

NO. 44821-1-II

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

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STATE OF WASHINGTON,

Appellant,

v.

LAUREN LUCILLE WRIGHT,

Respondent.

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

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REPLY BRIEF OF APPELLANT

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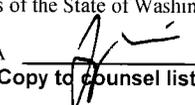
RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

**SERVICE**

Lise Ellner  
Po Box 2711  
Vashon, Wa 98070-2711  
Email: liseellnerlaw@comcast.net

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DATED December 5, 2013. Port Orchard, WA   
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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## I. ARGUMENT

### A. 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.

As was argued in the State's initial Brief of Appellant, the trial court in the present case erred by authorizing the Defendant to serve her sentence on Electronic Home Monitoring (EHM) because 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" such as Vehicular Assault under the "reckless" prong. *See*, State's Brief of Appellant at 24-26.

The State also pointed out that the Court of Appeals has previously held that even if a trial court imposes an exceptional sentence the trial court may not impose EHM as a sentence for those crimes listed in RCW 9.94A.734. *See*, State's Brief of Appellant at 24-25, *citing State v. Fuller*, 89 Wn.App. 136, 947 P.2d 1281 (1997).

The Defendant (in a brief section of her Brief of Respondent addressing this issue) first argues that although RCW 9.94A.734 prohibits the imposition of EHM for offenders convicted of a violent offense, a trial court may still impose an exceptional sentence even for violent offenses. Resp.'s Br. at 16. The Defendant then cites to *State v. Smith*, 124 Wn.App. 417, 436-38, 102 P.3d 158 (2004) for the proposition that "If an exceptional sentence is appropriate, the trial court has substantial discretion in determining the duration and nature of sentence, including the imposition of EHM in lieu of incarceration." Resp.'s Br. at 16. Reading the defense argument as a whole, the brief appears to imply that *Smith* stands for the proposition the EHM may be imposed as an exceptional sentence, even when the crime is a violent offense. *Smith*, however, does not in any way stand for this proposition.

In *Smith*, the defendant was convicted of three counts of assault in the second degree, each with a firearm enhancement. *Smith*, 124 Wn.App. at 425. The standard range for the base sentence on each count was 15-20 months and each count also carried a 36 months month firearm enhancement. *Smith*, 124 Wn.App. at 425, 436. The trial court, however, imposed an exceptional sentence downward of one day for the base sentence on each assault count, running concurrently. The trial court then noted that it did "not have the authority to depart from the sentencing

enhancements” and the court thus imposed three consecutive 36-month firearm enhancements running consecutively to the one-day concurrent sentences and to one another. *Smith*, 124 Wn.App. at 425, 437. The court in *Smith* did not impose Electronic Home Monitoring as part of the sentence. In fact, EHM and RCW 9.94A.734 are never mentioned in the *Smith* opinion at all.

The actual issue in *Smith* was whether substantial evidence supported the trial court’s finding that an exceptional sentence was warranted. *Smith*, 124 Wn.App. at 437. The issue in *Smith* was not whether a specific exceptional sentence was statutorily precluded, nor was the issue whether EHM was authorized as part of an exceptional sentence. *Smith*, therefore, is of no assistance in the present case.

In the present case the actual issue before this Court is quite simple. RCW 9.94A.734 specifically provides that electronic home detention “may not be imposed” for the Defendant’s crimes. Furthermore, in *Fuller* the Court of Appeals affirmed the trial court’s ruling that the SRA prohibited the imposition of EHM for certain crimes (such as Assault in the Third Degree) even when the trial court characterized the sentence as an exceptional sentence. As the *Fuller* court noted,

A conviction for third degree assault disqualifies an 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.

Given the plain and unambiguous language of RCW 9.94A.734 and the clear holding in *Fuller*, the trial court in the present case exceeded its authority when it authorized the defendant to serve her sentence on EHM. This Court should therefore reverse the trial court's ruling that the Defendant may serve her sentence on electronic home monitoring.

**B. AS IN THE CASE OF *STATE V. ROGERS*, THE EVIDENCE IN THE PRESENT CASE WAS INSUFFICIENT TO MEET 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.**

In her Brief of Respondent, the Defendant acknowledges that our Washington Supreme Court has held that in order to conclude that an exceptional sentence is warranted the trial court must find proof, based upon the evidence, that the defendant's condition significantly impaired her capacity to appreciate the wrongfulness of her conduct or conform her conduct to the requirements of the law. Resp.'s Br. at 8, *citing State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). The Defendant further

acknowledges that in *Rogers* the Court found that the evidence was insufficient. Resp.'s Br. at 8-9. The Defendant, however, argues that *Rogers* is distinguishable and that, unlike in *Rogers*, in the present case there was evidence showing that her ability to appreciate the wrongfulness of her conduct was impaired. Resp.'s Br. at 9. This claim, however, is without merit, as the present case involved less evidence of impairment than was present in *Rogers*.

In *Rogers*, the Supreme Court ultimately found that there was no evidence that any factor had “led to significant impairment of defendant's capacity to appreciate the wrongfulness of his conduct and to conform to the law.” *Rogers*, 112 Wn.2d at 185. The Supreme Court reached this conclusion despite the fact that it had accepted the trial court's finding that the defendant was under severe emotional and psychological stress when he committed a bank robbery, and that his judgment was exceptionally impaired, his thinking irrational, and his behavior impulsive.” *Id* at 184. The trial court's finding in this regard was based, at least in part, on the medical report of a psychologist on this issue. *Id*. Nevertheless, the Supreme Court found that the record was insufficient because there was no evidence that the defendant's above listed conditions in any way led to an actual impairment of his capacity to appreciate the wrongfulness of his actions. Specifically, the Court explained that,

For a person of defendant's background to commit this armed robbery, it is natural to believe that his judgment was impaired and his thinking irrational. However, there is no proof that such condition significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. 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.

*Rogers*, 112 Wn.2d at 185.

In the present case there was no expert testimony from a psychologist or any other mental health professional. Nor was there any other evidence that in any way demonstrated that the Defendant's capacity to appreciate the wrongfulness of her conduct was significantly impaired. The Defendant appears to argue that her age and maturity were somehow sufficient, but even assuming for the sake of argument that her age alone was sufficient to demonstrate that that "[her] judgment was exceptionally impaired, [her] thinking irrational, and [her] behavior impulsive," the evidence would still be insufficient. As the *Rogers* court made clear, there must be some evidence that those factors actually led to a significant impairment of defendant's capacity to appreciate the wrongfulness of his conduct. As in *Rogers*, there was no such evidence in the present case.

As the State explained in its opening brief, the mitigating circumstance outlined in RCW 9.94A.535(1)(e) is literally the Model Penal Code's insanity test. *See* State's Brief f Appellant at 21-23. While the fact that a criminal defendant may be only 18 years old might be sufficient to say that the Defendant has not gathered the maturity and wisdom that come with age, the fact that a defendant is only 18 falls far short of establishing criminal insanity under the Model Penal Code insanity test.

This Court, however, need not guess or speculate about what sort of evidence is required to meet the requirements of RCW 9.94A.535(1)(e). Rather, the Supreme Court outlined the requirements quite clearly in *Rogers*. First, if a trial court is to rely specifically upon the quoted statutory language, there must be proof to meet that standard. *Rogers*, 112 Wn.2d at 185. Secondly, evidence of impaired judgment and irrational thinking are insufficient. In order to meet the statutory test the trial 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." *Id* at 185. As there was absolutely no evidence in the present case that the Defendant's capacity was significantly impaired, the trial court's exceptional sentence must be reversed.

## II. 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 December 5, 2013.

Respectfully submitted,  
RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

# KITSAP COUNTY PROSECUTOR

## December 05, 2013 - 12:03 PM

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