

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

BRIAN DAVID MATTHEWS,
Appellant.

v.

STATE OF WASHINGTON,
Respondent.

BY: [Signature]
11/19/99
COURT REPORTER

Appeal from the Superior Court of Washington at Pierce County
Judge Bryan Chuscoff
Judgment No. 99-9-10779-0, Cause No. 98-1-05430-3

REPLY BRIEF OF APPELLANT

BRIAN DAVID MATTHEWS
Appellant Pro Per.
796769,
Stafford Creek Corrections Center H5-B113
191 Constantine Way
Aberdeen, WA 98520-9504

ORIGINAL

STATEMENT OF THE CASE

On 12/21/1998, the State of Washington ("State") charged BRIAN DAVID MATTHEWS ("MATTHEWS") with one (1) Count of Assault of a Child in the First Degree under Pierce County Superior Court Cause #98-1-05430-3. CP 247. On April 19, 1999, the State filed a First Amended Information that added a Second Count of Assault of a Child in the Second Degree. CP 278-79. On June 7, 1999, the State filed the Second Amended Information charging Assault of a Child in the First Degree in Count 1 and Assault of a Child in the Third Degree in Count II. CP 283-84. MATTHEWS ultimately pled guilty to the Second Amended Information. CP 266-75. None of these three Information's charged aggravating factors.

After numerous Appellate and Collateral Proceedings, among which was the Vacating of the exceptional sentence under Blakely v. Washington, (see In re Matthews, 128 Wn.App. 267, 115 P.3d 1043 (2005)) the Court of Appeals Division II issued an Order on February 7, 2008 Granting a Personal Restraint Petition under this matter. CP 492-93. The Order held that MATTHEWS was entitled to Withdraw his Guilty Plea and remanded to the trial Court for further proceedings. Id.

MATTHEWS first appeared in trial court after remand on April 4, 2008. On 7/17/2008, the Trial

Court formally entered a Written Order Withdrawing MATTHEWS' Guilty Plea. CP 15-16. MATTHEWS moved for reconsideration of the Order Withdrawing his Guilty Plea, which was heard on 8/7/2008. VRP 8/7/2009. In affirming the 7/17/2008 Order Withdrawing Guilty Plea, the trial court entered a three (3) Point Order on 8/7/2008, to wit: 1) The Guilty Plea's under Cause #98-1-05430-3 were Ordered Withdrawn on 7/17/2008; 2) That Cause #98-1-05430-3 is before the Pierce County Superior Court in Pre-trial status; and 3) The Judgment in Case #98-1-05430-3 is vacated. CP 21. The State specifically requested this 8/7/2008 Order entered nunc pro tunc to April 4, 2008, which was declined by the Trial Court. VRP 8/7/2008, pg. 67 @ 8-21.

After the Guilty Plea was Withdrawn and Judgment Vacated on 8/7/2008, MATTHEWS appealed to the Court of Appeals, Division II under COA#38186-9-II. The State immediately moved for the Court to determine appealability. On 11/19/2008, the Appellate Commissioner entered a Ruling that explained the effect of the Courts' February 7, 2008 Order Granting Petition. See COA#38186-9-II Ruling on Motion, 11/19/2008. The State Moved to Modify the Commissioner's Ruling, and on 2/9/2009, the full panel entered an Order denying the States Motion. See COA#38186-9-II, Order on Motion dated 2/9/2009.

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The Courts February 9, 2009 Order explains that the Courts February 7, 2008 Order Granting Petition did not Vacated the Convictions but remanded for further proceedings.

On 1/3/2010, MATTHEWS voluntarily withdrew the appeal under COA #38186-9-II. This Court issued a Mandate on 2/24/2010 disposing of the matter. See COA #388169-II, ruling dated 1/4/2010 and Mandate dated 2/24/2010. MATTHEWS exhibited non-traditional behavior throughout the court proceedings. VRP 1/20/2010 ff; CP's 27-54; 170-191.

The State filed the Third Amended Information on 6/29/2010. CP 64-66. The Court neither obtained a Plea from MATTHEWS nor entered one on his behalf. VRP 6/29/2010, pg. 46 @ 6 ff. When MATTHEWS formally objected to not being arraigned on the Third Amended Information, the Trial court accepted the Amendment and entered a Plea on MATTHEWS' behalf. VRP 7/7/2010, pg. 678 @ 5-22. The jury convicted and MATTHEWS timely appealed.

In MATTHEWS' Appellate Brief, there were raised eleven (11) Assignments of Error. See App. Br., pg. 1. In its Response Brief, the State failed to address whether the Third Amended Information violated the "Pelky Rule." See App. Br., Assignment of Error No. 3, pg. 1; and Issue Pertaining to Assignment of Error No. 3, pg. 2; cf Resp. Br., pg. 1.

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Additionally, the State failed to adequately address whether the trial Court should have continued the matter upon MATTHEWS' Motion. See App. Br. Assignment of Error No. 5; pg. 1; Issue Pertaining to Assignment of Error No. 5, pg. 2; cf Resp. Br. pg. 1. Further, the State failed to address whether the trial Courts imposition of an exceptional sentence was based upon reasons which were substantial and compelling. See App. Br., Assignment of Error No. 6, pg. 1; and Issue Pertaining to Assignment of Error No. 6, pg. 2; cf Resp. Br., pg. 1.

SUBSTANTIVE FACTS

MATTHEWS accepts the States facts presented in it Response in Supplementation to MATTHEWS' facts set forth in his Appellate Brief, with the following exceptions.

The trial Court dismissed Count II, dealing with the bruises and feet injuries to A.E. VRP 7/7/2010, pg. 667 @ 25, pg. 677 @ 10, CP 632. All reference to the bruising and feet injuries to A.E. must be disregarded by the Court as only Count I is upon review and Count I only deals with A.E.'s burn injuries, not the bruising or the feet injuries.

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1. BECAUSE THE TRIAL COURT VACATED MATTHEWS' CONVICTION ON AND AS OF AUGUST 7, 2008, IT WAS NECESSARY TO FILE CHARGES AND/OR RE-ASSIGN ON PREVIOUSLY FILED CHARGES FOR JURISDICTIONAL PURPOSES.

The State misdirects the Courts attention form the issues pertaining to MATTHEWS' assignments of error as enumerated in Appellate Opening Brief through mis-representation of the facts in this matter.

So as not to cloud the issues, MATTHEWS' jurisdictional claim is not predicated on the fact that he did not enter a plea in his first appearance in superior Court after the Court of Appeals' February 7, 2008 ruling, as misrepresented by the State in its response brief. See Resp. Br. pg. 16. The State presents that MATTHEWS "misunderstands the effect of the Court of Appeals' February 7, 2008 Order Granting Petition. It did not dismiss his case. The Judgment and Sentence was vacated, but the previously filed charges were not." See Resp. Br. pg. 16-17. This contention is a falsehood.

The trial Court Vacated the Judgement and Sentence on August 7, 2008. CP 21. The trial Court specifically declined to enter this Order Nunc Pro Tunc. VRP 8/7/2008 pg. 67 @ 8-21. After MATTHEWS filed Notice of Appeal under COA #38186-9-II, the State moved the court of Appeals, Division II for an Order to determine Appealability, which the Court treated as a RAP 18.14 Motion on the Merits. The

States position - then - was that as the trial Court was directed by the Court of Appeals to Vacate the Convictions MATTHEWS had no right to appellate review. In ruling on this Motion, the Appellate Commissioner clarified that the Appellate Courts February 7, 2008 Order did not result in MATTHEWS' convictions being vacated. This ruling was affirmed by full Panel on the States Motion to Modify the Commissioners ruling. See COA #38186-9-II ruling dated February 9, 2009.

As such, MATTHEWS clearly understands the effect of the appellate Courts February 7, 2008 Order; it did not vacate the Judgment & Sentence (J&S) but rather remanded to the Superior Court for further proceedings. CP 492-93; COA #38186-9-II ruling dated 2/9/2009. It was only as of August 7, 2008 that the convictions under Pierce County Superior Court Cause #98-1-054303 were vacated. CP-21. It is at this point in time that the State could have re-charged and/or re-arraigned MATTHEWS in the underlying cause.

- a. The Trial Court Failed to Re-acquire Subject Matter Jurisdiction After Vacating The Convictions In Cause #98-1-05430-3.

It is well settled and long adhered to in Washington Courts that a Superior Court acquires Subject Matter Jurisdiction only when an action is commenced. Wa. Const. Art. 1, § 25; Daniel v. Daniel,

116 Wash. 82, 198 P. 728 (1921); State v. Sponburgh, 84 Wn.2d 203, 206, 525 P.2d 238 (1974); Marley v. Department of Labor and Industries, 125 Wn.2d 533, 886 P.2d 189 (1994); State v. Corrado, 78 Wash.App. 612, 615, 898 P.2d 860 (1995); State v. Barnes, 146 Wn.2d 74, 81, 43 P.3d 490 (2002). In Washington, a Criminal Prosecution is initiated only at such time as an Information is filed. CrR. 2.1(a); State v. Greenwood, 120 Wn.2d 585, 594, 845 P.2d 971 (1993); Corrado, supra at 615. "The law is well settled that an order entered without jurisdiction is void." State ex rel. Patchell v. Superior Court, 60 Wn.2d 784, 787, 375 P.2d 747 (1962), cited in Corrado, supra at 615-16; Marley, supra at 541. Jurisdiction can be challenged at any time. Corrado, supra at 615. The burden of proving jurisdiction lies with the State. State v. Daniels, 104 Wn.App. 271, 274-75, 16 P.3d 650 (2001)(citing State v. L.J.M., 129 Wn.2d 386, 392, 918 P.2d 898 (1996)).

Here, MATTHEWS was charged with Assault of a Child in the First Degree on December 21, 1998. CP ²⁴⁷~~26~~ On April 19, 1999, the State filed a First Amended Information that added a second count of Assault of a Child in the Second Degree. CP 278-79. On June 7, 1999, the State filed a Second Amended Information charging Assault of a Child in the First Degree and Assault of a Child in the ^{THIRD}~~Second~~ Degree.

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(Count I & II). CP 283-84. MATTHEWS entered a guilty plea to this Second Amended Information. CP 266-75.

His Judgment under the Guilty Plea having been vacated on August 7, 2008, the State needed to file an Information as the Conviction on the Second Amended Information (CP 283-84) had been vacated. CP 21. There was nothing filed to re-commence the case after the conviction was vacated on August 7, 2008 until the State filed its Third Amended Information 22 months later on July 29, 2010. CP 64-66, 240-243. Ergo, the trial court could have acquired subject matter jurisdiction only as of June 29, 2010.

As a result of acquiring subject matter jurisdiction only as of June 29, 2010, every order made and/or entered between the dates August 7, 2008 through June 29, 2010 is void as the court was without jurisdiction to make and/or enter them. Patchett, supra at 787; Corrado, supra at 615-16; Marley, supra at 541. This is because the Superior Court acquires jurisdiction only at the time an action is commenced (Corrado, supra at 615-16; Barnes, supra at 81), which is at the filing of an Information (Greenwood, supra at 594; CrR 2.1(a)), and when a trial court acts without jurisdiction such acts are void. Patchell, supra at 787; Corrado, supra at 615-16.

Contrary to the States argument in its Resp. Br., the Court of Appeals' Order of February 7, 2008

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did not vacate the Judgment and Sentence under Pierce County Superior Court Cause #98-1-05430-3. See Resp. Br. pg. 16-17. The trial Courts Order Vacating Judgment dated August 7, 2008 vacated the Judgment. CP 21. This order was not entered nunc pro tunc. VRP 8/7/2008, pg. 67 @ 8-21. As the State did not commence the action after August 7, 2008 until 22 months thereafter, the trial Court did not have Subject Matter Jurisdiction in the matter and every order between August 7, 2008 and June 29, 2010 is void. As MATTHEWS was in custody and/or subject to conditions of release for said 22 month period and he was not brought to trial (or even formally processed), the trial court violated, inter alia, the time for trial provisions of CrR 3.3. As the State has failed to prove Jurisdiction (Daniels, supra at 274-75) MATTHEWS' conviction must be reversed and the underlying charge dismissed with prejudice. MATTHEWS respectfully requests so.

b. The Trial Court Failed To Acquire Personal Jurisdiction Over MATTHEWS Until After the State Rested Its Case In Chief and Every Order Entered Between 8/7/2008 and 7/7/2010 Is Void.

It is well settled and long adhered to in Washington courts that a Superior Court obtains personal jurisdiction over a defendant only when said defendant appears at arraignment, enters a plea, and is present in court on the day of trial. State

v. Melvern, 32 Wash. 7, 12, 72 P. 489 (1903); State v. Ryan, 48 Wn.2d 304, 305, 293 P.2d 399 (1956); Ollison v. Rhay, 68 Wn.2d 137, 139, 412 P.2d 111 (1966); State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969); State v. Cronin, 130 Wn.2d 392, 398, 922 P.2d 694 (1996); State v. Franks, 105 Wash.App. 950, 22 P.3d 269 (2001)(citing Cronin, supra at 398).

In Washington, a statute is superseded by a court rule only to the extent it is inconsistent or conflicts with the subsequently adopted criminal rule. See CrR 1.1. The statute is still vital to the extent it complements the court rule. State v. Alexis, 91 Wn.2d 492, 497, fn. 3, 588 P.2d 1171 (1979). If the rule does not expressly supersede the statute and the two provisions are not in apparent conflict, they are complimentary. Therefore, cases construing the statute may be used to interpret the Court rule. State v. Turner, 16 Wash.App. 292, 296, fn. 3, 555 P.2d 1382 (1986).

CrR 4.1 is the adopted Court Rule addressing the arraignment of a defendant in a criminal case. While the court rule is silent regarding pleas at arraignment, the Washington State Criminal Procedure Statute Specifically Compliments CrR 4.1 to this extent. See Laws of 2010 c 8, § 1039, eff. June 10, 2010 [RCW 10.40.060].

RCW 10.40.060 requires the defendant to plead within 1 day of arraignment. State v. Martin, 94 Wn.2d 1, 13, 614 P.2d 164 (1980). "Arraignment consists of ... obtain[ing] his answer to the charge. The defendant's answer is his plea." 12 Royce A. Ferguson, Jr., Wa. Practice and Procedure, § 1105, 236 (3rd ed. 2004); State v. Eaton, 164 Wn.2d 461, 191 P.3d 1270 (2008). "The law is well settled that an order entered without jurisdiction is void." Patchell, supra at 787; Corrado, supra at 615-16. A court enters a void order when it lacks jurisdiction. Marley, supra at 541. Jurisdiction can be challenged at any time. Corrado, supra at 615. The State bears the burden of proving jurisdiction. Daniels, supra at 274-275.

Here, the State asserts that the February 7, 2008 Order granting petition vacated the J&S. Resp. Br., pg. 16-17. However, MATTHEWS' previous judgment under Cause #98-1-05430-3 was vacated on, and as of, 8/7/2008. CP 21. This order vacated the conviction in Cause #98-1-05430-3, which was based upon a guilty plea. See State v. Tarrer, 140 Wn.App. 166, 169, 165 P.3d 35 (Division II, 2007). After this Order Vacating the Judgment was entered, the State did not arraign MATTHEWS on any previously filed Information, and the State did not file a new Information thereafter until June 29, 2010 when it

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filed its Third Amended Information on the second day of jury trial. CP 64-66, 240-43; VRP 6/29/2010, pg. 46 @ 6 ff.

As the trial Court neither obtained a plea from MATTHEWS nor entered one on MATTHEWS' behalf from the date the previous conviction was vacated on 8/7/2008 through 6/29/2010 when it filed its Third Amended Information, the Trial Court lacked personal jurisdiction over MATTHEWS. Cronin, supra at 398; Blanchey, supra at 938; Rhay, supra at 139; Ryan, supra at 305; Melvern, supra at 12. As no plea was entered on the Third Amended Information until 7/7/2010, all orders entered by the trial Court between 8/7/2008 and 7/7/2010 are void as the trial court was without personal jurisdiction to make and/or enter them. Patchell, supra at 787; Corrado, supra at 615; Marley, supra at 541; VRP 7/7/2010, pg. 678 @ 5-22.

Appropriately, the State readily admits that MATTHEWS was not arraigned after the previous judgment was vacated until over 22 months later. See Resp. Br., pg. 22, last paragraph.

The trial court lacked personal jurisdiction over MATTHEWS and was without authority to enter orders over and/or regarding him from 8/7/2008 through 7/7/2010. The State has failed to prove personal jurisdiction (Daniels, supra at 274-75) and the

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conviction must be reversed and dismissed with prejudice. MATTHEWS respectfully requests so.

c. The Trial Court Violated The Time For Trial Rule CrR 3.3 And The Case Must Be Dismissed.

CrR 3.3 requires the Court to set a criminal trial date within 60 days of arraignment for an in custody defendant. CrR 3.3 (b)(1)(i); State v. Kenyon, 143 Wn.App. 304, 177 P.3d 196 (2008), rev'd and dismissed, 167 Wn.2d 130, 216 P.3d 1024 (2009). The trial Court is ultimately responsible for ensuring compliance with the speedy trial period. CrR 3.3(a); Kenyon, supra. A Criminal charge not brought to trial within the time limits of CrR. 3.3 must be dismissed with prejudice. CrR 3.3(h); Kenyon, supra.

Mistakenly believing that the Court of Appeals' February 7, 2008 Order Vacated the Judgment and Sentence in Cause #98-1-05430-3, the State asserts that MATTHEWS' commencement date regarding time for trial was reset to April 4, 2008, pursuant to CrR 3.3(c)(2)(iv). Resp. Br., pg. 20.

As already adjudicated by a full panel at the Court of Appeals, Division II, said Courts' February 7, 2008 Order neither withdrew the Plea nor vacated the Judgment and Sentence. See COA #38186-9-II, Ruling Denying Motion to Modify, dated February 9, 2009.

Accordingly, MATTHEWS' initial commencement

date was reset under CrR 3.3(c)(2)(iii) to the date that the Order withdrawing the Guilty Plea was entered. The Trial Court entered the Order Withdrawing Guilty Plea on July 17, 2008. CP 15-16. MATTHEWS moved to reconsider this Order, which was denied by written Order entered on 8/7/2008. CP-21. MATTHEWS' previous Judgment was also vacated by the same written Order entered on 8/7/2008. CP 21. Therefore, MATTHEWS' Guilty Plea Conviction was Vacated (Tarrer, supra 169) by written Order entered on 8/7/2008 (CP 21) and his time for trial commenced on 8/7/2008. CrR 3.3(c)(2)(iii).

Because MATTHEWS was in custody on 8/7/2008, the trial court was required to conduct a criminal trial within 90 days of 8/7/2008. CrR 3.3 (b)(3)^{fn1}; Kenyon, supra. Because MATTHEWS was not brought to trial (or even formally charged) by 11/23/2008 (accounting for charges to be filed under CrR 3.2.1(f)(1) and arraignment thereafter under CrR 4.1(a)(1)), and because the trial court was without subject matter or personal jurisdiction to order continuances in the matter, the trial Court violated

fn1 MATTHEWS posted bail on 9/6/2008 and was out of custody thereafter until 5/19/2009. CrR 3.3(b)(3) applies.

the time for trial provisions of CrR 3.3. The conviction must be reversed, and the underlying charge dismissed with prejudice. CrR 3.3(h); Kenyon, supra. MATTHEWS respectfully requests so.

2) UNDER THE FACTS OF THIS CASE, THE FILING OF THE THIRD AMENDED INFORMATION CONSTITUTED A SUBSTANTIAL AMENDMENT REQUIRING RE-ARRAIGNMENT; BECAUSE RE-ARRAIGNMENT OCCURRED AFTER THE STATE RESTED ITS CASE IN CHIEF IT VIOLATES THE PELKEY RULE.

It is well settled law in Washington Courts that a substantial amendment of a Information requires re-arraignment. State v. Hurd, 5 Wn.2d 308, 312, 105 P.2d 59 (1940); State v. Pisauero, 14 Wash.App. 217, 218, 540 P.2d 447 (1975); State v. Woods, 143 Wn.2d 561, 623, 23 P.3d 1046 (2001). A substantially amended Information is one which provides for a change in statutory basis. Hurd, supra at 313; Pisauero, supra at 218. "Arraignment consists of ... obtain[ing] his answer to the charge. The defendant's answer is his plea." Eaton, supra. RCW 10.40.060 requires the defendant to plead within 1 day of arraignment. Martin, supra at 13. The State must charge any aggravating factor by Information which it intends to prove for purposes of seeking an exceptional sentence above the standard range. State v. Powell, 167 Wn.2d 672, 674, 223 P.3d 493 (2009). Once the State has rested, any amendment other than an amendment to a lesser charge is a per se violation

of the defendant's constitutional rights. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

In the case before the Court, MATTHEWS' Guilty Plea Conviction was Vacated on 8/7/2008. CP 21; Tarrer, supra 169. Charges were not filed thereafter until 6/29/2010 when the State filed the Third Amended Information, and no arraignment of any type occurred from 8/7/2008 through 6/29/2010. As the Third Amended Information was the first charging document filed after the previous Guilty Plea Conviction was Vacated on 8/7/2008, there was a change in statutory basis; i.e. the Third Amended Information added allegations of aggravating factors to wit: RCW 9.94A.535(3)(a); RCW 9.94A.535(3)(b); and RCW 9.94A.535(3)(n). The Original, First and Second Amended Information's (all prior to the Guilty Plea Conviction) did not allege aggravating factors. Compare CP 64-66 with CP's 247, 278-79, and 283-84.

Because there was a change in statutory basis under the Third Amended Information, re-arraignment was necessary. Hurd, supra at 312-13; Pisauro, supra at 218; Woods, supra at 623; Powell, supra at 674. The Court neither obtained MATTHEWS' plea to the Third Amended Information (Martin, supra at 13; RCW 10.40.060) nor entered one on MATTHEWS' behalf (RCW

10.40.190). VRP 6/29/2010, pg. 49 @ 23 - pg. 54 @ 20. It is not until after the State rested its case in chief (VRP 7/7/2010, pg. 648 @ 6) that the Trial Court granted the Third Amended Information and formally re-arraigned (arraigned) MATTHEWS on this Substantial Amendment. RP 7/72010, pg. 678 @ 5-22.

As the trial Court accepted the Third Amended Information and entered a Plea of not guilty (over MATTHEWS noted objection) thereupon after the State rested its case in chief, the amendment then violates the Pelkey Rule and is a Per Se violation of MATTHEWS' secured rights under the federal and state constitutions. Vangerpen, supra at 789; Pelkey, supra at 491; Wa. Const. Art. 1, §§ 3, 22; U.S. Const. Amendment VI. This is because the Third Amended Information was not to a lesser charge but instead charged 3 statutory aggravating factors which served to enhance the potential punishment involved.

Because re-arraignment was necessary (Hurd, supra at 312-13; Pisauero, supra at 218; Powell, supra at 674) which didn't occur until after the State rested its case in chief, the amendment constituted a per se violation of MATTHEWS' constitutionally secured rights under Pelkey, supra at 491; see also Vangerpen, supra at 789. The conviction must be reversed and the underlying charge dismissed with

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prejudice. MATTHEWS respectfully requests so.

3) THERE IS INSUFFICIENT EVIDENCE TO PROVE SPECIFIC INTENT.

Due process requires that the state bear the burden of proving each and every element of the crimes charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); Seattle v. Gallein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989). Intent is an essential element under RCW 9A.36.120(1)(a) and RCW 9A.36.011(1)(c) as well as under RCW 9A.36.120(1)(b)(i). specific intent cannot be presumed. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Intent exists only if a known or expected result is also the actor's objective or purpose." State v. Caliguri, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). A challenge to the sufficiency of the evidence admits the truth of the states evidence and any reasonable inference from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). While a finding of specific intent can be inferred, it can only be inferred from "conduct where it is plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004)(as cited in State v. Benton, No. 41661-1-II (10/4/2011). "Mere suspicion or speculation cannot be the basis for creation of logical inferences." Walters v. Maass, 45 F.3d 1355,

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1250 (9th Cir. (1986)).

Thus, in order for the jury to be able to infer specific intent, there must be evidence of "conduct where it [intent] is plainly indicated as a matter of logical probability." Delmarter, supra at 638.

In its response brief, the state asserts that the jury could infer that MATTHEWS' actions were intentional because A.E. received three (3) different burns which were inconsistent with an accidental burn. Resp. Br. pg. 28. However, such inference can only be made by "conduct" from MATTHEWS, where intent is plainly indicated. Id.

Here, the only evidence that the State presented of MATTHEWS' conduct at the time of A.E.'s injuries came from the States eye-witness; Jordan Sears. As Mr. Sears' testimony was State evidence, it's deemed admitted as true. Salinas, supra at 201. Mr. Sears' testimony maintained that MATTHEWS did not inflict A.E.'s injuries but rather that Mr. Sears personally witnesses A.E. accidentally self inflict them. VRP 7/6/2010, pg. 397, 401, 505, 506, 509 @ 16-25. Mr. Sears testified that MATTHEWS was busy playing a video game at the time of A.E.'s injuries. VRP 7/6/2010, pg. 414 @ 16-17; pg. 446 @ 18-19, pg. 459 @ 11-21; pg. 479 @ 2-20; pg. 487 @ 18-25; pg. 494 @ 24-25; 495 @ 1-6. Also, Mr. Sears testified that MATTHEWS never spanked A.E. VRP 7/6/2010, pg.

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436 @ 23-25.

There is no evidence of any "conduct" from MATTHEWS where the specific intent required to prove Assault of a Child in the first degree is "plainly indicated." As it is undisputed that Mr. Sears at all time relevant had access to A.E., the jury could not infer that A.E.'s injuries came only from MATTHEWS' conduct. As Mr. Sears himself testified for the State regarding MATTHEWS' conduct at the time of A.E.'s injuries, there is insufficient evidence of "conduct" from MATTHEWS for the jury to infer intent. Any inference as to intent was based upon mere suspicion or speculation - violating due process. Maass, supra at 1358; Lewis, supra at 1250; Gellein, supra at 61; McCullum, supra at 488.

Because MATTHEWS' conviction was obtained in violation of due process, this court must reverse and dismiss with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). MATTHEWS respectfully requests so.

4. The Record Does Not Support The Jury's Special Verdict On The Three (3) Aggravating Factors And The Exceptional Sentence Must Be Reversed And Vacated.

MATTHEWS relies on the case law and authority cited under Assignment of Error No. 8, 9, 10 in the App. Br., pg. 31 ff., and of which is incorporated herein by reference.

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In its response the State asserts that there is sufficient evidence for the jury to have found the aggravators. Resp. Br., pg. 29 ff.

However, as set forth in § 4 hereinabove, in order for the jury to be able to infer specific intent on the underlying charge there must be evidence of conduct to make such inference. Delmarter, supra at 638. As there is insufficient evidence of conduct to infer specific intent, there can be no evidence of factors to enhance the underlying charge.

The exceptional sentence must be reversed and vacated. MATTHEWS respectfully requests so.

5. The Trial Court Abused Its Discretion By Imposing An Exceptional Sentence That Is Clearly Excessive And Must By Reversed.

MATTHEWS relies on the case law and authority cited under Assignment of Error No. 7 in the App. Br., pg. 29 ff., and of which is incorporated herein by reference.

The State asserts in its Response that the Courts exceptional sentence was not an abuse of discretion. See Resp. Br., pg. 35 ff.

A sentence is clearly excessive if it is based upon untenable reasons. Kolesnik, 146 Wn.App. at 805. A reason is untenable when it is based upon facts which do not meet the requirements of the correct standards for imposing the exceptional sentence. RCW 9.94A.535 et seq.; RCW 9.94A.537(6);

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see In re Marriage of Littlefield, 133 Wn.2d at 346-47. A clearly excessive sentence is an abuse of discretion. State v. Bluehorse, 159 Wn.App. 410, 248 P.3d 537 (2011). The correct standard for imposing an exceptional sentence is that the jury must find the aggravating factors and the trial court is "left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." Suleiman, 158 Wn.2d at 290-91.

Here, the jury returned a special verdict finding 3 aggravating factors. CP 142; VRP 8/13/2010, pg. 844 @ 21-25, pg. 845 @ 1-4. The State requested an exceptional sentence premised upon these findings. Id. The trial court took exception with the fact of the States reasons. Id., pg. 854 @ 9-15. The trial court departed from the analysis that the State presented. Id., pg. 855 @ 9-10. The court found that MATTHEWS is a dangerous person and as such a much more significant penalty is justified. Id., pg. 858 @ 8-13. The court thought carefully about the terms the state asked for. Id., pg. 858 @ 21-23. The Court found that MATTHEWS is dangerous and after thinking it through declined the States recommended sentence and imposed its own precisely enumerated sentence. Id., pg. 859 @ 19-25, pg. 860 @ 1-4.

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A careful review of the sentencing hearing establishes that the trial court did not base its imposition of its precise sentence on the aggravators found by the jury, as requested by the State. The record is unequivocally clear that the trial court independently determined the factual basis of MATTHEWS' being a "dangerous person" as the justification for imposing its precise sentence. Id., pg. 858 @ 8-13.

Because the trial court based its sentence on facts (dangerous person) which do not meet the requirements of the correct standards for imposing the exceptional sentence, it is an abuse of discretion and the sentence imposed thereunder must be reversed.

Further, the first two (2) exceptional sentences imposed in this matter were 250 months, respectively. CP 314-24; CP 428-40. Each of these respective sentences were imposed with two (2) Counts of Assault. Id. Here, there was only one (1) Count of Assault. CP 143-162. The aggravating factors used for all three exceptional sentences were the same. CP 445-48; 226-230.

Here, after MATTHEWS prevailed with 9 years of litigating successful appeals and succeeded in vacating an unconstitutional conviction, and after getting one (1) of the Assault charges dismissed for insufficiency of the evidence, the trial court

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imposed an exceptional sentence of more than twice the amount of any previous exceptional sentence imposed in the same case, using the same aggravating factors. This sentence goes beyond the reasonable threshold; i.e. 45 years for 1 Count of Assault versus 20 years for 2 Counts of Assault - in the same case. See Ritchie, 126 Wn.2d at 393.

Contrary to the States assertion in its Response, this sentence is clearly unreasonable given the procedural history of this case. The sentence is clearly excessive and must be vacated. MATTHEWS respectfully requests so.

6. The Trial Court Erred When It Allowed MATTHEWS to Proceed Pro Se.

MATTHEWS relies on the case law and authority cited under Assignment of Error No. 11 in the App. Br., pg. 31 ff., and of which is incorporated herein by reference.

In its Response Brief, the State asserts that the trial court properly let MATTHEWS proceed Pro Se. See Resp. Br., pg. 41 ff. However, the State totally disregarded the precedent of Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

Edwards holds that the State is permitted to insist upon representation by counsel for those competent enough to stand trial but are not competent enough to conduct trial proceedings by themselves.

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Edwards, supra at 2387-88. Additionally, Due Process requires a trial court to hold a competency hearing sua sponte whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competent. State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001).

Here, it is clear that MATTHEWS was not competent enough to conduct trial proceedings by himself. MATTHEWS filed numerous Uniform Commercial Code (UCC) documents with the trial Court, believing the charges to be financial in nature. CP's 27-54; 170-191. MATTHEWS also Accepted for Value" the following documents: The entire case (CP 62-63); The original discovery and Sheriff incident report [982170322] in its entirety (CP 257)(See also the Sealed Envelope sent as an attachment by the Clerk, filed with the Court of Appeals, Division II on March 23, 2011 (All original discovery-Accepted for Value)); The Third Amended Information (CP 241-243); The Warrant of Commitment (CP 143-144); The Judgment and Sentence dated 8/13/2010 (CP 145-155) as corrected 10/8/2010 (CP 156-162; VRP 10/8/2010, pg. 7 @ 3-8; pg. 10 @ 6-21); The Supplemental Incident Report No.982170322.1 (CP 256-262); The Finding of Fact and Conclusions of Law for Exceptional Sentence (CP 226-230). MATTHEWS repeatedly identified himself as a Corporate body Politic/Corporate Sole. VRP 4/16/2010, pg.

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3 ff; CP's 27-59; 179-181. MATTHEWS claimed private contractual rights against Tracey Sears (VRP 7/1/2010, pg. 200 @ 10-25; pg. 201 @ 10-19) and against A.E. VRP 7/6/2010, pg. 380 @ 8-25; pg. 380 @ 8-25. MATTHEWS identified himself as a Maritime Vessel (VRP 4/6/2010, pg. 7 @ 7-8) and also as the Ship Manager. VRP 10/8/2010, pg. 4 @ 2-15. MATTHEWS repeatedly requested the court dismiss the case on the ground that the State of Washington was not a Jones Act Plaintiff. VRP 10/8/2010, pg. 15 @ 25 - pg. 16 @ 1; pg. 16 @ 20-23; pg. 17 @ 1-13. MATTHEWS submitted a Promissory Note registered to the State of Washington under the UCC. CP 27-39; CP 170-177; VRP 2/12/2010, pg. 22 @ 14-20. MATTHEWS filed numerous protests under the UCC. CP 40-54; VRP 4/16/2010, pg. 20 @ 2-9; CP 196-208.

Coupled with counsels' concerns with MATTHEWS' mental health (VRP 1/29/2010, pg. 12 @ 18-24; 4/16/2010, pg. 10 @ 1-25), the court should have at least ordered a competency hearing. Marshall, supra. It is apparent that MATTHEWS was attempting to conduct some type of International/Maritime Commercial business transaction as opposed to proceeding appropriately with court protocol.

The court should have insisted an attorney upon MATTHEWS at trial. Edwards, supra 2387-88. The trial court was required to Sua Sponte order a

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competency hearing. Marshall, supra. Because the trial court found MATTHEWS' answers equivocal (VRP 01/29/2010, pg. 14 @ 8-10), it should have removed pro se status.

Based upon the foregoing, the trial court erred when it allowed MATTHEWS to Proceed Pro Se. This Court must reverse and remand back to the trial court for a new trial. MATTHEWS respectfully requests so.

CONCLUSION

Based upon the forgoing, MATTHEWS respectfully requests this Court to reverse and dismiss his conviction with prejudice. In the alternative, MATTHEWS respectfully requests this court to reverse and vacate his exceptional sentence and remand to the trial court with instructions to impose a standard range sentence. In the extreme alternative, MATTHEWS respectfully requests this court to reverse his conviction and remand to the trial for a new trial.

Respectfully submitted on October 29,
2011.


BRIAN DAVID MATTHEWS
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DECLARATION OF SERVICE BY MAIL

GR 3.1

I, BREAN MATTHEWS, declare and say:

That on the 30th PM day of October, 2011, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, with First Class U.S. Mail, pre-paid postage affixed, under cause No. 41189-06-II

- * Reply Brief - Appellant
- * Declaration of Service by Mail GR 3.1
- * MOTION FOR AUTHORIZATION TO FILE OVERLENGTH BRIEF

addressed to the following:

* Court of Appeals, D.V. II. * Prosecutor/Prosecutor
950 Broadway Attorney
Ste. 300
Tacoma WA 930⁰⁰ 55 Tacoma Ave. S. Ste. 300 906
98402 Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my belief.

DATED THIS 30th PM day of October, 2011, in the City of Aberdeen, County of Grays Harbor, State of Washington.

WITH ALL RIGHTS RESERVED.

BREAN DAVID MATTHEWS

BREAN DAVID MATTHEWS

c/o [DOC 710709 UNIT H5B 113
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA (98520)

cc. Lira

ORIGINAL