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July 21, 2014
Court of Appeals
Division III
State of Washington

NO. 32232-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DAVID EMORY MANLOVE,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. Deliberate cruelty, as an aggravating factor, is inapplicable to residential burglary.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Is the aggravating factor of deliberate cruelty limited to crimes against persons?

STATEMENT OF CASE

Paula Parker resides at 2584 K Bridgman-Rettinger Road in Kettle Falls. She bought the property in August of 2005. (RP 106, ll. 4-15; RP 108, ll. 7-8)

David Emory Manlove is Ms. Parker's neighbor. He resides at 2584 M Bridgman-Rettinger Road. Ms. Parker and Mr. Manlove were good neighbors from the start. Ms. Parker considered him a friend. (RP 121, ll. 3-15; ll. 21-25; RP 122, l. 23 to RP 123, l. 23; RP 269, ll. 5-9)

Ms. Parker was on vacation from June 19 to July 2, 2013. When she returned home on July 3 she observed that someone had been in the

house. Certain photographs had been torn in half. She discovered a hand-rolled thick cigarette in an ashtray. She believed the cigarette was Mr. Manlove's. (RP 111, ll. 9-19; RP 113, ll. 6-7; RP 118, ll. 8-20; RP 119, l. 19 to RP 120, l. 12)

Ms. Parker contacted the Stevens County Sheriff's Office. Deputy Baskin responded. He observed the damaged photographs. (RP 161, ll. 20-21; RP 162, l. 21 to RP 163, l. 1; RP 164, ll. 19-21)

When Ms. Parker again returned to her house on July 7, 2013 she noticed substantial damages. A chainsaw was used to gouge a tree. There were broken windows. The front door was open. The interior had been ransacked. There were hatchet holes in the walls. The woodstove had been destroyed. Her mother's ashes had been dumped on the rug. (RP 125, ll. 22-24; RP 131, l. 9; RP 134, ll. 2-3; RP 139, l. 5 to RP 140, l. 5)

Ms. Parker again contacted the Stevens County Sheriff's Office. Deputy Swim responded. He observed that all of the plants in her front yard had been destroyed. He confirmed the damages to the interior of the house. (RP 172, ll. 15-18; RP 173, l. 20 to RP 174, l. 1; RP 174, l. 23 to RP 175, l. 6)

Sergeant Manke, Sergeant Blackman and Deputy Britton went to Mr. Manlove's residence on July 8. Sergeant Manke spoke to Mr. Manlove concerning the damages at the Parker residence. Mr. Manlove

responded that he did not know anything about it. (RP 239, ll. 5-8; RP 239, l. 21 to RP 240, l. 8; RP 241, ll. 13-18; RP 246, ll. 6-9; RP 252, ll. 21-23)

Sergeant Manke told Mr. Manlove he was going to read him the *Miranda*¹ warnings. Mr. Manlove responded “no thank you.” The sergeant proceeded to read the rights. (RP 242, ll. 2-6)

When Sergeant Manke asked him why he had damaged Ms. Parker’s residence Mr. Manlove responded “it’s my mountain.” (RP 242, ll. 11-13)

Mr. Manlove stated that because “it’s my mountain ... there’s no crime.” (RP 243, ll. 2-10)

Deputy Swim applied for a search warrant of Mr. Manlove’s residence on July 9, 2013. Upon arrival he observed a marijuana grow. A hatchet belonging to Ms. Parker was located in the basement on the floor. One (1) of Ms. Parker’s chainsaws was in a storage shed. (RP 141, l. 21 to RP 142, l. 7; RP 179, ll. 7-9; RP 198, ll. 18-20; RP 200, ll. 18-22; RP 205, ll. 15-20)

Deputy Swim also found a 30-06 rifle in a storeroom in the basement. He was unable to find any medical marijuana authorization. (RP 203, ll. 1-13; RP 210, l. 16 to RP 211, l. 2)

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)

Ms. Parker later went to Mr. Manlove's residence. She looked through the window and saw items of hers inside the house. There was also one of the chairs near the pickup. An antique Coleman ice chest was sitting outside. (RP 140, l. 18 to RP 141, l. 10; RP 142, l. 15 to RP 143, l. 16; RP 148, ll. 9-11)

Sergeant Erdman applied for a search warrant on August 28, 2013. A second search of Mr. Manlove's residence revealed a veil belonging to Ms. Parker that was part of a belly dancing costume. He also found a mortar and pestel; notebooks and journals; paints and CDs; and jewelry which belonged to Ms. Parker. (RP 147, l. 22 to 148, l. 4; RP 265, ll. 12-15; RP 267, ll. 1-5; RP 268, ll. 17-23; RP 277, l. 7 to RP 278, l. 4)

A CrR 3.5 hearing was held on January 2, 2014. The trial court ruled that Mr. Manlove's statements were admissible. Findings of Fact and Conclusions of Law were entered on January 16, 2014. (RP 77, l. 7 to RP 80, l. 7; CP 78)

Following the CrR 3.5 hearing an evidentiary hearing was conducted concerning a prior offense. The trial court later ruled that evidence of the prior offense would be inadmissible at trial. (RP 91, ll. 6-9)

Mr. Manlove was charged with residential burglary, unlawful possession of a firearm second degree, manufacturing marijuana and posses-

sion of stolen property third degree by an Information filed on July 11, 2013. (CP 1)

The Information was later amended to add a fifth count of first degree malicious mischief and an aggravating factor of deliberate cruelty to Count I - residential burglary. (CP 37)

Mr. Manlove was sent to Eastern State Hospital (ESH) pursuant to an order for a competency evaluation. A competency order was entered on November 26, 2013. (CP 15; CP 20; CP 41)

Prior to the commencement of trial a Second Amended Information was filed. Count III was changed from manufacturing marijuana to possession of more than forty (40) grams of marijuana. The dates were expanded on the respective counts to the period June 19 through July 9, 2013. A Corrected Second Amended Information was entered later that day. (CP 131; CP 135)

Mr. Manlove had been committed to ESH in 2011. A Commitment Order and a Notice of Firearm Ineligibility were introduced at trial. (RP 226, ll. 7-11; RP 229, ll. 14-22; RP 231, ll. 3-8; Exhibit 46; Exhibit 47)

Keith Wilder, who owns a construction company, estimated that the necessary repairs for Ms. Parker's property would cost approximately \$15,922.52. (RP 215, ll. 17-18; RP 222, l. 25 to RP 223, l. 14)

A jury found Mr. Manlove guilty of all offenses. It answered the special verdict form “Yes” as to the aggravating factor of deliberate cruelty. (CP 186; CP 187; CP 188; CP 189; CP 190; CP 191)

Judgment and Sentence was entered on January 28, 2014. Mr. Manlove has no prior felony history. The standard range sentence for residential burglary with an offender score of three (3) is thirteen (13) to seventeen (17) months. The trial court imposed an exceptional sentence of one hundred and twenty (120) months. (*i.e.*, the maximum punishment on a class B felony). The trial court ran the sentence consecutive to Mr. Manlove’s gross misdemeanor conviction under Stevens County No. 11 1 00090 1. (CP 199)

Mr. Manlove filed his Notice of Appeal on February 4, 2014. (CP 213)

A restitution hearing was conducted on June 3, 2014. The trial court determined that Ms. Parker’s total damages were \$29,002.00. The Court then doubled the amount of restitution to \$58,004.00. (RP 470, ll. 6-17; Supp. CP 248)

SUMMARY OF ARGUMENT

No case law exists to support the application of the aggravating factor of deliberate cruelty to the offense of residential burglary.

Mr. Manlove's exceptional sentence should be reversed and the case remanded to the trial court for resentencing within the standard range.

ARGUMENT

RCW 9A.52.025(1) states:

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(Emphasis supplied.)

The jury determined that Mr. Manlove committed the crime of first degree malicious mischief when he entered Ms. Parker's residence without permission. Malicious mischief first degree is defined in RCW 9A.48.070(1) as follows:

A person is guilty of malicious mischief in the first degree if he knowingly and maliciously:

(a) **Causes physical damage to the property** of another in an amount exceeding \$5,000.00; ...

(2) Malicious mischief in the first degree is a class B felony.

(Emphasis supplied.)

The State was required to prove that Mr. Manlove both knowingly and maliciously caused the damage to Ms. Parker's property. RCW 9A.04.100(12) defines the word "malice" as

... import[ing] an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse

The State elected to add the aggravating factor of deliberate cruelty to the offense of residential burglary as opposed to malicious mischief first degree. The State's election was probably based upon *State v. Pockert*, 53 Wn. App. 491, 497, 768 P.2d 504 (1989) wherein the Court ruled:

The first aggravating factor mentioned by the court was deliberate cruelty to the victims in that Mr. Pockert was extremely agitated because of the breakup of the relationship and was "getting even" Malice is an element of the crime and is defined by RCW 9A.04.110(12), in pertinent part: "'Malice' and 'maliciously' shall import an evil intent, wish, or design to vex, annoy, or injure another person." Here, this conduct is within the definition of an element of the

crime.

The *Pockert* ruling stands for the proposition that malice and deliberate cruelty are synonymous.

There is a complete lack of factors to support adding the aggravating factor of deliberate cruelty to unlawful possession of a firearm second degree, possession of stolen property third degree, or possession of more than forty (40) grams of marijuana.

Residential burglary is a property crime.

RCW 9.94A.715(1) specifically refers to RCW 9.94A.411(2) to define what constitutes a crime against a person. Residential burglary is not listed. “Residential burglary occurs when a person enters or remains unlawfully in a dwelling with intent to commit a crime against persons or property therein.” *State v. Douglas*, 128 Wn. App. 555, 567, 116 P.3d 1012 (2005) (citing RCW 9A.52.025). Because residential burglary is not listed in RCW 9.94A.411, it does not qualify as a crime against a person and thus it cannot be a basis for the court to impose community custody.

Post-Sentence Review of Childers, 135 Wn. App. 37, 40, 143 P.3d 831 (2006).

The trial court ruled that community custody did not apply to residential burglary. The Judgment and Sentence struck out the language relating to community custody. (RP 411, ll. 3-5; CP 204)

RCW 9.94A.535(3) provides, in part:

... the following circumstances are an exclusive list of factors that can support a sentence above the standard range. ...

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

Mr. Manlove challenges the aggravating factor as used in his case.

It is his position that because residential burglary is a property crime that deliberate cruelty cannot be used to enhance his sentence.

“Deliberate cruelty” is defined as “gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself.” *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996) (*quoting State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993)). The conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence. *Scott*, 72 Wn. App. at 214 (*citing State v. Holyoak*, 39 Wn. App. 691, 696, 745 P.2d 515 (1987)). It must involve cruelty of a kind not usually associated with the commission of the offense in question. *State v. Crane*, 116 Wn.2d 315, 334, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

State v. Faagata, 147 Wn. App. 236, 249, 193 P.3d 1132 (2008).

The trial court relied upon the *Faagata* case in imposing the exceptional sentence. The trial court's interpretation of the case is misplaced.

The *Faagata* case involved first degree murder. The cases cited by *Faagata* are also crimes against persons: *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996) (first degree murder); *State v. Holyoak*, 39 Wn. App. 691, 696, 745 P.2d 515 (1987) (first degree assault); *State v. Crane*, 116 Wn.2d 315, 334, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (second degree murder and assault on a child); *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993) (first degree murder).

It does not appear that the aggravating factor of deliberate cruelty has ever been applied to the offense of residential burglary. The State did not present any authority to the trial court to indicate that deliberate cruelty could be used as an aggravating factor in a prosecution for residential burglary.

Residential burglary is not classified as a violent offense under the Sentencing Reform Act (SRA). *See*: RCW 9.94A.030(54)

Deliberate cruelty requires gratuitous violence. Violence is generally thought of in connection with offenses against persons. In *Pasco v. Ross*, 39 Wn. App. 480, 483, 694 P.2d 37 (1985) the Court held:

The terms “violence” and “force” are synonymous when used in relation to assault, and include any application of force, even though it entails no pain, bodily harm, or serious injury
....

The SRA was enacted in 1981. The aggravating factor of deliberate cruelty was added by LAWS OF 1983, ch. 115, § 10.

Over a period of thirty (30) years it does not appear that deliberate cruelty has been utilized as an aggravating factor for the offense of residential burglary. It should not be used at this time.

CONCLUSION

The aggravating factor of deliberate cruelty is inapplicable to the offense of residential burglary. Mr. Manlove is entitled to be resentenced without the aggravating factor. His standard range sentence for residential burglary would be thirteen (13) to seventeen (17) months.

DATED this 21st day of July, 2014.

Respectfully submitted,

s/ Dennis W. Morgan

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NO. 32232-7-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	STEVENS COUNTY
Plaintiff,)	NO. 13 1 00126 2
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
DAVID EMORY MANLOVE,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 21st day of July, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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