

70936-4

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COA NO. 70936-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

CARLA FORD,

Appellant.

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

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in failing to comply with RCW 9.94A.680.

Issue Pertaining to Assignment of Error

Appellant was eligible for alternatives to total confinement because, as a nonviolent offender, her standard range sentence was less than a year. RCW 9.94A.680 provides "For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used." Did the court err in failing to comply with this statutory mandate?

B. STATEMENT OF THE CASE

The State originally charged Carla Ford with one count of residential burglary involving the dwelling of Scott Nance on December 10, 2012. CP 59. The State later amended the information to include an additional count of residential burglary involving the dwelling of Elizabeth Ries on December 6, 2012. CP 53. Ford was tried with co-defendant Shauntel Raymur. 3RP¹ 2.

Evidence produced at trial showed Elizabeth Ries' residence was burgled while her adult son was upstairs studying. 2RP 35-40. A next-

¹ The verbatim report of proceedings is referenced as follows: 1RP – 5/10/13; 2RP – three consecutively paginated volumes consisting of 7/29/13, 7/30/13 and 7/31/13; 3RP – 9/18/13.

door neighbor, Francis Schatz, saw a blue Chevy pickup with two women, one with blonde hair and the other with dark hair, parked nearby. 3RP 39-80. One of the women walked to the front door of the Ries residence, then returned to the pickup and drove off. 3RP 79-80, 83. Later on that day, Schatz saw the same truck parked near the Ries residence. 3RP 84. He wrote down the truck's license plate as "B96127K." 3RP 94. The gate and back door of the Ries residence were open. 3RP 86-87. Schatz left to get some coffee and upon his return saw the two women walking in front of the Ries residence with a backpack. 3RP 88, 91. By this time, a police officer had arrived and was talking to Ries. 3RP 88. Schatz was unable to identify Ford as one of the women he saw earlier. 3RP 92, 95, 110. He identified Raymur, the blonde, as the other woman. 3RP 93, 109-10.

Nance, meanwhile, testified that he came home during the day and found Raymur in his house. 3RP 47-48. He pulled a gun on her and asked what he was doing in his home. 3RP 48. She said "I'm with her." 3RP 49. Nance saw another person step out of the bathroom and leave through the back door. 3RP 49. A person Nance later identified as Ford ran out of the driveway. 3RP 48, 50. Raymur then ran outside. 3RP 50-51. Nance followed and confronted both women in what he described as a green Chevy truck. 3RP 51-52, 59. He obtained a partial license plate number of "971." 9RP 60-61. The women drove off to the side of him and away.

3RP 52. Nance went back into his house and saw the bedroom drawers had been dumped and various items had been put in a box. 3RP 53.

Police arrested Raymur and Ford after photomontages were shown to the witnesses. 3RP 110. At the time of police contact, Ford was standing outside a truck, which had the license plate number given by Schatz. 3RP 111, 114.

Ford presented an alibi defense on both counts, consisting of witnesses testifying that she was someplace else when the burglaries occurred. 3RP 146-49, 196-99.

A jury acquitted Ford of the Ries burglary but found her guilty of the Nance burglary. CP 34, 36. The jury returned a special verdict that the victim was present at the time of the Nance burglary, which qualifies as an aggravating circumstance under RCW 9.94A.535(3)(u). CP 18.

The State recommended an exceptional sentence of 12 months confinement. 3RP 2. The court imposed a sentence of 9 months confinement, the top of the standard range. CP 9-10. The court noted "[w]e would have been in a very different situation than we're in now" if Nance had fired his gun or if Nance had been hit him with the vehicle, resulting in serious injury or death. 3RP 5. The court also stated "I understand this is your first offense, but I believe this is an appropriate

sentence and this will be the sentence of the court." 3RP 6. This appeal follows. CP 1-2.

C. ARGUMENT

THE COURT FAILED TO COMPLY WITH THE STATUTORY REQUIREMENT GOVERNING CONSIDERATION OF SENTENCING ALTERNATIVES FOR THOSE SUBJECT TO CONFINEMENT FOR LESS THAN ONE YEAR.

Under RCW 9.94A.680, "[a]lternatives to total confinement are available for offenders with sentences of one year or less." The statute lists several sentencing alternatives, one of which applies to all such offenders (RCW 9.94A.680(1)), and two of which encompass offenders convicted of a nonviolent offense. RCW 9.94A.680(2), (3).

Ford's conviction for residential burglary qualifies as a nonviolent offense. See RCW 9.94A.030(33) ("Nonviolent offense' means an offense which is not a violent offense."); RCW 9.94A.030(54) (list of "violent offenses" does not include residential burglary). The standard range sentence for Ford's burglary conviction, based on an offender score of zero, was 3 to 9 months. CP 9. Ford qualified for a sentencing alternative under RCW 9.94A.680.

RCW 9.94A.680 provides "For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available

alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used."

The court violated this provision. The court did not consider or give priority to the sentencing alternative articulated in RCW 9.94A.680 at the sentencing hearing. 3RP 4-6. Nor did the court state its reasons in writing on the judgment and sentence for why it did not use an alternative sentence. Pre-printed boilerplate language in the judgment and sentence directs the court to check one of several boxes for why alternatives to total confinement were not used. CP 10. None of the boxes is checked.

When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "[C]ourts are to give effect to that plain meaning as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004).

The plain language of RCW 9.94A.680 requires courts to consider and give priority to sentencing alternatives, and to state their reasons in writing on the judgment and sentence for why a sentencing alternative was not used. The court erred in failing to comply with this statutory requirement. Ford requests remand to remedy the error.

Standard range sentences can be challenged on appeal if the sentencing court had a duty to follow a specific procedure required by the Sentencing Reform Act and failed to do so. State v. Hale, 94 Wn. App. 46, 53 n.6, 971 P.2d 88 (1999) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)); State v. Rienks, 46 Wn. App. 537, 541, 731 P.2d 1116 (1987). The court here failed to follow statutory requirements of RCW 9.94A.680 in imposing the standard range sentence on Ford.

Although Ford did not object below to the court's failure to follow the statutory mandate, sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); see, e.g., State v. Jones, 118 Wn. App. 199, 204, 208-09, 76 P.3d 258 (2003) (trial court erred in ordering mental health treatment as a condition of community placement without following requisite statutory procedure; challenge addressed for first time on appeal).

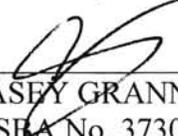
D. CONCLUSION

For the reasons set forth, Ford respectfully requests that this Court direct the trial court to comply with RCW 9.94A.680.

DATED this 27th day of March 2014

Respectfully Submitted,

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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 27TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2014.

X *Patrick Mayovsky*