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JUL 07 2010

King County Prosecutor  
Appellate Unit

NO. 64862-4-1

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

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STATE OF WASHINGTON,

Respondent,

v.

GERALD COLLICK,

Appellant.

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

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AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the jury's special verdict and the resulting exceptional sentence on the ground that the offense involved a destructive and foreseeable impact on persons other than the victim.<sup>1</sup>

2. The trial court erred when it sentenced appellant to two exceptional sentences based on just one aggravating circumstance.<sup>2</sup>

3. The trial court erred when it failed to incorporate into the face of the Judgment and Sentence its Findings of Facts and Conclusions of Law regarding the exceptional sentence.

Issues Pertaining to Assignments of Error

1. To support the exceptional sentence, the State was required to prove to the jury beyond a reasonable doubt that appellant's telephone calls (which the jury found constituted felony harassment) involved a destructive and foreseeable impact on persons other than the victim. The State failed to produce evidence that anyone other than the victim knew of, or was impacted by,

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<sup>1</sup> This assignment of error pertains only to the special verdicts rendered in counts III and IV.

these particular calls. Was the evidence insufficient to support the exceptional sentence?

2. The trial court was presented with just one aggravating factor to support an exceptional sentence. Yet, it sentenced appellant to both a sentence beyond the standard range and a consecutive sentence. Did the trial court err?

3. The trial court failed to incorporate its Findings of Facts and Conclusions of Law for the exceptional sentence into the face of the Judgment and Sentence. Should the case be remanded to cure this defect?

B. STATEMENT OF THE CASE

In the fall of 2005, appellant Gerald Collick was attending massage school at Ashmead College with classmates Nathaniel Schleimer, and Charity Cox. RP 251-53. Schleimer had been previously licensed as a massage therapist in California, so he took a more active role in the class, teaching and correcting other students. RP 137.

At some point, a classroom conflict developed between Schleimer and Collick. RP 139. While trying to resolve it after

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<sup>2</sup> This assignment of error pertains to the sentences for counts III through VI.

class in the school elevator, Schleimer placed his hand on Collick's shoulder. RP 136-39. Collick, who had been significantly traumatized by childhood physical and sexual abuse, interpreted the action as aggressive and dominating. RP 259, 378-82, 461. In fact, a few months after the incident, Collick called the police and reported the incident as an assault. RP 372-80.

In the meantime, Collick began calling Cox on a regular basis to talk about class work, vent frustrations about the school, and discuss other matters. RP 256-63. Cox became alarmed as Collick began to express more anger toward specific individuals at the school and spoke of shooting people. RP 264-68.

Cox informed Schleimer about Collick's bizarre statements, and the police eventually were notified. RP 141-43, 269. Legal proceedings were initiated, resulting in Collick pleading guilty to harassment of Cox, Schleimer, and Juanita Carpenter (an Ashmead College official). CP 3; RP 453. The case was assigned to the Seattle Municipal Mental Health Court, but Collick was unable to meet his obligations and ended up serving his term. CP 3; RP 453.

On June 13, 2008, Collick (who had been released from custody) called Schleimer and left an angry message threatening to

kill him.<sup>3</sup> RP 132-35. Another such phone message was left on June 15, 2008.<sup>4</sup> RP 132-37. Schleimer called the police to report the incident. RP 120-21. He also changed his home phone number so his girlfriend, Sonya, would not hear any more messages left by Collick. RP 372.

On August 3, 2008, Schleimer received two more separate phone calls from Collick threatening to kill him.<sup>5</sup> RP 149. These calls were received on Schleimer's cell phone. RP 372.

On August 5, 2008, Charity Cox received a call from Collick in which he threatened to kill her and harm her family.<sup>6</sup> RP 273. She immediately informed her husband and called the police to report the incident. RP 273-74, 181- 82. Cox received another such call on September 10, 2008.<sup>7</sup> RP 277. Cox discussed the calls with her husband, and they took steps to protect themselves such as obtaining guns and discussing relocation. RP 276, 281-82.

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<sup>3</sup> This call formed the basis of count I.

<sup>4</sup> This call formed the basis of count II.

<sup>5</sup> These calls formed the basis of counts III and IV.

<sup>6</sup> This call formed the basis of count V.

<sup>7</sup> This call formed the basis of count VI.

On September 8, 2008, the King County Prosecutor charged Collick with two counts of witness tampering. CP 1-9. On September 22, 2008, the charges were amended, adding one more count of witness tampering. CP10-15. Meanwhile, Collick was taken into custody in Portland Oregon and later transported to King County. RP 312-13.

On November 13, 2008, Collick was ordered to undergo a competency evaluation. CP 16. He was found to be suffering acute symptoms of psychiatric illness, including paranoid delusions. CP 20. The medical report concluded Collick lacked the capacity to participate in legal proceedings, because he was unable to assist in his defense. CP 20-21. It was recommended that he return to Western State Hospital for 90 days of drug treatment to achieve competency. CP 21-22. The trial court so ordered. CP 24-26. When the parties returned on March 5, 2009, the trial court found Collick was competent to stand trial. Supp. CP \_\_ (sub no. 29, Minutes, 3/5/09).

On September 22, 2009, the charges were amended, with the prosecutor charging six counts of felony harassment instead of witness tampering. CP 28-31. The prosecutor also charged that Collick's conduct in each offense amount to deliberate cruelty and

involved a destructive and foreseeable impact on persons other than the victim. CP 28-31.

A jury trial was held September 22-30, 2009. The jury found Collick guilty of all six counts. CP 60-65. It also returned special verdicts, finding Collick's conduct amounted to deliberate cruelty on all counts. CP 66-71. Additionally, the jury found Collick's conduct imparted a destructive and foreseeable impact on persons other than the victims in counts III – VI. CP 68-71. It found no such impact on counts I and II. CP 66-67.

At the sentencing hearing held on January 29, 2010, it was noted the defendant had no significant previous criminal history. RP 452. The State also conceded that, based on new case law,<sup>8</sup> the deliberate cruelty special verdicts could not be used in support of an exceptional sentence because the jury had not been properly instructed. RP 442. However, the State urged the trial court to impose an exceptional sentence on counts III through VI based on the aggravating factor that Collick's conduct involved a destructive and foreseeable impact on others. RP 443. The State asked the trial court to score the offenses as follows:

Count I – 22 months (top of the standard range)

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<sup>8</sup> State v. Gordon, 153 Wn. App. 516, 531-35, 223 P.3d 519 (2009).

Count II – 22 months (top of the standard range)

Count III – exceptional sentence of 60 months (maximum penalty)

Count IV – exceptional sentence of 60 months (maximum penalty)

Count V -- exceptional sentence of 60 months (maximum penalty)

Count VI -- exceptional sentence of 60 months (maximum penalty)

RP 443. The State also asked that counts I and II be served concurrently with each other but consecutive to the other counts, and the remaining counts run consecutively. RP 443.

The trial court agreed with the State's recommendation and sentenced Collick to a total of 262 months. CP 91-100, 112-16. Collick appeals. CP 101-11.

C. ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE EXCEPTIONAL SENTENCE IMPOSED IN COUNTS III and IV.

In order to support the giving of an exceptional sentence – be it a sentence beyond the standard range or a consecutive sentence where a concurrent is presumed the State must prove the facts supporting aggravating circumstances to a jury beyond a

reasonable doubt. RCW 9.94A.535, 9.94A.537(3), and 9.94A.589. Here, the jury rendered a special verdict finding counts III-IV involved a destructive and foreseeable impact on persons other than the victim. CP 68-69; see also, 9.94A.535(3)(r). Based on this finding alone, the trial court imposed an exceptional sentence.<sup>9</sup> CP 112-16; RP 475. The evidence, however, does not support the jury's finding.

To support an exceptional sentence under 9.94A.535(3)(r), the State generally must produce evidence establishing the impacted person was aware of the defendant's criminal conduct and was in some way destructively impacted by it. See, e.g., State v. Jackson 150 Wn.2d 251, 274-75, 76 P.3d 217 (2003); (testimony that children at victim's school were traumatized by defendant's false abduction story and murder of a classmate); State v. Johnson, 124 Wn.2d 57, 75, 873 P.2d 514 (1994), (testimony children witnesses to a shooting were traumatized by it); State v. Cuevas-Diaz, 61 Wn. App. 906, 812 P.2d 883 (1991) (record showed children present in the home during an attack on their mother were traumatized by the attacks); State v. Barnes, 58

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Wn. App. 465, 475, 794 P.2d 52 (1990) (testimony by psychologist that child traumatized by being in the house while her mother was murdered by her father); State v. Crutchfield, 53 Wn. App. 916, 928, 771 P.2d 746 (1989), overruled on other grounds by State v. Chadderton, 119 Wn.2d 390, 396, 398, 832 P.2d 481 (1992) (record included fact that parents suffered emotional trauma as a result of the offense).

Additionally, the State must show the impact on others was one not normally associated with the commission of the offense at issue. Jackson 150 Wn.2d 274; Crutchfield, 53 Wn. App. at 928.

Here, the State argued the jury could find a destructive impact to others based on threats to Sonya or threats to Schleimer's parents. RP 415, 437-38. The State, however, never called Sonya or the parents to testify. Indeed, there is no testimony either Schleimer's parents or Sonya even knew about these particular calls. Instead, the only evidence offered regarding the impact on Sonya or Schleimer's parents was Schleimer's testimony that Sonya was terrified by the call she heard. RP 147.

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<sup>9</sup> The calls for counts III and IV were made to Schleimer in August 2008.

However, Schleimer testified the call Sonya heard was a made in March – a call that pre-dated the charged offenses.<sup>10</sup> RP 146-47.

Not only was there no evidence Sonya heard the calls at issue in counts III and IV, but the record strongly suggests just the opposite. Schleimer testified after the June calls he specifically changed his home phone number so Sonya would not hear any other calls. RP 372-73. He said the August calls (counts III and IV) were received on his cell phone, not the home line he shared with Sonya. Id. Hence, there is nothing in the record suggesting anyone other than Schleimer heard these calls. This is insufficient to support a special verdict under 9.94A.535(3)(r).

Because the State did not offer evidence beyond a reasonable doubt supporting the special verdicts in counts III and IV, this Court should reverse the exceptional sentences for those counts and remand for resentencing within the standard range.

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<sup>10</sup> The call Sonya heard was placed March 14, 2008. CP 3; RP 146-47. The calls that formed the basis of counts III and IV were placed August 3, 2008. CP 28-31.

II. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO TWO EXCEPTIONAL SENTENCES BASED ON ONE AGGRAVATING FACTOR.

Where concurrent sentences are normally presumed, running sentences consecutively amounts to an exceptional sentence. RCW 9.94A.589(1). Thus, consecutive sentences must be supported by a jury's finding of aggravating factors.<sup>11</sup> RCW 9.94A.535, 9.94A.537, and 9.94A.589.

Additionally, in cases of multiple exceptional sentences, a jury must find multiple aggravating factors. See, State v. Quigg, 72 Wn. App. 828, 845, 866 P.2d 655 (1994). In other words, the finding of a single aggravating factor will not support both a nonstandard range sentence and an exceptional consecutive sentence. Id.; In re Holmes, 69 Wn. App. 282, 292-93, 848 P.2d 754 (1993) overruled on other grounds, State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995); State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992).

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<sup>11</sup> Although the United States Supreme Court recently held the Sixth Amendment does not prohibit States from assigning to judges, rather than to juries, the finding of facts necessary to imposition of consecutive sentences for multiple offenses (Oregon v. Ice, --- U.S. ---, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009)), Washington law requires otherwise.

Here, for counts III through VI, the trial court sentenced Collick both beyond the standard range and consecutively. This amounted to two exceptional sentences for each of these offenses. However, there was only one supporting aggravating factor. Thus, the trial court erred.

For the reasons stated above, this Court should remand for resentencing as follows: (1) if this Court finds that the special verdicts in counts III and IV are not supported by sufficient evidence (as argued above), it should instruct the trial court to sentence Collick within the standard range for those counts and sentence him to only one exceptional sentence for counts V and VI; or (2) if this Court finds there was sufficient evidence supporting all the special verdicts, this Court should remand with instructions that Collick be sentenced to only one exceptional sentences for counts III – VI.

- III. THE TRIAL COURT ERRED WHEN IT FAILED TO INCOPORATE ITS FINDINGS AND CONCLUSIONS REGARDING THE EXCEPTIONAL SENTENCE INTO THE FACE OF THE JUDGMENT AND SENTENCE.

The Judgment and Sentence in this case states:

**2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):**  
[X] Substantial and compelling reasons exist which justify a sentence above/below the standard range in

Count(s) 3, 4, 5, 6. Findings of Fact and Conclusions of Law are attached in Appendix D.

CP 92. There is no Appendix D included in the Judgment and Sentence. CP 91-100. Although the trial court later signed written Findings of Facts and Conclusions of Law, the findings are not designated as Appendix D. CP 112-16. Thus, there is nothing in the face of the Judgment and Sentence that incorporates those findings.

The trial court's failure to include the findings in the face of the Judgment and Sentence is potentially prejudicial to appellant. See, e.g., RCW 10.73.090 (establishing a time-bar to collateral attack based on facial validity or invalidity of a sentence). Thus, this Court should remand with instructions for the trial court to explicitly incorporate the findings and conclusions for the special verdict into the face of the sentencing document.

D. CONCLUSION

For reasons stated above, appellant requests this court remand for resentencing on counts III through VI and for incorporation of the exceptional sentence Findings of Facts and Conclusions of Law into the face of the Judgment and Sentence.

Dated this 7<sup>th</sup> day of June, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64862-4-1
	)	
GERALD COLLUCK,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GERALD COLLUCK  
DOC NO. 335749  
MONROE CORRECTIONAL COMPLEX / SOU  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF JULY, 2010.

x *Patrick Mayovsky*