where the findings are unchallenged, they are verities on appeal." *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Here, the trial court made the unchallenged finding that Officers Aldridge and Jensen of the Vancouver Police Department went to the Weller home in response to a complaint of child abuse and to comply with their statutory[2] duty to determine whether the children needed to be taken into protective custody. The trial court, without objection of the parties, referred to community caretaking and noted it was the same as the health and safety emergency exception to the warrant requirement. The court further found that when Officer Aldridge initiated her investigation into the imminent danger the children might be in, she at all times considered it to be an issue of protective custody due to neglect or abuse, and not a criminal investigation. The trial court made the unchallenged finding that no suggestion had been made that the Vancouver Police Department went

---

[2] RCW 26.44.050 provides:

Except as provided in RCW 26.44.030(11), upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

into the home with a pretextual purpose, and that they were at all times engaged in the community caretaking function. The trial court made the unchallenged finding that the officers, while having been provided with information suggesting the children were in imminent danger, took care to begin the investigation with an open mind. The trial court made the unchallenged finding that while interviewing the children, the officers and the children ended up in the garage, and that the children, while scattered, were looking for the stick that they claimed was used in the child abuse. The trial court made the unchallenged finding that the officers observed the stick in the garage, and that they saw it within the first twenty to thirty minutes of their welfare investigation. The trial court made the unchallenged finding that at the time the officers observed the stick, they were still trying to assess the credibility of the children (which was relevant to whether the complaint was founded and the officers could be deemed to have probable cause to believe that the children were abused or neglected and that they would be injured if not removed from the home prior to obtaining a court order). The trial court made the unchallenged finding that the officers came into the home to investigate the welfare of the children, and that consent was not raised an issue. The trial court made the unchallenged finding of fact that the officers had authority to be there, and that the scope of their interviews was appropriately tailored to their

purpose in being there. These findings are unchallenged and the defendants do not argue that they are not supported by substantial evidence in the record.

Additionally, pursuant to this Court's independent review of the record, the record demonstrates that Officer Aldridge went into this investigation with the (correct) belief that the determination of whether the children in the Weller home were in imminent risk was hers, not CPS's. RP 146. Despite having obtained information that would support a reasonable belief that children inside the Weller home were in imminent risk of danger (the note indicating physical abuse by beating with a stick), Officer Aldridge nevertheless appreciated that it was her duty to make an independent determination whether there was probable cause to remove children from their parents' home. RP 145-46, 149. Officer Aldridge expressed sensitivity to the parental rights of the Wellers, noting that an unsupported removal of children from a home would violate parental rights. Officer Aldridge testified that the purpose of her visit was to determine whether there was an imminent risk to the children and make sure they were safe from harm. RP 146. Aldridge testified that her purpose was not to conduct a criminal investigation, and she had no plan to search the residence. RP 147-48. Aldridge testified that the vast majority of these cases she has assisted CPS with do not turn into criminal cases. RP 148.

Aldridge testified that she wanted to talk to C.G. privately, away from the parents and the other children, and there was nowhere downstairs in the house where they could not have been overheard. RP 158. When she initially entered she could not speak to C.G. without Sandra hearing. RP 155-56. That was how they ended up in the garage on both occasions. While in the garage trying to speak to C.W. and C.G., the children were both scattered and could not focus. RP 167. C.G. alternated between dealing with the animals in the garage to looking around both outside and inside the garage, randomly stating "it's not here." RP 167. At that particular point, the officers had still not determined whether the children's allegation of abuse was founded, or whether they were credible. RP 168. In other words, they had not determined if they would be removed from the room. RP 168. Aldridge candidly observed that teenagers lie more than younger kids, and she did not know if these were simply children who are mad at their parents for not getting a car for their birthday. RP 168. Aldridge testified that a thorough investigation is needed before children can be removed. RP 168. Officers Jensen and Aldridge were just standing there, trying to get the kids focused and talking to them. RP 170. Aldridge was "frustrated" and "at a loss." RP 170. As the kids are roaming and searching, Officer Aldridge saw a stick and said "Is that it?" RP 170. C.G. confirmed that it was. RP 170-71.

Officer Aldridge testified that she did not direct the kids to look for the stick. RP 170.

The trial court concluded as a matter of law that the officers were lawfully in the place where they observed the stick because they were still conducting an investigation into whether the children were in imminent risk of danger. Part of that determination is an assessment of whether the children's claims were credible. They were in the process of questioning the children while the children were looking for the stick. The trial court concluded as a matter of law that the stick was in plain view. That is, she found that the officers observed the stick while they were in an area in which they had the present right to be, and the stick was identified as relevant to the claim of abuse (that is, readily observable as contraband prior to its retrieval). The trial court concluded as a matter of law that the retrieval of the stick was therefore lawful.

The defendants' argument about why suppression of the stick is required is not entirely clear. They appear to claim that because an investigation into whether someone inside the home is in need of emergency aid may lead to evidence of criminality on the part of someone in the home, officers may *never* enter or remain in a home under the emergency aid exception where evidence of a crime might be discovered. Stated another way, they assert both here and below that there can be no

overlap between an emergency aid purpose and a criminal investigation purpose. But the defendants do not cite any authority which explicitly says this. Indeed, numerous cases, including *Schultz*, supra, recognize that an emergency situation can overlap with a criminal investigation. In *Schultz*, where the Supreme Court codified six factors to be considered in determining whether entry into a private residence is lawful under the emergency aid doctrine, the case involved an allegation of domestic violence. While the Court ultimately held that the facts in *Schultz* did not support the finding of a lawful entry under the six enumerated factors, the Court recognized that a domestic violence emergency would justify entry into a home where the six factors are met, despite the fact that evidence of a crime will be garnered by the entry. Indeed, the Court stated "...domestic violence presents unique challenges to law enforcement and courts. We hold that the likelihood of domestic violence may be considered by courts when evaluating whether the requirements of the emergency aid exception to the warrant requirement have been satisfied." *Schultz* at 485-86. An emergency situation presents an exigency. *Schultz* at 488.

The Supreme Court held in *Schultz*:

> We determine whether the police encountered an exigent circumstance permitting entry without a warrant on the specific facts presented. *State v. Raines,* 55 Wn.App. 459,

> 464, 778 P.2d 538 (1989) (citing *State v. Lynd,* 54 Wn.App. 18, 22, 771 P.2d 770 (1989)). Domestic violence presents unique challenges for law enforcement. Domestic violence situations can be volatile and quickly escalate into significant injury. Domestic violence often, if not usually, occurs within the privacy of a home. Our legislature has recognized that the risk of repeated and escalating acts of violence is greater in the domestic context. RCW 10.99.040(2)(a). The legislature has sought to provide "maximum protection" to victims of domestic violence through a policy of early intervention. RCW 10.99.010. The Court of Appeals has recognized that "[p]olice officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants." *Raines,* 55 Wn.App. at 465, 778 P.2d 538.

Schultz at 755-56.

The Court went on to note numerous cases in which the Court of Appeals has applied the emergency aid doctrine to domestic violence cases, which unavoidably involve criminal investigation: *State v. Johnson,* 104 Wn.App. 409, 16 P.3d 680 (2001) (emergency aid exception justified a warrantless entry after a report that a victim of domestic violence had locked herself in a bathroom, the defendant had a cut on his wrist and was slow to answer questions about location of the victim); *State v. Menz,* 75 Wn.App. 351, 880 P.2d 48 (1994) (warrantless entry was justified after police received a phone call reporting domestic violence in progress; upon arrival officers observed that the door was ajar, the lights and television were on, and no one responded to knocks or announcements); *Raines,* supra, at 462 (warrantless entry justified when householder stepped aside

and allowed officers in when they asked if they could "look around"); *Lynd,* supra, (warrantless entry was justified when a person called 911 and hung up, return calls met a busy signal, defendant admitted outside his home to assaulting the victim, the defendant was packing a car as if preparing to leave, and the defendant did not want the officer to look in the house). *Schultz* at 755-56.

The factors identified in *Schultz* for determining whether an entry is justified are:

> (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched." The Court of Appeals has suggested three more factors: (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.

Schultz at 754. (Internal citations omitted).

"Where an officer's *primary* motivation is to search for evidence or make an arrest, the caretaking function does not create any exception to the search warrant requirement." *State v. Williams*, 148 Wn.App. 678, 683, 201 P.3d 371, 374 (2009). (Emphasis added). See also *State v. Gocken,* 71 Wn.App. 267, 275–77, 857 P.2d 1074 (1993).

Although the three new added factors are arguably redundant to the first three (as noted by the dissent in *Schultz*), all six are met in this case. The officers subjectively believed that children inside the Weller home likely needed assistance for health or safety concerns; a reasonable person in the same situation would share that belief; there was a reasonable basis to associate the need for assistance with the place being searched (the children lived inside the Weller home, and the alleged abuse was occurring inside the home); there was an imminent threat of substantial injury to persons or property (the children had written a note to their therapist begging for help because they were being beaten and bloodied with a stick); the officers believed two specific people (and possibly more) were in need of immediate help for health or safety reasons; and the claimed emergency was not a mere pretext for an evidentiary search.

The Wellers' argument, taken to its logical extreme, would hold that if an officer responds to a report that someone inside a residence is dying of a heart attack he may enter the home to render aid. But if he responds to a report that someone inside a residence is being stabbed to death, he may not enter the home to render aid because in doing so, he will necessarily be making an arrest and collecting a potential murder weapon as evidence—rendering the entry mere pretext to conduct an evidentiary search. They cite no apposite authority to support this contention. It is

difficult to imagine how the officers are supposed to respond to situations like this absent the ability to enter the home to render emergency aid. Yes, child abuse and neglect cases will sometimes reveal evidence of criminal activity. But the delay inherent in getting a court order for removal of the children could put the children in imminent risk of continued physical abuse. Indeed, the legislature recognized as much when it crafted RCW 26.44.050.

At the point at which the board was seen in the garage, the officers had not begun conducting a criminal investigation. They had not yet even determined if the children were credible. Indeed, they could barely get them to focus. Most importantly, they had not yet decided whether the children were going to be removed from the home. They had only been in the house for twenty to thirty minutes when the board was discovered. The officers candidly admitted that at some point after recovering the board (on which they saw what appeared to be blood after removing it) the investigation became a criminal one. The defendants did not challenge the admission of any evidence collected or observed after the collection of the board when, at some point, the investigation became a criminal one. Again, their motion was limited to suppression of the stick. The trial court properly held that the officers were lawfully inside the house pursuant to the emergency aid exception to the warrant requirement, and that their

investigation was not a mere pretext for a criminal search. Moreover, even if the officers had been specifically looking for the weapon, rather than trying to corral two teenagers who simply could not focus or remain still, that would not render the officers' actions unlawful. The instrumentality of the physical abuse was critical to the officers' determination whether the children's claims were credible. It would provide corroboration. Likewise, the presence of a board that had been used as a deadly weapon was relevant to the officers' determination of whether the children should remain in the home. The trial court properly denied the motion to suppress.

d. Entry into garage

Jeffrey Weller argues in this appeal that the officers violated article 1, section 7 by entering the garage as part of their inquiry into whether the children were at imminent risk of physical abuse. Stated another way, he argues that the officers would have needed an independent basis, apart from the overall emergency they were investigating, to enter individual rooms of the home--that each nook and cranny of the house requires an independent application of the six *Schultz* factors.[3]

[3] Sandra Weller, having not joined in Jeffrey Weller's assignments of error, does not make this claim. In any event, the State would argue that Sandra Weller also waived this specific claim below. Again, a review of her argument to the trial court at pages 237-38 of the VRP shows that she was merely echoing what Jeffrey argued about the

Jeffrey Weller did not make this argument below. To the extent anyone made this argument below it was Sandra Weller, and she did not frame it in the way it is currently being framed. Her argument, found on page 238 of the VRP, was really that the officers had shifted their focus, *by the time they entered the garage*, exclusively to a criminal investigation--not that each room in the house requires an independent emergency aid analysis. Jeffrey is limited in this appeal to the argument he made below, namely that whereas the initial entry into the home was lawful and made pursuant to the emergency aid exception, the focus of the investigation changed primarily to a criminal one by the time they entered the garage and discovered the stick. For the reasons stated above in section *b*, this Court should not review claims that either were not made or were abandoned or waived below. Even if this argument were preserved for review, Jeffrey Weller cites no authority which holds that once officers are lawfully inside a home under the emergency aid exception to the warrant requirement, they must establish individualized emergency as to each nook and cranny of the home. Moreover, the children *lived* in this home. The officers were entitled to examine the living conditions the children were being exposed to for a determination of whether they were at

---

investigation having become primarily a criminal one by the time the officers entered the garage--not that each individual room in the home requires a separate application of the six *Schultz* factors.

imminent risk of neglect or physical abuse. Jeffrey cites no authority for the idea that the police were limited to standing in the entryway of the home to conduct their investigation. Moreover, the police are not required to employ the least restrictive means to investigate the welfare of a vulnerable citizens. *State v. Hos*, 154 Wn.App. 238, 248-49, 225 P.3d 389 (2010). Jeffrey's claim on this point should not be reviewed, and should fail in any event.

e. Plain View

Both defendants argue that the collection of the stick violated their right to privacy under article 1, section 7, because the stick was not in "plain view," as that term is defined. "The requirements for plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him." *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307, 309 (2005), citing *State v. Chrisman*, 94 Wn.2d 711, 715, 619 P.2d 971 (1980) (*Chrisman* I).

Again, this argument was not made below and is waived. Both Jeffrey and Sandra Weller limited their argument for suppression, both in briefing and in oral argument to the trial court, to the claim that the officers were conducting a criminal investigation rather than an emergency aid investigation into the report that children were suffering

neglect and physical abuse. See CP 81-86 (Jeffrey Weller), RP 235-238. They did not argue that, assuming the officers were engaged in rendering emergency aid and all six *Schultz* factors were met, the stick was not in "plain view" because it was not readily recognizable as contraband. Indeed, Jeffrey Weller's attorney said "Once they determine that there--some potential evidence was there, and the stick was there, whether it was in plain view or whether it wasn't doesn't matter. I don't care if it was in plain view. At that point, it becomes a criminal investigation." RP 235. For her part, Sandra Weller's attorney did not even mention plain view. RP 237-38. Their joint claim that the stick was not readily recognizable as contraband is made for the first time in this appeal. Not only did the Wellers not claim that the stick was not readily recognizable as contraband (the second prong of the "plain view" test), they argued the opposite: That the stick was so immediately recognizable as contraband that the moment they fixed their eyes on it, the investigation became a criminal one and the officers were required to vacate the home immediately and apply for a warrant. The Wellers should not be allowed to induce the trial court into *not* making any findings of fact and conclusions on law on an issue by specifically waiving it, and then be heard to call it error on appeal. For the reasons set forth in section *b,* above, this Court should decline to review this claim for the first time in this appeal.

f. Any error in failing to suppress the stick was harmless

The admission of the stick into evidence at trial was harmless beyond a reasonable doubt. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Stephens,* 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980). The reviewing court looks to the untainted evidence to determine whether it necessarily leads to a finding of guilt.

The word overwhelming is a strong one, yet it does not come close to describing the veritable mountain of untainted evidence establishing the Wellers' guilt. Five of the six Weller children described a harrowing, sadistic environment in which C.W. and C.G. were repeatedly brutalized with a rotating roster of boards and bike locks, and were severely deprived of food. C.G. was being systematically starved. When she was examined by Dr. Copeland seventeen days after being rescued from the Weller home, she weighed 89 pounds--at five foot, five inches tall. Both C.G. and C.W. were balding due to pulling their hair out from stress. C.W. had an injury consistent with repeated trauma to his buttocks. C.G. had scars and

scabs on her back from being hit with a bike lock. Each of the testifying children gave consistent stories of either hearing or watching C.G. and C.W. being savagely beaten with a roughly three and a half to four foot long board against their naked backsides. Their underwear would stick to their torn up, bloody skin. The children gave consistent stories of C.G. and C.W. having to eat rotten food, moldy, hairy bread, or disgusting food out of a can. The police and CPS saw empty cans in the house that had been opened with a screwdriver. They gave consistent stories of locks on the cabinets and refrigerator. They gave consistent stories of the food stealing escapades and the punishments that followed. They candidly admitted to keeping messy rooms and to sneaking out onto the roof. They gave consistent accounts of C.G. and C.W. being imprisoned in their room for the bulk of the day and having no electricity. They described a bizarre living environment in which the children had to sleep all day and stay up all night to stay on the same schedule as Jeffrey Weller. Presumably, this was so that Jeffrey could keep his jail warden's eye on the children at all times, and ensuring that they were sleeping when he was sleeping enabled him to better imprison his children. This bizarre schedule ensured that C.W. and C.G. would be awake during the hours in which their room had no light. The children gave consistent accounts of poor hygiene and rarely bathing, having to share bath water among the six of them because the

Wellers did not want to pay for the extra water it would take to allow the children to be clean. For her part, Sandra Weller was both sadistic and lazy. She slept all day and ate better food than her children. She singled out the non-biological children for terroristic treatment. She reveled in watching Jeffrey inflict savage beatings on C.G. and C.W., encouraging him to inflict ever more blows. Her behavior was arguably more despicable than Jeffrey's. Jeffrey, for his part, was C.W. and C.G.'s step-father, not the parent who adopted them at age two.

The actual admission of the board into evidence, and the unsurprising testimony that C.W.'s blood was found on it, was of minor moment in the overall trial. The jury heard consistent descriptions of this torture device without having to see it. The board certainly was not needed to corroborate the violence inflicted on C.G. and C.W.--the corroboration was overwhelming.

Finally, even if the admission of the board were deemed not harmless as to the assault in the second degree convictions, it would have no effect on the convictions for unlawful imprisonment, assault of a child in the third degree, and assault in the fourth degree. The board had nothing to do with those counts. The error, if any, in admitting the board into evidence (as well as the testimony that C.W.'s blood was found on it), was harmless beyond any doubt.

II. THE INFORMATION WAS NOT MISSING AN ESSENTIAL ELEMENT ON THE CHARGE OF UNLAWFUL IMPRISONMENT.

The Wellers allege the information charging Unlawful Imprisonment was defective for failing to include all the essential elements of the crime. An Information must include all essential elements of a crime in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). As Darling is challenging the sufficiency of the information for the first time on appeal, the information shall be construed "quite liberally." *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). The Wellers contend that the information is deficient for failing to define the word "restraint." In *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), the Washington Supreme Court rejected the defendant's contention that the definition of an element of an offense is an essential element that must be alleged in the charging document. *Allen*, 176 Wn.2d at 628-30.

Unlawful Imprisonment is set by statute as "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040. The term "restrain" is defined in a separate statute as "...to restrict a person's movements without consent and without legal

authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). The State charged the Wellers with two counts of unlawful imprisonment, using the statutory language under RCW 9A.40.040. For an information to be constitutionally sufficient, the essential elements must "appear[] in any form, or by fair construction can be found" in the information. *Kjorsvik*, 117 Wn.2d at 108. If all the essential elements are in the information, the court inquires as to whether the defendant "has shown that he was nonetheless prejudiced by any vague or inartful language in the charge." *Kjorsvik*, 117 Wn.2d at 111.

The Wellers rely in part on a recent Division One holding in *State v. Johnson*, 172 Wn.App. 112, 297 P.3d 710 (2012). However, a different panel of Division One disagreed with its holding in *Johnson, supra* after the Supreme Court issued its opinion in *State v. Allen, supra.* In *State v. Phuong*, 174 Wn.App. 494, 299 P.3d 37 (2013), Division One found that the defendant's contention that the statutory definition of 'restrain' is an essential element of the crime of Unlawful Imprisonment fails. *Phuong,* 299 P.3d at 86. Phuong claimed that a statutory definition, not a constitutional imperative, was required to be in the charging document. *Id.* Division One relied upon the Supreme Court's holding in *Allen, supra* to deny Phuong's claim and upheld the information as constitutionally sufficient. *Id.*

In *State v. Allen, supra*, the Supreme Court addressed whether, in a case involving the crime of Felony Harassment, the true threat requirement is an essential element of the statute. *Allen*, 294 P.3d at 687. The Court rejected the defendant's contention that the true threat requirement is an essential element of felony harassment, and relied upon Court of Appeals' cases that found the true threat requirement is not an essential element of harassment. *Id.* at 688-89 (citing *State v. Tellez*, 141 Wn.App. 479, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wn.App. 799, 236 P.3d 897 (2010).

As in the cases above in which the Court found it sufficient to instruct the jury on the definition of "true threat" (referring to *Allen, supra, Tellez, supra,* and *Atkins, supra*), it was sufficient for the trial court in the Wellers' case to instruct the jury on the definition of "restrain." The Wellers were sufficiently notified of the crime for which they were charged, including all essential elements, by the information, which reflects the statutory language of the Unlawful Imprisonment statute. As in *Phuong, supra* the information was sufficient, and the necessary elements of unlawful imprisonment are found and fairly implied by the charging document. The Wellers' convictions for Unlawful Imprisonment should be affirmed.

III. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD.

Jeffrey Weller claims that the accomplice liability statute in unconstitutional. Sandra Weller does not join in this argument. This claim fails.

Jeffrey Weller claims that the accomplice liability statute is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. This claim has been considered and rejected by this Court previously.

In *State v. Ferguson*, 164 Wn.App. 370, 376, 264 P.3d 575 (2011) this Court followed Division One's opinion in *State v. Coleman*, 155 Wn.App. 951, 961, 231 P.3d 212 (2010) and held that the accomplice liability statute does not infringe upon constitutionally protected speech. The reasoning of the *Coleman* Court, adopted by this Court in *Ferguson* was that

> [T]he accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. Therefore, by the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.

Coleman at 960-61. This Court, in *Ferguson*, added

> Because the statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it

> does not forbid the mere advocacy of law violation that is protected under the holding of Brandenburg. Agreeing with and adopting Division One's rationale in Coleman, we also hold that the accomplice liability statute is not unconstitutionally overbroad.

Ferguson at 376.

Jeffrey Weller asks this Court to reconsider *Ferguson*, arguing that this Court's reliance on the mens rea requirement does not meet the federal standard imposed by *Brandenburg v. Ohio*, namely that the First Amendment protects speech advocating criminal activity unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827 (1969). This Court should decline that request because the *Ferguson* Court addressed the *Brandenburg* standard, holding that "[b]ecause the [accomplice liability] statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*." The State asks this Court to adhere to its holding in *Ferguson*.

IV. THE EXCEPTIONAL SENTENCE IS NOT UNLAWFUL.

Sandra and Jeffrey each claim the trial court erred in imposing an exceptional sentence as they claim they were both convicted as accomplices and the statute which provides for aggravating factors does

not allow for such a finding for an accomplice. Sandra and Jeffrey's reasoning is flawed and their reliance on *State v. Hayes*, 177 Wn.App. 801, 312 P.3d 784 (2013) is misplaced. Both Sandra and Jeffrey's exceptional sentences should be affirmed as the jury properly found aggravating factors for both of them based on their own, individual conduct.

RCW 9.94A.535(3) allows for the court to impose a sentence outside the standard sentencing range if the jury finds one or more of the listed aggravating factors pursuant to procedures discussed in RCW 9.94A.537. The jury in Sandra and Jeffrey's case was given a separate special verdict form for each defendant and for each count charged. CP 151-175 (Jeffrey Weller) and CP 116-122 (Sandra Weller). Each special verdict form was identical to all others. The special verdict form asked the jury if "The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim," and whether the crime was one of domestic violence and if so, whether "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." Id. The jury returned special verdicts of "yes" to both questions on all counts on which they convicted for both Sandra and Jeffrey. Id.

Sandra and Jeffrey now allege that the statute which allows for an exceptional sentence based on a finding of an aggravating factor does not allow for such aggravators to be found for those who are convicted as accomplices to the crime. Sandra and Jeffrey rely on *State v. Hayes,* supra, to support this contention. In *Hayes*, the Court analyzed whether the aggravating factor under RCW 9.94A.535(3)(d) could extend to a defendant convicted of the underlying crime as an accomplice. *Hayes* at 808. The Court found that the "major economic offense enhancement" did not contain a "triggering device" that extends its application to a conviction based on accomplice liability. *Id.* The enhancements considered by the Court in *Hayes* involved whether "the current offense involved [certain conduct]...." *Id*; RCW 9.94A.535(3)(d). The Court stated that the term "the current offense" does not equate to legislative intent to apply the sentence enhancement to accomplices. *Id.* at 810.

The situation in the case at hand is markedly different than the situation in *Hayes, supra.* In Sandra and Jeffrey's case, the jury was asked regarding one aggravating factor whether "*the defendant's* conduct ...manifested deliberate cruelty to the victim." CP 151-177, 116-122. (emphasis added). Each defendant, Sandra and Jeffrey, had a separate special verdict form for each count. It is clear that the question the jury was asked to consider was each defendant's conduct during the

commission of the crime, and not whether the crime overall met some certain standard of behavior. So even if Sandra and Jeffrey were convicted as accomplices, the jury specifically considered their conduct and their behavior in determining that they each individually acted with deliberate cruelty to the victims.

In other case law on this subject it is clear the harm the court seeks to avoid is the possibility of an accomplice having an aggravating factor found against him that is based solely on the principal's conduct. *See State v. Pineda-Pineda*, 154 Wn.App. 653, 664, 226 P.3d 164 (2010) (stating "...the defendants' own acts must form the basis for the enhancement"); *State v. McKim*, 98 Wn.2d 111, 118, 653 P.2d 1040 (1982) (holding that for the deadly weapon enhancement to apply to an accomplice, the State must have proved that the accomplice himself knew the principal was armed with a deadly weapon at the time of the crime); *State v. Altum,* 47 Wn.App. 495, 505, 735 P.2d 1356 (1987) (upholding an accomplice's exceptional sentence based on an aggravating factor of deliberate cruelty in part because the accomplice "personally treated [the victim] in a cruel manner"). The jury in Sandra and Jeffrey's trial considered whether each defendant, personally, had exhibited deliberate cruelty towards the victims based on the form of the question and the special verdict form as it was given to the jury. CP 151-177, 116-122. It is clear the jury's finding of an

aggravating factor for deliberate cruelty was based solely on each defendant's personal conduct. The jury's finding for this aggravating factor should be affirmed as to both Sandra and Jeffrey, no matter whether they were convicted as accomplices or principals.

Further, the legislature did intend for at least certain aggravating factors under RCW 9.94A.535 to be applicable to those convicted of crimes as accomplices. For certain aggravating factors the jury is instructed to consider *only* the defendant's conduct, such as whether the defendant displayed deliberate cruelty. RCW 9.94A.535(3)(a). This protects the defendant from being found to have committed an aggravating factor based on conduct only of the principle actor that the accomplice may not have been aware of. Also, prior case law from this Court recognized the ability of the deliberate cruelty aggravating factor to be applied to accomplices. *See State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989) and *State v. Altum,* 47 Wn. App. 495, 735 P.2d 1356, *rev. denied,* 108 Wn.2d 1024 (1987). It is important to note that the Legislature is presumed to be aware of case law interpreting the statutes it has enacted. *In re Marriage of Little*, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981). Furthermore, when the Legislature enacts a statute, absent an indication that it intended to overrule a particular interpretation, any changes or

amendments to statutes are presumed to be consistent with prior judicial decisions. *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000).

In 1987 and 1989 the Court of Appeals interpreted RCW 9.94A.390 (recodified as RCW 9.94A.535) regarding the applicability of a certain aggravating factor to an accomplice, finding based on the facts, the aggravating factor was properly applied to an accomplice. *State v.Altum, supra; State v. Hawkins, supra.* Former RCW 9.94A.390 (versions in effect at the time of the opinions in *Hawkins, supra* and *Altum, supra*) did not have any specific mention of accomplice liability, similar to the statute currently in effect. This statute was recodified in 2001. Again, the statute makes no direct mention of accomplice liability. RCW 9.94A.535. In *State v. Hayes* this Court interpreted this absence of direct mention of accomplice liability to preclude application of certain aggravating factors to accomplices. However, the Legislature is presumed to have been aware of the judicial interpretation of former RCW 9.94A.390 and the Court's upholding of an aggravating factor to an accomplice in *Altum, supra* and *Hayes, supra* evidences the Legislature's intent not to change the judicial interpretation of RCW 9.94A.390 as applicable to accomplices. The Legislature, being aware that the appellate courts were affirming aggravating factors applied to accomplices, did nothing to change the statute to disallow such application, something entirely within its ability.

This choice is a clear indication by the Legislature of its intent to allow the judicial interpretation of this statute as applicable to accomplices to stand.

In *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989), this Court considered whether the aggravating factor contained in former RCW 9.94A.390 (recodified as RCW 9.94A.535) of deliberate cruelty to the victim is properly applied to a defendant convicted as an accomplice. In upholding the applicability of this aggravating factor to the accomplice defendant, the Court discussed that it would not "split hairs" in attempting to determine whether the accomplice or the principle had a greater role in the commission of the crime. *Hawkins*, 53 Wn.App. at 606 (quoting *State v. Altum*, 47 Wn.App. 495, 505, 735 P.2d 1356, *rev. denied*, 108 Wn.2d 1024 (1987)). The defendant's exceptional sentence based on this aggravating factor was affirmed though he was only an accomplice to the underlying crime. *Id.*

Similarly in *State v. Altum*, 47 Wn. App. 495, 735 P.2d 1356, *rev. denied*, 108 Wn.2d 1024 (1987), this Court also considered whether certain aggravating factors could be applied to an accomplice in a robbery and rape. The Court upheld the defendant's exceptional sentence because even though the defendant was only an accomplice to the robbery, this defendant's individual actions as a whole justify the imposition of the exceptional sentence. *Altum*, 47 Wn. App. at 505. This reasoning applies

directly to Sandra's involvement in the crimes for which she was convicted as an accomplice. Just as the defendant in *Altum*, Sandra did not just assist Jeffrey in committing the crimes, but she personally treated her children in a deliberately cruel manner in her encouragement and direction to Jeffrey to engage in these crimes.

The jury was presented with a defendant, Sandra, who encouraged her husband to beat her children with a deadly weapon; who told him to hit them again and again, and who stood by as her husband took a deadly weapon to her children and instead of coming to their aid, instead of protecting her children, she aided and encouraged and requested he engage in this conduct. It is overwhelmingly clear from the evidence presented at trial that Sandra, herself, displayed deliberate cruelty to the victims during the commission of the crime. Clearly this aggravating factor was intended to apply to this situation and to this type of accomplice--one who by their own behavior fulfilled the requirements of the aggravating factor.

Regarding the second aggravating factor found by the jury, an ongoing pattern or abuse, the State agrees that the jury was not asked to consider Sandra's specific individual conduct in determining whether this was an ongoing pattern of abuse for the crimes in which she was convicted as an accomplice. As she was convicted as an accomplice for counts 1, 2, 5, and 6, this aggravating factor was not properly found by the jury under

the Court's holding in *State v. Hayes, supra* for those counts and under the clear intent of the courts in finding that aggravating factors must be based on an individual defendant's conduct in *In Re Howerton,* 109 Wn.App 494, 36P.3d 565 (2001), *State v. Altum, supra* and *State v. Pineda-Pineda, supra.* However, as discussed above, Sandra's aggravating factor for exhibiting deliberate cruelty to the victims was properly applied to her and properly found by the jury. This aggravating factor alone supports the trial court's exceptional sentence as imposed. It is not necessary for every aggravating factor found by a jury to be valid in order for this Court to affirm Sandra's exceptional sentence. *See State v. Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192 (2005) (citing *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)). If this Court is satisfied that the appellate court would have imposed the same sentence based on the remaining valid aggravating factor, then the exceptional sentence may be affirmed. *Id.* It is clear from the record below the trial court was appalled at the cruel nature of the actions of Sandra during the commission of the crimes. The aggravating factor the jury found in which it considered only Sandra's actions is sufficient to uphold the exceptional sentence the trial court imposed. This sentence is clearly warranted given Sandra's extreme behavior and evidence of her deliberate cruelty to her children, as found by the jury.

Further, both of Jeffrey's aggravating factors should be affirmed as Jeffrey was convicted as a principal for all of his crimes. Jeffrey appears to claim he could have been convicted of all of his crimes as an accomplice. However, none of the evidence presented at trial supports this contention. All of the witnesses agreed that Jeffrey inflicted the blows at Sandra's direction, with the exception of the occasions where he would act unilaterally. The victims and other witnesses all testified consistently and all the evidence admitted showed that Jeffrey was a principle actor on all of the crimes committed against his children. Moreover, he was the only party charged in count 3, the strangulation on C.G. It is also clear from the evidence at trial that Sandra was convicted as a principal for the unlawful imprisonment of which she was convicted. Jeffrey's claim that the aggravating factors were improperly applied to his convictions is absolutely without any support in the record. It is clear from all the evidence that the jury could have only found that either Jeffrey was the principal actor in all the assaults, or that he was not guilty of the crimes. The jury found the former. As Jeffrey was convicted as a principal, his argument regarding the inability of the court to sentence him outside the standard range because he was only an accomplice is without any merit. All aggravating factors found by the jury as to Jeffrey should be affirmed.

For all the foregoing reasons, Sandra and Jeffrey's claims are meritless with regard to the aggravating factor of deliberate cruelty, and with regard to all crimes for which they were convicted as the principal. The trial court's imposition of an exceptional sentence as to both Sandra and Jeffrey was appropriate and based on properly found aggravating factors. Their sentences should be affirmed. If this Court disagrees, the case should be remanded to the trial court for a resentencing, wherein the trial court can determine whether she would structure the exceptional sentences differently based upon the counts for which each defendant was inarguably a principal.

V. THE TRIAL COURT DID NOT ENGAGE IN JUDICAL FACT FINDING

Jeffrey Weller alleges his exceptional sentence was based upon improper judicial fact-finding. Sandra Weller does not join this claim. The record is clear the trial court based its imposition of an exceptional sentence for both Jeffrey and Sandra on the aggravating factors found by the jury. The trial court's findings and conclusions it entered to support the exceptional sentence show the trial court determined there were substantial and compelling reasons to justify an exceptional sentence, as the trial court is required to do. RCW 9.94A.535.

A jury's findings by special interrogatory are reviewed for sufficiency of the evidence. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (citing *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001)). A court's finding of legal justification to impose an exceptional sentence is reviewed de novo. *Id.* (citing *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)). RCW 9.94A.535 sets forth the circumstances under which a trial court may impose an exceptional sentence. The statute requires that whenever a trial court imposes a sentence outside the standard range it must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. The trial court did this in making its findings and conclusions to which Jeffrey now assigns error.

Jeffrey claims the trial court's findings and conclusions supporting his exceptional sentence constitute "judicial fact-finding." However, it is clear the trial court included in its findings that the jury returned a special verdict unanimously finding Jeffrey's conduct during the commission of the crimes manifested deliberate cruelty to the victims as to counts 1, 2, 3, 4, 5, 6 and 13. CP 40. The trial court also included in its factual findings that the jury returned a special verdict unanimously finding the crimes in counts 1, 2, 3, 4, 5, 6, and 13 involved domestic violence and were part of an ongoing pattern of psychological or physical abuse of the victim

manifested by multiple incidents over a prolonged period of time. CP 40. The trial court then outlined the trial testimony to show that the jury's findings as to deliberate cruelty and ongoing pattern of abuse were "supported by the evidence admitted at trial..." CP 42. Further, the only "findings" the trial court found were that "At trial [various witnesses] testified that [facts witnesses testified to]." CP 40-42. These "findings" only outline the trial testimony to make it clear the trial court found there were substantial and compelling reasons to give an exceptional sentence based on the evidence presented at trial. This finding by the trial court of substantial and compelling reasons to justify an exceptional sentence is required by statute. RCW 9.94A.535. As a trial court exceeds its authority in imposing an exceptional sentence when it relies upon reasons that are not substantial or compelling, it is imperative that the trial court make a finding as to whether the jury's finding is supported by evidence and whether the facts of the case create substantial and compelling reasons to justify the sentence. *See State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). A trial court can be presumed to be aware that its imposition of an exceptional sentence will be reviewed with scrutiny by the appellate courts. *See id* (stating that appellate courts must determine whether a sentencing judge's articulated reasons justify imposition of an exceptional sentence). It is therefore reasonable, and in fact prudent, for a trial court to

specifically articulate its reasoning in imposing such a sentence as the trial court below did.

As Jeffrey does not challenge the jury's finding as not being supported by substantial evidence, the issue on whether the trial court appropriately imposed an exceptional sentence is an issue of whether the trial court committed an error of law in imposing the exceptional sentence. *See Stubbs*, 170 Wn.2d at 125. In imposing an exceptional sentence, a trial court must not base the sentence on factors necessarily considered by the Legislature in establishing the standard range for the offense, and the aggravating factor must be substantial and compelling to distinguish this particular offense from others in the same category. *Ferguson*, 142 Wn.2d at 649. The trial court's outline, in writing, of the particularities of this offense can reassure this Court that the exceptional sentence imposed was supported by substantial and compelling reasons. It is clear from the testimony at trial that Jeffrey's offenses were particularly heinous and egregious and went far beyond behavior required for convictions of Assault in the Second Degree and Unlawful Imprisonment.

Jeffrey's contention the trial court based its exceptional sentence on "judicial fact-finding" is absolutely without merit. The trial court's findings were a clear attempt to outline and clearly show that Jeffrey's behavior went above and beyond that required to support his convictions

and that his behavior clearly exhibited deliberate cruelty above and beyond that required by the statute for the commission of the offense. The trial court's findings also outline all the evidence to show Jeffrey's crimes were part of an ongoing pattern of abuse. These findings are clearly not "judicial fact-finding" but rather are the trial court's efforts to carefully outline how the aggravators found by the jury create substantial and compelling reasons to legally justify an exceptional sentence. The findings do just that, and Jeffrey's sentence was appropriate given the jury's verdicts and the circumstances of the case. The trial court's imposition of an exceptional sentence should be affirmed.

D. D. CONCLUSION

The convictions and sentences should be affirmed.

DATED this 28th day of March, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

March 28, 2014 - 4:52 PM

Transmittal Letter

Document Uploaded: 447266-Respondent's Brief.pdf

Case Name: State v. Jeffrey Weller and Sandra Weller

Court of Appeals Case Number: 44726-6

Is this a Personal Restraint Petition? Yes ▪ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

▪ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: Abby.Rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com
wapofficemail@washapp.org