

No. 44643-0-II
Cowlitz Co. Cause No. 12-1-00719-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

SANDY FEHR,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
DAVID PHELAN/WSBA #36637
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. The trial court did not violate the Appellant's state constitutional right to appear in person by answering a jury question and allowing certain evidence to be replayed.
2. The trial court did not violate the Appellant's Sixth and Fourteenth Amendments right to appear in person by answering a jury question and allowing certain evidence to be replayed.
3. The trial court did not infringe on the Appellant's right to participate in her own defense by forbidding her from visibly reacting to testimony.
4. The trial court did not infringe on the Appellant's rights under the Sixth and Fourteenth Amendments by forbidding her from visibly reacting to testimony.
5. The trial court did not infringe on the Appellant's rights under Article I, Section 22 of the Washington Constitution by forbidding her from visibly reacting to testimony.
6. The school bus stop enhancement did not violate Appellant's Fourteenth Amendment right to due process.
7. The court's instruction did contain an obvious scrivener's error.
8. The evidence, testimony, and circumstances made the jury's burden sufficiently clear.
9. The court's instruction did contain an obvious scrivener's error.
10. The court's instruction did contain an obvious scrivener's error, but any such error was harmless.
11. The sentencing enhancements were appropriately applied.

12. Trial counsel for the Appellant was not ineffective in not seeking an exceptional downward departure. Even if ineffective, there was no prejudice.
13. Trial counsel for the Appellant was not ineffective in not seeking an exceptional downward departure. Even if ineffective, there was no prejudice.
14. Trial counsel for the Appellant was not ineffective in not seeking an exceptional downward departure. Even if ineffective, there was no prejudice.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts with the following addition. Regarding the court's instruction to the Appellant about appropriate courtroom behavior, it is most appropriately reviewed in context. The entire conversation with Appellant focused on outward reaction towards jurors, and specifically conduct in court, and was obviously not intended to prevent Appellant from discussing tactics or issues with defense counsel. It occurred before jury selection. RP 7. The judge begins by cautioning Appellant not to have contact with jurors. RP 6. Then the judge states, "And then make sure you don't **show** any disagreement, agreement or any responses to the testimony." RP 7, *emphasis added*.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY ALLOWING THE JURY TO HEAR A REPLAY OF ADMITTED EVIDENCE WITHOUT HER PRESENCE OR CONSULTATION

The trial court did not violate the Appellant's right to be present, or appear and defend. The question about whether or not the audio could be replayed was a "question of law," and Appellant had no right to be present under the Federal Constitution or the Washington State Constitution. Conferences between counsel and the judge that are related to legal matters and not related to the resolution of disputed facts do not require the defendant/Appellant's presence. *In re Pers. Restraint of Lord*, 123 Wn. 2d 296, 306, 868 P.2d 889 (1994). The question here involved whether an admitted exhibit, which had already been played to the jury, could be replayed at the jury's request. This is a question of law that sits within the sound discretion of the trial court. *State v. Frazier*, 99 Wn.2d 180, 190, 661 P.2d 812 (1980). It cannot be said that the Appellant's exclusion from this particular situation had any substantial relation to the fullness of her opportunity to defend. *State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011).

Appellant relies on *State v. Koontz* to suggest that the decision to replay an admitted audio exhibit was a critical stage of trial, but that reliance is entirely misplaced. Ironically, the *Koontz* court specifically distinguished the issue in that case, involving the replay of video-taped testimony of the defendant and others from the trial itself, with what it considered the more mundane replay of tapes previously admitted into evidence. *State v. Koontz*, 145 Wn.2d 650,

659, 41 P.3d 475 (2002). They concluded that one was entirely unlike the other and that a different standard applied. *Id.* Jurisprudence from one issue did not apply to the other. *Id.*

The conference regarding this issue was not a critical stage of the proceeding and so no right to be present inured. *Sublett* is compelling on this issue. Where the conference or hearing involved only the “purely legal issue of how to respond to a jury’s request for clarification in one of the trial court’s instructions,” it was “not a critical stage of the proceedings.” *State v. Sublett*, 156 Wn.App. 160, 183, 231 P.3d 231 (2010). There was no review of this issue in the subsequent case because the Petitioners abandoned it. *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012). Like the question for clarification, this request for a replay of an admitted exhibit

The question of whether to replay an admitted exhibit, an issue which was itself subject to well settled caselaw, was a question of law and not fact. Even under the stricter “appear and defend” standard under the Washington Constitution, the brief conference to determine the replay of an admitted exhibit was not a critical stage of the proceeding that bore any relation to Appellant’s opportunity to defend, because the Appellant’s inclusion had no relation to the outcome.

Even if the court finds there was a violation, under the U.S. or Washington constitution, any such error was harmless. Violations of

the right to “appear and defend” are subject to a harmless error analysis. *Irby*, 170 Wn.2d at 886, 246 P.3d 796, citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Any alleged violation in this case was harmless beyond a reasonable doubt.

There was simply no prejudice to the Appellant. The trial court lawfully replayed one time the audio recordings of the controlled buy. The presence or absence of the Appellant at the argument over whether the tapes could be replayed could have had no effect on the outcome and thus there was no harm. There is no evidence that the trial court abused its discretion, on the contrary, the trial court heard argument from both counsel for the State and counsel for the defense, before rendering a decision to replay, one time, evidence which had already been admitted and played for the jury. RP 318. There were no disputed facts at issue and so Appellant could not have swayed the outcome one way or the other at the slightest.

At best, Appellant could have urged her attorney to argue against replaying the tape, yet even if that had been the case, it would have been unlikely to change the outcome, just as this court contemplated in *Burdette*. *State v. Burdette*, ___ Wn. App. ___, 313 P.3d 1235, 1244-45 (2013). There is longstanding precedent in this State allowing the replay of audio evidence during deliberations, seeded in *State v. Oughton*, 26 Wn.App. 74, 82-83, 612 P.2d 812 (1980) and

recognized in *State v. Frazier*, 99 Wn.2d at 190, 661 P.2d 126. The absence of the Appellant from this part of the proceeding was harmless, created no prejudice, and the convictions should be affirmed.

B. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO PARTICIPATE IN HER OWN DEFENSE BY CAUTIONING HER TO SHOW NO REACTION TO THE TESTIMONY

Appellant's contention that the trial judges caution about reacting to testimony interfered with her right to participate in her own defense is completely without merit. It rests entirely on taking a judge's statement out of context and stretching it far beyond its intended meaning. The judge's caution, given before *voir dire*, was clearly directed at stopping the Appellant from essentially testifying through visible reactions to testimony. Moreover, this was a caution that the Appellant did not heed, as is clear from the trial court's statement during sentencing. Specifically, when pronouncing sentence, the trial court stated, "Don't shake your head, all right? I dealt with that during the trial and I'm not going to deal with it now." RP 340.

The trial court's directive did not prevent or prohibit Appellant from participating in her own defense. Aside from the bland statement by Appellant that such was the case, there is no detail or analysis advanced that suggested in what way the judge's directive to

not **show** a reaction to testimony prevented Appellant from confronting adverse witnesses, making suggestions to her attorney, or any of the other myriad claims. This argument is without merit and should be disregarded and the convictions affirmed.

C. THE ERROR IN THE BUS STOP VERDICT FORM WAS HARMLESS

The State concedes that the language on the special verdict form was faulty. It clearly involved the transposition of two words, route and stop, while otherwise tracking the statutory language. The question is appropriately framed as whether such a transposition was harmless. Appellant's citation to *Recuenco* is misleading, when they contend that "failure to submit such facts to the jury is not subject to harmless error analysis." App. Brief 13. As the court in *Recuenco III* noted, the case did not deal with an error related to the jury's findings, because the information alleged a deadly weapon enhancement, the jury was instructed on a deadly weapon enhancement, and the jury returned a verdict on a deadly weapon enhancement. *State v. Recuenco*, 163 Wn.2d 428, 435, 180 P.3d 1276 (2008). The analysis was limited to whether the judge imposed a sentence based on a crime that had not been charged, specifically, a firearm enhancement where a deadly weapon enhancement had been alleged. *Id.* at 437, 180 P.3d 1276. The limitation regarding a harmless error analysis simply does not apply where the error was instructional.

This is even clearer when the court considers *State v. Williams-Walker*, where the Washington State Supreme court explicitly recognized this distinction, noting that the “error was made, not in the jury instruction, but in the trial court’s imposition of a sentence.” 167 Wn.2d 889, 900, 225 P.3d 913 (2010). The error in this case was made in the jury instruction and instructional errors are subject to a harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S.Ct. 2546 (2006). Having advanced no *Gunwall* analysis, the Sixth Amendment jurisprudence on this issue binds.

The error in the jury instructions was harmless beyond a reasonable doubt. First, the jury heard evidence regarding a bus stop, not a route. All of the testimony spoke of a single point, not a line or area of travel. RP 152-54. Rick Lecker of the Longview School District testified about a single bus stop, including identifying a single point on a map as the location of that stop. RP 152. Ruth Bunch of the Geographic Information Systems department testified that she received the location of “the bus stop” and then put it into the map, that later became State’s exhibit 9. RP 155. At one point she mistakenly referred to it as a “bus route,” but then immediately corrected herself and said “from the bus stop point.” There is no doubt that any instructional error was harmless because the evidence presented regarding the actual element was extensive and unchallenged. There is no danger that the Appellant was held

accountable for conduct for which she was not charged, or that she did not commit and there is no doubt regarding these facts. The error was an obvious scrivener's error, the verdict was supported by substantial and uncontroverted evidence, and any error was completely harmless. The court should affirm the enhancements.

D. DEFENSE COUNSEL WAS NOT INEFFECTIVE

Counsel was not ineffective in choosing to argue for a Prison-based Drug Offender Sentencing Alternative at Appellant's sentencing hearing. The decision was very likely a tactical one, considering the Appellant's long criminal history and previous sentence of 75 months for a single count of Possession with the intent to distribute. RP 330. Her offender score of 10 at the outset also suggested a downward departure would be unlikely, because the additional buys did not artificially increase her offender score. The decision to seek a prison-based DOSA was reasonable and the failure to seek a downward departure was not ineffective.

Even if ineffective, the error was harmless. The case is distinguishable from *State v. McGill*. In *McGill*, the trial court repeatedly acknowledged it was constrained by the mandatory sentencing guidelines, and showed considerable consternation about that limitation, ultimately imposing the low-end sentence. 112 Wn.App. 95, 99, 47 P.3d 173 (2002). The Appellant started with an offender score of 10, before any current offenses were considered.

The trial court's comments in this case left little doubt regarding whether it felt constrained by the sentencing guidelines, sentencing the Appellant to the highest possible sentence and noting that the "only one thing I can do to keep our streets safe, at least from Ms. Fehr, is to impose ... 192 months." RP 341. Unlike *McGill*, the trial court in this case, if it felt constrained at all, felt constrained by the upper limit, not the lower. That gets to the heart of the concern stated by the *McGill* court. That court, citing *State v. Pryor*, noted that "remand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid factors." *Id.* at 101, 47 P.3d 173, citing *State v. Pryor*, 115 Wn.2d 445, 456, 799 P.2d 244 (1990). They found persuasive that the "trial court's comments indicate it would have considered an exceptional sentence had it known it could." *Id.* They remanded because they could not say "that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id.* That is certainly not the case here.

If anything, this case is like *State v. Hernandez-Hernandez*, where Division 3 found that failing to ask for a *Sanchez* downward departure was not ineffective. In that case, defense counsel argued several mitigating factors and argued for a low-end sentence. 104 Wn.App. 263, 265-66, 15 P.3d 719 (2001). The court in *Hernandez-Hernandez* found that based on those facts, Hernandez-Hernandez

could not show prejudice. *Id.* at 266. In this case, defense counsel argued mitigating factors and sought a prison-based DOSA sentence, which still would have resulted in more time than a low-end sentence. The court chose to sentence the Appellant to the maximum possible sentence. There is no evidence of prejudice, so the failure to seek an exceptional downward departure, if ineffective, was harmless. This court should affirm the convictions.

IV. CONCLUSION

The Appellant was not denied her right to be present when the trial court decided to replay an admitted audio recording after consulting both the State and defense counsel. This was not a “critical stage of the proceeding,” such that would trigger a right to be present. No factual issues were in dispute. Nothing about her presence would have changed the outcome. The conviction should be affirmed.

The trial court’s directive to show no reaction to trial testimony did not violate the Appellant’s right to counsel, or participate in her own defense. The caution was specific to reactions to testimony and was clearly not intended, nor could it reasonably be believed to have prevented communication between Appellant and her trial counsel. The argument is without merit and the conviction should be affirmed.

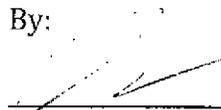
The school zone enhancement was lawfully applied, in spite of the error in the verdict form. An obvious scrivener’s error, the defect

produced no prejudice. The evidence was overwhelming and uncontested that the transactions occurred within 1,000 feet of a bus stop. The jury hear no testimony about a “route” and there is absolutely no danger the Appellant was prejudiced.

Finally, Appellant did receive effective assistance of counsel. Given her history, her offender score, and the posture of the case, it was a legitimate strategy to seek a prison-DOSA. Even assuming such a decision was ineffective, Appellant can show no prejudice, as she was sentenced to the high end and the judge made no comment that indicated even the remote possibility the outcome would have been different. The trial court’s sentence should be affirmed.

Respectfully submitted this 3rd day of January, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By: 

DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

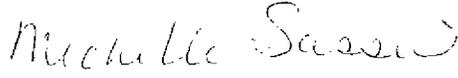
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 6th, 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 06, 2014 - 11:57 AM

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