

NO. 44821-1-II

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

STATE OF WASHINGTON,

Appellant,

v.

LAUREN LUCILLE WRIGHT,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00110-3

BRIEF OF APPELLANT

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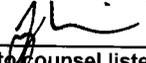
SERVICE	Lise Ellner Po Box 2711 Vashon, WA 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 9, 2013, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to Counsel listed at left.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
ii. STATEMENT OF THE ISSUES.....	3
III. STATEMENT OF THE CASE	3
IV. ARGUMENT.....	17
A. The trial court erred in imposing an exceptional sentence because the evidence in the record fell far short of meeting the “stringent” test required to show that a defendant's capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was significantly impaired.....	17
B. The trial court erred in authorizing the Defendant to serve all but three days of her sentence on electronic home monitoring because RCW 9.94A.734(a) and (e) specifically state that home monitoring may not be imposed for the Defendant’s crimes.....	24
V. CONCLUSION	27

TABLE OF AUTHORITIES

CASES

<i>In re Leach</i> , 161 Wn.2d 180, 163 P.3d 782 (2007).....	24, 26
<i>State v. Allert</i> , 117 Wn.2d 156, 815 P.2d 752 (1991).....	19
<i>State v. Allert</i> , 58 Wn.App. 200, 791 P.2d 932 (1990).....	22
<i>State v. Branch</i> , 129 Wn.2d 635, 919 P.2d 1228 (1996).....	18
<i>State v. Fuller</i> , 89 Wn.App. 136, 947 P.2d 1281 (1997).....	15, 25, 26
<i>State v. Ha'mim</i> , 132 Wn.2d 834, 940 P.2d 633 (1997).....	18, 19
<i>State v. Ha'mim</i> , 82 Wn.App. 139, 940 P.2d 633 (1997).....	14, 19
<i>State v. Hobbs</i> , 60 Wn.App. 19, 801 P.2d 1028 (1990).....	20, 21
<i>State v. Hunter</i> , 102 Wn.App. 630, 9 P.3d 872 (2000).....	24
<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	22
<i>State v. Law</i> , 154 Wn.2d 85, 110 P.3d 717 (2005).....	17
<i>State v. Mulcare</i> , 189 Wn. 625, 66 P.2d 360 (1937).....	24
<i>State v. Rogers</i> ,	

112 Wn.2d 180, 770 P.2d 180 (1989).....	19, 20
<i>State v. Thorne,</i>	
129 Wn.2d 736, 921 P.2d 514 (1996).....	24
<i>State v. Wilson,</i>	
700 A.2d 633 (Conn. 1997)	21

STATUTES

Cal. Penal Code § 4.01(1).....	21
RCW 9.94A.030(54).....	12, 25
RCW 9.94A.505(2)(a)(i)	17
RCW 9.94A.535	18-19, 21-23, 25
RCW 9.94A.585(4).....	18
RCW 9.94A.734(1).....	12, 24, 25

I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that there was a mitigating factor warranting an exceptional sentence. Conclusion of Law XII, CP 76-77.

2. The trial court erred in finding that there were facts in the record that support a finding that the Defendant's lack of judgment due to her age and inexperience was sufficient to warrant an exceptional sentence. Conclusion of Law XII, CP 76-77.

3. The trial court erred in concluding that Washington law allows a trial court to impose an exceptional sentence that the Defendant's lack of judgment due to her age and inexperience. Conclusion of Law XII, CP 76-77.

4. The trial court erred in concluding that home monitoring can be imposed as an exceptional sentence despite the fact that controlling statutes specifically provide that the Defendant was ineligible for home monitoring based on her convictions in the present case. Conclusion of Law XIII, CP 77.

5. The trial court erred in authorizing the Defendant to serve her sentence on electronic home monitoring when RCW 9.94A.734(a) and (c) provide that home monitoring may not be imposed when a defendant

convicted of a violent offense or assault in the third degree. Conclusion of Law XIV, CP 77; CP 78-88.

6. The trial court erred in finding that electronic home monitoring can be imposed as an exceptional sentence in the present case. COL V, CP 75.

7. The trial court erred in finding that the Defendant's crime was typical of youthful offenders. FOF III, CP 73.

8. The trial court erred in finding that it was unlikely that the Defendant would learn anything from spending time in jail. FOF X, CP 74.

9. The trial court erred in finding that the Defendant's emotional state contributed to her offense. FOF XII, CP 74.

II. STATEMENT OF THE ISSUES

1. Whether the trial court erred in imposing an exceptional sentence when the evidence in the record fell far short of meeting the “stringent” test required to show that a defendant’s capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was significantly impaired?

2. Whether the trial court erred in authorizing the Defendant to serve all but three days of her sentence on electronic home monitoring when RCW 9.94A.734(a) and (e) specifically state that home monitoring may not be imposed for the Defendant’s crimes?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Lauren Lucille Wright was charged by amended information filed in Kitsap County Superior Court with one count of Vehicular Assault and one count of Assault in the Third Degree. CP 15-17. Following a jury trial the Defendant was found guilty of both offenses. CP 18. Over the State’s objection the trial court orally imposed what it characterized as an “exceptional sentence” of 6 months with all but 3 days of the sentence to be served on Electronic Home Monitoring. CP 79-80; RP (4/05/2013) 42-43. The matter was then set over for formal entry of the written Judgment and Sentence and for entry of the Findings of Fact and Conclusions of

Law regarding the “exceptional sentence.” RP (4/05/2013) 44-46. Prior to entry of the J&S the State filed a written motion asking the court to reconsider the sentence imposed. CP 63-71. The court then entered the written Judgment and Sentence and set over the hearing on the State’s issues regarding the sentence. CP 78; RP (4/12/2013) 9, 14. The trial court ultimately declined to modify the exceptional sentence and rejected the State’s request to stay the sentence pending appeal. RP (4/26/2013) 19, 22-23. This appeal followed and, pursuant to a request by the State, this Court stayed the sentence pending appeal.

B. FACTS

On June 22, 2010 an automobile collision occurred on Sedgwick Road near the intersection with Banner Road. RP 152, 189. At trial, Trooper David Huibregtse of the Washington State Patrol explained that that portion of Sedgwick is a two lane road with one lane going eastbound and one going westbound. RP 154. In addition, that section of the road is a no-passing zone marked with a solid double yellow line. RP 154; 157-58. The posted speed limit on Sedgwick road is 45 miles per hour, and when a person travelling eastbound on Sedgwick Road approaches Banner Road there is an incline that makes it difficult to see oncoming traffic. RP 159, 162.

On June 22, Stanley McMeekin was travelling eastbound on Sedgwick, approaching Banner Road. RP 197-98. Mr. McMeekin was driving behind a large truck when he noticed a Toyota sedan (driving faster than 45 m.p.h.) pass him. RP 196, 203. The Toyota then began to pass the truck in front of Mr. McMeekin as well. RP 200.¹ Mr. McMeekin then saw smoke from the truck's tires and saw the Toyota flying upside down. RP 201.

Clifton Spillman, a long haul truck driver, was driving the semi truck (with a 53 foot box trailer) in front of Mr. McMeekin. Mr. Spillman testified that he was driving eastbound, headed towards the ferry terminal, and was driving up a grade or incline when he noticed a car passing him on the left. RP 183-85. Based on his years of experience as a professional driver, Mr. Spillman estimated that the car that was passing him was driving about 60-65 miles per hour. RP 185-86.

At that same time Mr. Spillman saw that ahead of him on the right side of the road there was a car that had pulled up on Banner Road to the intersection with Sedgwick, stopped, and then pulled out to make a left hand turn in front of him. RP 185-86; 188. Based on his experience, Mr. Spillman testified that there was enough distance between him and the car

¹ Mr. McMeekin was unable to recall if the Toyota passed both his car and the truck at once (without moving into the right lane after passing Mr. McMeekin's car) or if the Toyota passed him and then went back into the right lane before passing the truck. RP

ahead of him that the driver could have safely made a left hand turn in front of him. RP 186-87.

When Mr. Spillman saw the car passing him on the left he began to apply his brakes. RP 193-94. Mr. Spillman could not give an exact estimate on how close he was to the intersection when he first saw the Defendant's car attempting to pass him, but he did testify that "[I]t was too close. I'll tell you that." RP 195. As he approached the intersection with Banner Road, Mr. Spillman then saw the two cars collide in front of him. RP 189.

Karin Lundy testified that on the afternoon of June 22 she was driving her daughter to riding lessons when she approached Sedgwick Road from Banner Road. RP 326. Ms. Lundy stopped at the stop sign, and saw that to her left there was an approaching truck coming up the hill on Sedgwick. RP 327, 332. Ms. Lundy believed there was a sufficient distance between her car and the truck for her to safely make a left hand truck and, as no cars were approaching from her right, Ms. Lundy then began to make a left hand turn onto Sedgwick. RP 332. As she came into the intersection Ms. Lundy suddenly saw the Defendant's car coming at her in her right hand lane. RP 333-34. Ms. Lundy had not seen the Defendant's car prior to that moment, and Ms. Lundy explained that she

199-200.

would not have made the turn if she had seen it. RP 346. The two cars then collided, and Ms. Lundy was knocked unconscious. RP 335.

Ms. Lundy awoke as the fire personnel were in the process of removing her from the car, and Ms. Lundy was then transported to Harrison Hospital in Bremerton. RP 335. As a result of the collision Ms. Lundy suffered two broken ribs and a broken wrist. RP 337. These injuries caused Ms. Lundy significant pain and she was unable to sleep in a bed due to the pain, which lasted approximately 8 months. RP 338-39.

Sarah Lundy (who was 16 at the time of trial) testified that she was in the passenger seat and remembered her mother stopping at the stop sign at the intersection of Banner and Sedgwick. RP 295-97. As her mother began to make the left turn onto Sedgwick, Sarah saw a car coming at them in their right lane, which was the same lane that her mother was turning into. RP 298. Sarah then turned her head to the side and closed her eyes and braced herself for the collision. RP 298. Sarah was eventually transported to the hospital, but suffered no major injuries. RP 299-300. Sarah did have a number of bruises and lacerations to her legs, neck, and face. RP 300.

Trooper David Huibregtse of the Washington State Patrol responded to the collision at the intersection of Banner Road and Sedgwick on June 22. RP 152.

Trooper Huibregtse arrived at the scene after the collision and saw that one car had been pushed into a ditch and another car (the Toyota Camry the Defendant had been driving) was upside down. RP 166-67. Trooper Huibregtse briefly spoke with the Defendant (who was walking around) and asked her if she was okay and if there were any injuries. RP 167. The Defendant responded that she wasn't injured and the trooper testified that the Defendant's responses were coherent. RP 167.

Washington State Patrol Cory Macaluso also assisted in the investigation, and he went to Harrison Hospital to speak with the Defendant as well as Karin Lundy and Sarah Lundy. RP 124-25. He arrived at Hospital at 4:43pm and first spoke with the Defendant, and advised of her rights. RP 126-28. The Defendant was cooperative and spoke with the Trooper. RP 130. Trooper Macaluso asked the Defendant what happened and the Defendant responded,

I was driving west on Sedgwick. I was going about 60 to 70 miles per hour, because I was late to pick up my mom at the Southworth Ferry. I saw a silver car turning left onto Sedgwick from the right side of the road on Banner. I hit my brakes and steered to the left to try and avoid the vehicle. I hit the car and turned the vehicle hard. The car flipped over, and it was on its top. A man came up to my vehicle, and he helped. He took off my seat belt and helped me down and out of the vehicle.

RP 130. Trooper Macaluso testified that the speed limit on the road where the Defendant was driving was 45 miles per hour. RP 131. Trooper

Macaluso asked the Defendant if she knew the speed limit on Sedgwick, and the Defendant acknowledged that the speed limit was 45 miles an hour. RP 133.

Trooper Macaluso asked the Defendant if she had been passing any vehicles and the Defendant said that she had. RP 131. When asked how many cars she had passed, the Defendant stated, "I passed everyone." RP 131. Trooper Macaluso asked the Defendant why she decided to take Sedgwick instead of Long Lake road, and the Defendant responded, "I did not take Long Lake because cars go slow, and it's hard to pass cars." RP 131. Trooper Macaluso then asked the Defendant to describe her driving on Sedgwick, and the Defendant explained that,

I was over the speed limit the whole time, because I was in a big hurry. I was going from 50 to 60 miles per hour, when I was just driving. I would speed up when I was passing cars.

RP 131-32. Trooper Macaluso also asked the Defendant if she normally drove that way, and the Defendant responded, "No, I normally drive good." RP 134.

Trooper David Killeen (who has extensive training and experience in accident reconstruction and investigations) was also involved in the investigation in the present case. RP 211-16. Trooper Killeen responded to the scene and took a number of photographs. RP 218. A "total station"

was also done at the scene, in which lasers are used to accurately measure and map the various distances and locations of evidence at the scene. RP 215-16, 219.

Gouge marks, which are often indicative of the point of impact, were found in the westbound lane. RP 224-25, 229-30. No gouge marks were found in the eastbound lane. RP 230.

With respect to the victim's car, Trooper Killeen found that the metal from the left front corner of the car had been pushed back towards the center of the car (towards, for instance, the inside mirror), indicating the direction of impact was from the left front tire back towards the right passenger area of the car. RP 236-37. With respect to Defendant's car, Trooper Killeen found that the direction of impact was more front-to-back in a "12:00 to 6:00 direction." RP 240.

After examining the evidence found at the scene and the damage to the two vehicles, Trooper Killeen was able to form an opinion as to the positions of the two automobiles at the moment they collided. RP 235. Specifically, Trooper Killeen found that the evidence was consistent with one car travelling eastbound in the westbound lane and the second car attempting to make a left turn from Banner Road into the westbound lane. RP 243.

The Defendant also testified at trial and explained that she was 18 years old at the time of the accident. RP 352. The Defendant acknowledged that she was unfamiliar with the road, but knew that the speed limit was 45 miles an hour. RP 353-54, 360. The Defendant explained that she was in a big hurry as she was late to pick up her mother at Ferry. RP 354, 360. The Defendant admitted that she was speeding and that she had passed several other cars on Sedgwick, beginning soon after she began driving on Sedgwick. RP 354-55. The Defendant also acknowledged that just before the accident she had passed both the car and the truck as she was approaching Banner Road. RP 357. Finally, when asked if she thought her speeding had something to do with the collision, the Defendant acknowledged that it could have. RP 369.

The defense presented no evidence that the defendant suffered from any mental defects or disabilities. Nor was there any mental health testimony of any kind. Furthermore, there was no testimony that the Defendant suffered from any conditions whatsoever that could have significantly impaired the Defendant's capacity to appreciate the wrongfulness of her conduct or her ability to conform her conduct.

The Defendant was convicted of one count of Assault in the Third Degree and one count of Vehicular Assault (under the “reckless” prong).² CP 83.

Prior to Sentencing both the State and the Defendant filed sentencing memorandums. CP 19, 30. In its sentencing memorandum, the State pointed out that the Defendant was found guilty under the “reckless” prong of vehicular assault, and the crime of vehicular assault is a “violent offense” when it is committed under the “reckless” prong. CP 20, citing RCW 9.94A.030(54). In addition, the SRA provides that a defendant convicted of a violent offense (and even assault in the third degree) is precluded from being sentenced to electronic home monitoring. CP 20, citing RCW 9.94A.734(1)(a) and (e).

The defense also submitted a sentencing memorandum, in which it specifically stated,

The defense concedes that the court cannot sentence Ms. Wright to home monitoring or community service. Additionally, the first time offender option is not available to Ms. Wright, as she has been found guilty of a violent offense.

² On the vehicular assault charge the jury was instructed solely on the “reckless” prong. See, Court’s Instructions to the Jury, listed in the State’s Supplemental Designation of Clerk’s Papers (Instruction #9), filed simultaneously with this brief. Specifically, the jury instruction defining vehicular assault stated, “A person commits the crime of vehicular assault when he or she operates or drives any vehicle in a reckless manner and proximately causes bodily harm to another.” The “to-convict” instruction likewise required the jury to find that the Defendant drove a vehicle in a “reckless manner.” State’s Supp. Desig. of CP (Instruction # 13).

CP 31. The Defendant, however, asked the trial court to impose an exceptional sentence downward of “no jail time.” CP 35. The Defendant argued that an exceptional sentence downward was warranted for the several reasons, including the following:

To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident;

That, before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained;

The Defendant had no prior criminal history;

The Defendant was only 18 years old at the time of the accident, and had the accident occurred 9 months earlier the Defendant would have been charged in juvenile court.

CP 31-34. The State filed a written response addressing each of the Defendant’s claims. CP 56.

At the sentencing hearing, the trial court first acknowledged that electronic home monitoring and a first offender waiver were unavailable due the nature of the Defendant’s convictions. RP (4/05/2013) 29. The court, however, stated that home monitoring would be available as an exceptional sentence. RP (4/05/2013) 30. Turning to the arguments raised in the defense memorandum, the trial rejected the Defendant’s claims that the victim was the initiator or provoker of the incident, or that the Defendant had made a good-faith effort to compensate the victim. RP

(4/05/2013) 37-38. The trial court also rejected the Defendant's argument that her lack of criminal history warranted an exceptional sentence, as that argument had previously been rejected by the courts. RP (4/05/2013) 39.

The trial court next addressed the Defendant's age. RP (4/05/2013) 40. The trial court noted that age alone cannot support a mitigated sentence, but the trial cited *State v. Ha'mim* 82 Wn.App. 139, 940 P.2d 633 (1997), and concluded that the *Ha'mim* case stood for the proposition that "crimes that are typical of teenagers showing a lack of judgment might fit within the statutory mitigating factor that states that the defendant's capacity to appreciate his or her conduct is impaired." RP (4/05/2013) 40. The trial court then concluded that,

Based upon my observations of the testimony in this case, which includes your demeanor, Ms. Wright, I find there are facts in the record that support by preponderance of the evidence that Ms. Wright's lack of judgment due to her age and inexperience warrants a finding that there is a substantial and compelling reason to deviate below the standard-range sentence.

RP (4/05/2013) 41-42. The trial court then turned to the issue of what sentence would be appropriate, and the trial court explained that it felt that electronic home monitoring was ideal. RP (4/05/2013) 42. With respect to whether the court could impose such a sentence, the trial stated,

And the research of the Court was – on its own was whether or not electronic home monitoring could be

ordered as – as an exceptional sentence when the statute prohibits it. That was the primary focus of the Court.

And while there are no published decisions on this particular question, there are some unpublished decisions that were helpful in guiding the Court in its determination today in fashioning a sentence.

RP (4/05/2013) 42. The trial court then orally imposed a sentence of six months and specifically authorized the Defendant to serve all but 3 days of that sentence on electronic home monitoring. RP (4/05/2013) 42-43.

The matter was then set over for formal entry of the written Judgment and Sentence and for entry of the Findings of Fact and Conclusions of Law regarding the “exceptional sentence.” RP (4/05/2013) 44-46.

Prior to entry of the J&S the State filed a written motion asking the court to reconsider the sentence imposed. CP 63-71. Specifically, the State pointed out that in *State v. Fuller*, 89 Wn.App. 136, 947 P.2d 1281 (1997), the court had held that electronic home monitoring could not be imposed, even as an exceptional sentence, for those offenses that are statutorily ineligible for home monitoring. CP64.

At the next hearing on April 12, the State cited *Fuller* and argued that the Defendant was ineligible for home monitoring. RP (4/12/2013) 3-4. The trial court responded to the State’s arguments regarding *Fuller* by stating,

The difficulty, of course, the court is in is that there's some Division II unpublished decisions that are squarely inapposite to this.

RP (4/12/2013) 4. The State responded that unpublished opinions have no precedential value and are not to be cited. RP (4/12/2013) 4-5. The trial court responded by noting that while unpublished opinions have no precedential value, opinions of Division III are not binding on the court. RP (4/12/2013) 5. The State objected strongly and argued that published decisions from all the divisions of the Court of Appeals, including Division III, were binding on the trial court. RP (4/12/2013) 5.

The trial court then concluded that it would go ahead with the formal sentencing and set over the hearing on the State's issues regarding the legality of the sentence. RP (4/12/2013) 9. The trial court then entered the written Judgment and Sentence and the Findings of Fact and Conclusion of Law regarding the exceptional sentence and set over the hearing on the State's issues regarding the sentence. CP 72, 78; RP (4/12/2013) 9, 14.

At the next hearing the trial court ultimately declined to modify the exceptional sentence and rejected the State's request to stay the sentence pending appeal. RP (4/26/2013) 19, 22-23.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE BECAUSE THE EVIDENCE IN THE RECORD FELL FAR SHORT OF MEETING THE “STRINGENT” TEST REQUIRED TO SHOW THAT A DEFENDANT’S CAPACITY TO APPRECIATE THE WRONGFULNESS OF HER CONDUCT OR TO CONFORM HER CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SIGNIFICANTLY IMPAIRED.

The trial court below imposed an exceptional sentence based on what it characterized as the Defendant’s “lack of judgment due to her age and inexperience.” CP 77. The evidence in the record (which contained no evidence regarding a mental condition), however, fell far short of demonstrating that the defendant suffered from any condition that significantly impaired the Defendant’s capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law.

Generally, a trial court must impose a sentence within the standard range. *See* RCW 9.94A.505(2)(a)(i); *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). The SRA permits departures from the standard range, instructing that “[t]he court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an

exceptional sentence.” RCW 9.94A.535. If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

RCW 9.94A.585(4), in turn, provides that to reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient. Washington courts have construed this statute to establish three prongs, each with its corresponding standard of review, as follows,

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

Law, 154 Wn.2d at 93, citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997); *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d 1228

(1996); and *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)).

Furthermore, the Washington Supreme Court has previously made it clear that a defendant's youthful age alone is insufficient to warrant an exceptional sentence. *Ha'mim*, 132 Wn.2d at 847. In *Ha'mim*, the defendant argued that his age (18) should be considered as a mitigating circumstance warranting "an exceptional sentence below the standard range because young people tend to exercise poor judgment." *Ha'mim*, 132 Wn.2d at 845. The Supreme Court noted that the SRA does not list age as a statutory mitigating factor, but the SRA does include "as a mitigating factor that the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired." *Id* at 846, citing former RCW 9.94A.390 (which has since been recodified as 9.94A.535(1)(e)). The Court in *Ha'mim*, however, held that the defendant did not meet this standard as there was "no evidence in the record that the defendant's capacity to appreciate the wrongfulness of her conduct or to conform it to the requirements of the law were in any way impaired." *Id* at 846.

Subsequent cases have further addressed what types of showings are required to demonstrate that a defendant's capacity to appreciate the wrongfulness of his act was significantly impaired. For instance in *State*

v. *Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989), the Court explained that this test is a “stringent” one and there must be proof to meet the standard. In *Rogers*, the Court accepted the trial court's finding that the defendant was under severe emotional and psychological stress when he committed a bank robbery, but the Court found no proof that the defendant’s capacity to appreciate the wrongfulness of his conduct was significantly impaired. *Rogers*, 112 Wn.2d at 185. The Court further noted that,

If a trial court is to rely specifically upon the quoted statutory language, there must be proof to meet that standard. Indeed, impaired judgment and irrational thinking is inherent in most crimes. The court must find, based upon the evidence, that those factors led to significant impairment of defendant's capacity to appreciate the wrongfulness of his conduct and to conform to the law. There simply is no finding, nor any evidence, to meet this stringent test.

Id.

Similarly, in *State v. Hobbs*, 60 Wn.App. 19, 22, 801 P.2d 1028 (1990) the trial court imposed a mitigated sentence because at the time of the offense the defendant was suffering “extreme emotional distress caused by the upset in his domestic relationship” with his girlfriend. The Court of Appeals, however, reversed because while it acknowledged that there was evidence the defendant was “extremely emotionally distressed at the time of the offense . . . there is no proof that this condition significantly

impaired Hobbs' capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *Hobbs*, 60 Wn.App. at 24.

In addition, it is worth noting just where the statutory mitigating factor found in RCW 9.94A.535(1)(e) comes from in order to understand it in its proper perspective.

In the middle part of the 20th Century a number of courts and legislatures decided to adopt the Model Penal Code (MPC) insanity test which was less stringent than the "M'Naghten" test used in Washington. Unlike insanity law in Washington (which requires a complete inability to perceive the nature and quality of the charged acts), the MPC test requires only a showing that a defendant lacks a "substantial capacity." Specifically, the American Law Institute, in its Model Penal Code, sets forth the following standard:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks substantial capacity either to appreciate the criminality [wrongfulness] of his or her conduct or to conform his or her conduct to the requirements of the law.

Model Penal Code § 4.01(1).³

³ The Commentary to the Model Penal Code explains that states are free to choose between the term "criminality," meaning legal wrongfulness, and the term "wrongfulness," which includes legal and moral wrongfulness. Model Penal Code and Commentary at 164, 169. See also, *State v. Wilson*, 700 A.2d 633, 639 (Conn. 1997) (noting that "The history of the Model Penal Code indicates that "wrongfulness" was offered as a choice so that any legislature, if it wishes, could introduce a "moral issue" into the test for insanity," citing MPC Commentary at 164 and A.L.I., 38th Annual Meeting, Proceedings (1961) p. 315).

Furthermore, when the Legislature revamped the criminal code in 1975 it specifically considered a proposal to adopt several of the portions of the Model Penal Code insanity test, yet rejected the MPC test. *See, e.g., State v. Allert*, 58 Wn.App. 200, 207, 791 P.2d 932 (1990) *citing* D. Boerner, *Sentencing in Washington* § 9.12(c)(3), at 9-26 (1985)(stating that the legislature in 1975 “considered and rejected” Model Penal Code §4.01 as an insanity defense standard). Although the Legislature rejected the Model Penal Code’s test as the insanity test in Washington, the Legislature did create a “mitigating circumstance” under RCW 9.94A.535 that allows a court to take a defendant’s ability to appreciate the wrongfulness of his acts. The Washington Supreme Court has explained that the mitigating circumstances outlined in RCW 9.94A.535 are often referred to as “failed defenses,” and that “the mitigating circumstances enumerated in [former] RCW 9.94A.390 [now in RCW 9.94A.535] represent failed defenses.” *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Further, “these ‘failed defense’ mitigating circumstances include . . . mental conditions not amounting to insanity . . . [former] RCW 9.94A.390(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired).” *Jeannotte*, 133 Wn.2d at 851.

In short, the mitigating circumstance outlined in RCW 9.94A.535(1)(e) is literally the Model Penal Code’s insanity test. A

finding that defendant has met this “stringent” test is thus a finding that the defendant would qualify for the insanity defense in those states that have adopted the Model Penal Code’s test.

Thus when RCW 9.94A.535(1)(e) is viewed in its proper perspective, it is obvious that the trial court’s finding in the present case was erroneous. To say that the Defendant’s “lack of judgment due to her age and inexperience” would be sufficient to find her legally insane in those states that have adopted the Model Penal Code insanity test is utterly absurd. The State acknowledges that the Model Penal Code insanity test is less stringent than Washington’s insanity test, but to say that the test would be met merely by the fact that a Defendant was 18 and had a lack of judgment and experience is clearly incorrect.

Rather, in the present case the Defendant stated that she was aware of the speed limit on Sedgwick, but that she was intentionally speeding because she was in a hurry. Furthermore, there is no evidence or testimony in the record that the Defendant suffered from any mental impairment or other condition that impaired her capacity to appreciate the wrongfulness of her conduct or to conform it to the requirements of the law.

In conclusion, this Court should reverse the trial court’s finding that an exceptional sentence was warranted in the present case and remand this matter for sentencing within the standard range.

B. THE TRIAL COURT ERRED IN AUTHORIZING THE DEFENDANT TO SERVE ALL BUT THREE DAYS OF HER SENTENCE ON ELECTRONIC HOME MONITORING BECAUSE RCW 9.94A.734(A) AND (E) SPECIFICALLY STATE THAT HOME MONITORING MAY NOT BE IMPOSED FOR THE DEFENDANT'S CRIMES.

In addition to the fact that the trial court erred in finding that an exceptional sentence was warranted in the present case, the trial court also erred by imposing a sentence that was statutorily precluded, even as an exceptional sentence.

It is well settled in Washington that establishing the penalties for crimes is a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) (collecting cases). The power of the legislature in this respect is plenary, subject only to constitutional constraints. *Id.* (citing *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937)). Thus, with respect to sentencing, a trial court's discretion is strictly limited to whatever discretion is granted to it by the legislature. *See, e.g., State v. Hunter*, 102 Wn.App. 630, 636, 9 P.3d 872 (2000). A trial court may only impose a sentence that is authorized by statute. *In re Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

As stated above the Defendant was convicted of one count of Assault in the Third Degree and one count of Vehicular Assault under the

“reckless” prong. RCW 9.94A.734 specifically provides that electronic home detention “may not be imposed” for offenders who have been convicted of a number of specific offenses, including Assault in the Third Degree and any “violent offense.” *See* RCW 9.94A.734(a) and (e). Vehicular Assault under the “reckless” prong is a “violent offense.” *See* RCW 9.94A.030(54)(a)(xiii).

The plain language of these statutes is clear, and the Legislature has specifically stated that electronic home monitoring “may not be imposed” for either of the Defendant’s crimes. As the Defendant is currently serving a sentence on home monitoring in violation of Washington law, this Court should stay the sentence in the present case.

It should also be noted that although RCW 9.94A.535 does authorize a trial court to impose an exception sentence in certain situations, the statute does not authorize a trial court to impose electronic home monitoring in cases where the legislature has clearly and unequivocally stated that electronic home monitoring “may not be imposed.” Furthermore, the Court of Appeals addressed this specific issue in *State v. Fuller*, 89 Wn.App. 136, 947 P.2d 1281 (1997).

In *Fuller*, the defendant was convicted of third degree assault and the trial court, “by an exceptional sentence,” authorized the defendant to serve the sentence on home detention. The trial court then later became

concerned that it had exceeded its authority and ordered a hearing on the issue. *Id* at 139. The trial court then concluded that the RCW's prohibited home detention for third degree assault and modified the judgment and sentence by elimination home detention. *Id*. The defendant then appealed. The Court of Appeals, however, held that the statutes specifically stated that home detention may not be imposed for offenders convicted of third degree assault, and that

A conviction for third degree assault disqualifies and offender from home detention. This statute is unambiguous. The plain meaning indicates Mr. Fuller may not serve his time on home detention.

Fuller, 89 Wn.App. at 140.

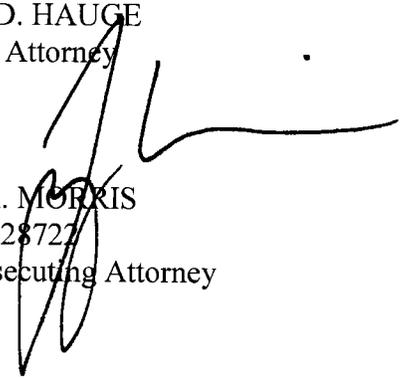
In conclusion, the plain language of the controlling statutes clearly states that EHM may not be imposed for the Defendant's crimes in the present case. As the Court of Appeals in *Fuller* explained, the statutory language is clear and unambiguous and does not authorize EHM for violent offenses, even as an exceptional sentence. Despite this plain language of the statute and the holding of Fuller, the trial court in the present case authorized the Defendant to serve all but three days of her sentence on electronic home monitoring. This Court should reverse the trial court's ruling that the Defendant may serve her sentence on electronic home monitoring.

V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court's order finding that an exceptional sentence was warranted and reverse the trial court's ruling that the Defendant could serve her sentence on electronic home monitoring (either as part of standard range sentence or as a part of an exceptional sentence), and remand the cause for resentencing within the standard range.

DATED September 9, 2013.

Respectfully submitted,
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