

NO. 23834-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DION DAVIS,

Appellant.

---

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

The Honorable Jerome Leveque

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL.

Appellant Anthony Davis was charged with several offenses arising from an alleged domestic violence incident involving his girlfriend and her daughter. On appeal Mr. Davis contends his right to a fair trial was violated by the deputy prosecutor's improper efforts to misstate and shift the burden of proof. He further contends the evidence was legally insufficient to support a conviction for unlawful imprisonment. Finally, Mr. Davis contends the exceptional sentence he received was improper because it was obtained in a manner contrary to the specific Legislative directives of the Sentencing Reform Act (S.R.A.).

B. ASSIGNMENTS OF ERROR.

1. The prosecutor committed misconduct that violated appellant's right to a fair trial when she shifted the burden of proof and repeatedly asked appellant if other witnesses were liars.

2. The evidence at trial was insufficient to prove unlawful imprisonment of T.B. beyond a reasonable doubt.

3. The trial court acted contrary to its prescribed sentencing authority when it imposed an exceptional sentence in a manner contrary to that prescribed by the S.R.A.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Where the deputy prosecutor during trial repeatedly pursued two separate and equally impermissible lines of questioning which sought to shift the burden of proof and obscure the jury's obligations, was the misconduct so flagrant as to warrant appellate relief? (Assignment of Error 1)

2. A criminal conviction may not be sustained on appeal in the absence of evidence from which the trier of fact could reasonably find all the elements of the offense. Unlawful imprisonment requires proof of restraint, but the testimony only established minimal contact and the jury rejected the bulk of the remaining allegations. Must this court reverse Mr. Davis' conviction for unlawful imprisonment? (Assignment of Error 2)

3. Mr. Davis was tried during the period after Blakely v. Washington and before the Legislature adopted a new procedural mechanism for the imposition of exceptional sentences. During this interim period, did the parties or the court have the power to adopt procedures different than those then prescribed in the S.R.A. in support of the exceptional sentence determination? (Assignment of Error 3)

D. STATEMENT OF THE CASE.

1. Proceedural History. Mr. Davis was charged by information filed on May 27, 2004, with harassment and fourth degree assault against Bobbi Dewey. CP 1. An amended information was filed on November 4, 2004, charging harassment, second degree assault, and unlawful imprisonment against Bobbi Dewey, second degree assault and unlawful imprisonment against her daughter T.B., as well as third degree malicious mischief, and violation of a domestic violence criminal protection order. CP 2-3.

A jury trial was held before the Honorable Jerome J. Leveque beginning on January 18, 2005, and concluding with guilty verdicts on various allegations or related lesser offenses on January 24, 2005. CP 45-53.

On January 25, 2005, Mr. Davis was sentenced. 1/25/05RP; CP 56-74. He received a standard range sentence on the felony harassment offense (Count 1) and suspended sentences on the misdemeanors. CP 56-74. As to the allegation of unlawful imprisonment of T.B (Count 5), the court imposed an exceptional period of confinement based on the jury's response to a special interrogatory finding the defendant knew or should have known "the

victim was particularly vulnerable and incapable of resistance due to extreme youth.” CP 55, 63.

This appeal timely followed. CP 75.

2. Trial testimony. Bobbi Dewey and Mr. Davis had been dating since July 2003, when he moved into her apartment with her and her seven-year-old daughter, T.B., in March of 2004. RP 174, 437. On the evening of May 7th, while Ms. Dewey and T.B. drove to their apartment after a Campfire meeting, Ms. Dewey was talking to Mr. Davis on a cellular telephone. RP 175. Ms. Dewey came to believe Mr. Davis had been drinking and complained, “I can’t deal with this. This is like the third time this week you’ve come home drunk.” RP 175-76.

Mr. Davis explained that during the day, he and Ms. Dewey had argued through a series of telephone and email messages regarding the status of their relationship and Mr. Davis’s desire to have children. RP 439-40. The result was a mutual decision to breakup. RP 440. In light of this, Mr. Davis testified he did not want to return to their apartment after work, so he went to Chan’s Dragon Inn to eat dinner and then to a motel. RP 441-42, 448, 475.

Contrary to Mr. Davis's account, Ms. Dewey testified both she and Mr. Davis arrived back at the apartment at the same time and went inside. RP 176. T.B. went to her room and watched television while Mr. Davis reportedly undressed, got in the bed and watched television and ate while Ms. Dewey was getting some laundry together. RP 163, 176. Ms. Dewey decided she needed thread and asked Mr. Davis to watch T.B. while she went to the store. RP 176. According to Ms. Dewey, when Mr. Davis declined, she opened the door to their bedroom and said, "This is just not working. You're going to have to leave and move out in two weeks." RP 177.

Ms. Dewey testified that Mr. Davis then,

...opened the bedroom door and peeked his head out because he was nude and said—he said, "Come here." And I came into the bedroom, and he shut the door, and he said—and he was just like—well, he was standing in front of me like about that close to my face (indicating) just staring at me. And I said, "What?" And then he didn't say anything. He just kept staring at me, and I said, "What?"

And then that's the point where he grabbed me by my neck and threw me.

RP 177. Ms. Dewey described being thrown into a nightstand, grabbed again by the throat and having her head banged into the wall several times. RP 177. When she got up, Ms. Dewey said,

she was thrown into a rod iron bed frame and Mr. Davis banged her head against the bars of the bed. RP 178.

Hearing the noise, T.B. came in and asked “What’s going on?” to which Ms. Dewey reportedly said, “run,” “get the neighbors; go get help.” RP 146-47, 178. Mr. Davis told T.B. “Don’t you go anywhere” and held Ms. Dewey, prompting T.B. to say, “Don’t hurt my mom.” RP 147-48, 179. T.B. grabbed Mr. Davis’s arm and he pulled her down by the shirt. RP 180.

When they were down on the floor Mr. Davis allegedly said, “I’ll take you both out right now.” RP 180. He said, “[d]on’t you touch me” and “told us to go sit on the ottoman in the living room.” RP 180. In the living room, Mr. Davis reportedly broke a picture frame and boasted about being from Chicago where “we break bones” as he grabbed Ms. Dewey’s finger. RP 181.

Ms. Dewey testified she tried to calm him and Mr. Davis replied, “If you say anything to your friend. . . I’ll kill him and then I’ll kill you too.” RP 182. They then made their way back to the bedroom while Mr. Davis swore and broke a light shade. While picking up shards of glass, Ms. Dewey’s hand was accidentally cut. RP 183.

Mr. Davis then told Ms. Dewey and T.B. to go to their rooms. Mr. Davis expressed some concern about student financial aid and then reportedly said, "if I don't get my check from Whitworth, I will take you out." RP 183-84. When Mr. Davis realized Ms. Dewey's hand was bleeding he washed it off, started crying, got dressed and left. RP 184.

Ms. Dewey called 9-1-1, then nearby family and a friend. RP 185, 223-36. Officers Tramell Taylor and Gordon Innis responded to the call and were dispatched to Ms. Dewey's apartment. RP 300-04, 344-47. Officer Taylor interviewed Ms. Dewey, while Officer Innis interviewed T.B. RP 304-11, 352-59. Based on the information they received, Officer Taylor called Mr. Davis's cellular telephone, but Mr. Davis mistakenly believed the officer was Ms. Dewey's new boyfriend. RP 315-16, 446-47. According to the officer, Mr. Davis subsequently said that they had an argument but "there's nothing wrong with her." RP 316-17.

3. Sentencing. Mr. Davis was sentenced on January 25, 2005. 1/25/05RP. The prosecutor recommended a 12-month exceptional sentence on the unlawful imprisonment count as to T.B., standard or suspended sentences on the remaining counts, and various legal and financial obligations. Id. at 5-9.

Defense counsel argued for leniency based on Mr. Davis's lack of prior criminal history, military service and active work as a student. Id. at 9-11. Mr. Davis apologized to Ms. Dewey and her family and expressed his gratitude to the prosecutor, defense counsel and judge for a fair trial. Id. at 18-19. Judge Leveque then imposed an exceptional sentence on the harassment charge and followed the prosecutor's other recommendations. Id. at 19-25.

E. ARGUMENT.

1. PROSECUTORIAL MISCONDUCT DENYING APPELLANT A FAIR TRIAL REQUIRES REVERSAL

a. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Washington Supreme Court instructed:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worth of his office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial . . . We do not condemn vigor, only its misuse . . . No prejudicial instrument, however, will be permitted. His

zealousness should be directed to the introduction of competent evidence. . . .

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); see also State v. Reed, 102 Wn.2d 140, 145-48, 684 P.2d 699 (1984).

To determine whether prosecutorial improprieties constitute misconduct, the reviewing court must decide first whether such comments were improper, and, if so, whether a “substantial likelihood” exists that the comments affected the jury. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutor’s questions or comments rose to the level of misconduct, requiring a new trial. State v. Stith, 71 Wn.App. 14, 19, 856 P.2d 415 (1993).

b. Two separate lines of question were improper.

i. Implying a defendant has the burden to produce evidence was flagrantly improper. In accordance with the due process clause of the federal constitution, “a defendant has no duty to present any evidence. The State bears the entire burden of proving each element of its case beyond a reasonable doubt.” State v. Traweck, 43 Wn.App. 99, 107, 715 P.2d 1148 (1986) (citing In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct.

1068 (1970)), disapproved on other grounds by State v. Blair, 117 Wn.2d, 479, 491, 816 P.2d 718 (1991). As a result, a prosecutor commits misconduct when she shifts the burden of proof to the defendant by suggesting that the defendant has an obligation to produce evidence of his innocence. State v. French, 101 Wn.App. 380, 385, 4 P.3d 857 (2000), rev. denied, State v. Barraza, 142 Wn.2d 1022 (2001); State v. Cleveland, 58 Wn.App. 634, 648, 794 P.2d 546 (1990); Traweck, 43 Wn.App. at 107.

During the prosecutor's cross-examination of Mr. Davis she inquired regarding the frequency of his visits to Chan's restaurant and whom he might have known there. RP 463. After Mr. Davis explained that he was sitting in the restaurant rather than the lounge and did not know who was tending bar but knew others on the staff, the deputy prosecutor asked:

Q: And where are those people?

A: Where are they? What do you mean?

Q: The ones that waited on you that night.

A: Tonight or today?

Q: The ones that waited on you when you were at Chan's on May 7<sup>th</sup>.

A: You're saying, where are they now?

Q: Where are they today?

A: I'd imagine at work on somewhere at home. I don't know.

Q: They're not here testifying?

A: Absolutely not.

RP 465-66. These improper questions plainly implied Mr. Davis had an obligation to provide evidence to corroborate his defense.

In the same vein, the deputy prosecutor asked,

Q: Now, from the time you left Chan's parking lot until the time you checked out that next morning who did you talk to? You said you were on your cell phone in the parking lot.

A: I either talked to Greg or April or somebody, you know. Again I don't have the particulars like you guys do.

Q: Are they here to corroborate your story?

A: They could be, but no, they're not.

Q: They could be, but they're not. So in an alibi defense would it be important to have someone verify what you're saying? Would it be important?

A: I mean—it's up to you to prove this. This is my story. I don't know.

Q: I'm asking you if you think it would be important, your opinion.

A: No, because they're not going to come if they didn't think anything happened.

Q: So anyone you called on the cell phone that night, you don't have them to tell us about it and you don't have any records that that ever occurred, and you don't have motel records?

A: That's correct.

RP 477-78. Again these questions implied Mr. Davis had some obligation to produce witnesses to rebut the State's allegations.

In Traweek, the court recognized that it was improper for the prosecutor to point out that the defendant had failed to call any witnesses that would refute the State's evidence. 43 Wn.App. at 107. In Cleveland, the court held it was improper for the

prosecutor to argue the defendant had a good attorney who would have put on evidence of innocence if any existed. 58 Wn.App. at 648. Cf. Blair, 117 Wn.2d at 492 (not improper to comment on defendant's failure to call witnesses where justified under the missing witness doctrine). The line of questioning detailed here was a flagrant attempt to imply Mr. Davis had some burden to disprove the State's case. That simply is not true. By suggesting Mr. Davis had the duty to present evidence where the State rightly had the burden of proof, the prosecution violated Mr. Davis's right to a fair trial.

ii. Trying to force the defendant to say other witnesses were liars was grossly improper. The appellate courts of this state have repeatedly observed that the practice of prosecutors asking one witness whether another is lying is contrary to the duty to seek convictions based only on probative evidence and sound reason. State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995); State v. Castaneda-Perez, 61 Wn.App. 354, 362-63, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991). Questions designed to force witnesses to accuse each other are out of bounds in the same manner as inflammatory remarks, incitements to vengeance, exhortations to join the war against crime, and appeals to

prejudice, patriotism or class bias. Neidigh, 78 Wn.App. at 79.

Despite the repeated condemnation of this practice in the appellate courts, prosecutors continue to intentionally make these improper arguments, apparently, because “it’s always been found to be harmless error....” Id. at 76.

The deputy prosecutor in this case turned to the potential inconsistencies between Mr. Davis’s testimony and that of Officer Taylor regarding the timing of their telephone conversation. She asked Mr. Davis,

Q: Okay. Now, you heard Officer Taylor testify that it was at the end of the investigation that he called you. You heard him testify to that?

A: Right.

Q: So that probably according to everything that’s come in I think would have been around 10:30. Is that what you heard, approximately?

A: I don’t know. I guess so.

Q: Okay. Now, basically then what you’re telling this jury is that you did not receive a call around 10:30 from a person saying they were an officer?

A: I thought it was around 9.

Q: You didn’t receive one at 10:30? Yes or no.

A: No. From an officer?

Q: Yes.

A: No.

Q: Okay. So what you’re telling the jury is that that officer lied under oath?

A: I’m just telling the jury what I knew.

Q: Okay. But either you are right or he’s right. Somebody’s not right. Wouldn’t that be true?

A: My story is true.

RP 478-79. The trial deputy used the same improper technique with regard to questions about the evidence of the other witnesses.

With regard to prosecution witness Dean Smith,<sup>1</sup> she asked,

Q: Now according to your testimony, you were not at the apartment so Dean Smith didn't see you?

A: That's correct. Dean was creative.

Q: And he didn't see you on the phone?

A: That's right.

Q: Didn't see you get in your car and leave; is that right?

A: That's correct.

Q: So Dean Smith also lied under oath on the stand?

A: Absolutely.

RP 483. With regard to T.B.,

Q: Okay. And she made up fantastic traumatic stories to get you in trouble; is that right?

A: That's incorrect.

Q: Okay. Why did she make up lies about you?

A: She didn't. What she told is her mother's story.

Q: so you said Taylor lies; now she doesn't lie?

A: The story is her mother's, which that story is a lie.

Q: So this 7-year-old little girl, 8 years old now, came into this courtroom and testified, and everything she said to this jury, they were lies?

A: The story was her mother's. She's—

Q: I'm asking you a question.

A: The story is a lie.

Q: Okay. And so [T.B.] is also out to get you along with the officer; is that right?

A: I don't know about any officer being out to get me.

Q: You said he lies too on the stand.

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<sup>1</sup> Dean Smith was called by the State to testify regarding noises he heard on the evening of May 7<sup>th</sup> and his observations of someone he believe to be the Mr. Davis going to a car and leaving the area. RP 385-93.

A: I don't even know how to answer a question like that.

RP 484.

The improper use of these so-called "liar" questions led to reversal in State v. Padilla, because "the case essentially turned on the credibility of the two witnesses. In such a swearing contest, the likelihood of the jury's verdict being affected by improper questioning is substantial." 69 Wn.App. 295, 302, 846 P.2d 564 (1993). Forcing the defendant into the role of accuser turns a close case against the defendant. State v. Suarez-Bravo, 72 Wn.App. 359, 366-68, 864 P.2d 426 (1994). Mr. Davis contends this too was such a case.

c. The prosecutorial misconduct in this case was so flagrant and ill-intentioned as to warrant appellate relief. An objection to prosecutorial improprieties is generally waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 666, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the misconduct may be addressed for the first time on appeal when it was so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its

effect.” Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

In Mr. Davis’s case, defense counsel did not object to the improper lines of questioning. Nevertheless, the issue is properly considered for the first time in this Court as the questioning was so “flagrant and ill-intentioned” as to irrevocably prejudice the jury against Mr. Davis, and very likely affect the verdict, thus contravening Mr. Davis’s right to due process of law and a fair trial. RAP 2.5(a)(3).

d. These flagrantly improper lines of inquiry compromised Mr. Davis’ right to a fair trial. This form of improper conduct by a prosecutor “may deprive the defendant of fair trial. And only a fair trial is a constitutional trial.” State v. Charlton, 90 Wn.2d 657, 665, 585, P.2d 142 (1978) (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Even where the improper comments or questions were not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that

no jury instruction would have cured the problem. Belgarde, 110 Wn.2d at 507.

In Mr. Davis's trial, the prosecutor's improper inquiry regarding his failure to produce evidence and repeated efforts to force him to characterize the officers and complaining witness as "liars" served to mislead the jury and shift the burden of proof contrary to clearly established constitutional standards in Washington. The prejudicial effect of the misconduct is particularly significant here where the jury was called upon to evaluate conflicting testimony. Compare Padilla, 69 Wn.App. at 302. As a result, the improper comments could not be alleviated by a curative instruction, i.e., a "bell once rung cannot be unrung." State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996); State v. Trickel, 16 Wn.App. 18, 30, 553 P.2d 139 (1976), rev. denied, 88 Wn.2d 1004 (1977). Because the misconduct directly implicated Mr. Davis's constitutional rights, the prosecutor must demonstrate the error was harmless beyond a reasonable doubt. Easter, at 242; Belgarde, 110 Wn.2d at 508. Because the flagrant misconduct of the prosecutor denied Mr. Davis a fair trial, reversal of his tainted convictions arising out of the May 7<sup>th</sup> allegations is required.

2. EVIDENCE IN SUPPORT OF THE UNLAWFUL IMPRISONMENT CHARGE WAS CONSTITUTIONALLY INSUFFICIENT TO SUSTAIN CONVICTION.

a. Evidence of legally cognizable restraint was required. Mr. Davis was charged in Count V of the amended information with unlawful imprisonment of T.B. CP 3.<sup>2</sup> RCW 9A.40.040 provides that “[a] person is guilty of unlawful imprisonment if he knowingly restrains another person.” Mr. Davis contends here, as he did at trial, that there was not any significant interference with T.B.’s liberty which was necessary to establish restraint. RP 544-47.

b. Due process requires proof beyond a reasonable doubt of every element of the crime. Due process requires a defendant in a criminal case be convicted only upon proof beyond a reasonable doubt of every element of the charged crime. U.S. Const. amend. 14,<sup>3</sup> Const. art. 1, §§ 3, 21, 22;<sup>4</sup> Jackson v. Virginia,

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<sup>2</sup> The amended information charged:

COUNT V: UNLAWFUL IMPRISONMENT, committed as follows: That the defendant, ANTHONY D. DAVIS, in the State of Washington on or about May 07, 2004, did knowingly restrain [T.B.], and the crime was aggravated by the following circumstance: the defendant knew and should have known that the victim was particularly vulnerable and incapable of resistance due to extreme youth, as provided by RCW 9.94A.535(2)(b).

<sup>3</sup> The Fourteenth Amendment provides in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law;”

443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970); In re Winship, 397 U.S. 358, 365-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In reviewing the sufficiency of the evidence on appeal, the court determines if, looking at the evidence in the light most favorable to the State, a rational trier of fact could have found every element of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In order to support a conviction for unlawful imprisonment, the prosecutor must prove the defendant “knowingly restrain[ed] another person.” RCW 9A.40.040. The essence of this allegation is the restraint and a “person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in place of his lawful choice.” Bender v. City of Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983) quoting Kilcup v. McManus, 64 Wn.2d 771, 777, 394 P.2d 375 (1964) (discussing restraint in the context of false arrest and imprisonment actions). This restraint may be accomplished by physical force, threat of force or conduct reasonably implying that force would be used. Id.

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<sup>4</sup> Washington Constitution Art. I, § 3 provides that “No person shall be deprived of life, liberty, or property, without due process of law. WA Const Art I, § 21 provides that “The right of trial by jury shall remain inviolate....” WA Const Art I, § 22 details specific procedural rights of persons accused of committing crimes.

The prosecutor included a number of unlawful imprisonment allegations as to Ms. Dewey that were rejected by the jury. The jury did, however, return a guilty verdict on Count V, unlawful imprisonment of T.B., which Mr. Davis contends was not supported by constitutionally sufficient evidence.

c. Evidence was insufficient to establish restraint. In her closing argument, the deputy prosecutor identified a variety of acts she believed would support the unlawful imprisonment allegation:

When Bobbi Dewey asked her daughter to go to the neighbors for help, [Mr. Davis] physically reached out and restrained that little girl from going. He kept those two people in that apartment against their will. He told them where to go, what to do, "Sit down there," "Don't talk," "Don't cry," "Don't react to the trauma around you."

And, if you recall when Bobbi Dewey moved off that little ottoman where they were told to sit and stay and she picked up some glass, what does Mr. Davis do? He followed her into the kitchen. And where did she say he was standing when they were sitting on that ottoman? Right in front of them, and, had there been an opportunity to run for that door, do you think they would have tried? They were in fear for their lives. There was one person in control of that situation, and that was Mr. Davis.

And Bobbi told you how she tried to calm him down. All she wanted was to get out of this alive, calm him down, get him to leave. And the neighbor's testimony directly corroborates that. He didn't hear her voice screaming at him. He heard just the defendant's voice yelling, and she did everything she could to keep her and her daughter safe as possible, but he restrained those two people in that apartment,

and the first time they had an opportunity to get help, she made that phone call. He purposely restricted their movements because he did not want anyone to stop him.

....

Mr. Davis used physical force, and he used intimidation, and these two people, Bobbi Dewey and her little girl, were afraid to do anything but what he told them to do. When he said, go sit there, they did. When he ordered [T.B.] to go back to her room, she did. When she had to go to the bathroom, what does she do? She asks permission. They did not have the freedom to leave that apartment, and that is why you can find him guilty of second degree assault because he had the intent to keep them in that apartment until his rage had ended and he was ready to go.

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The jury rejected exactly this prosecutorial theory regarding the felony assault allegations based on intent to commit unlawful imprisonment. CP 46, 48-49. In light of this categorical rejection of the State's nebulous theory of restraint as being "not free to wander," it is uncertain what the jury might have based its verdict as to T.B. in Count V. As was noted elsewhere, T.B. felt free to leave the bedroom and use the bathroom. Movement within an apartment, as described here, was has already been found to be insufficient to support conviction. State v. Kinchen, 92 Wn.App. 442, 963 P.2d 928 (1998) (children had access to phone, given food, access to bathroom, etc.)

For purposes of establishing “knowing restraint of another,” a substantial interference with another’s liberty sufficient to constitute such restraint occurs when, considering the context of the event, a real or material interference occurs as opposed to a slight inconvenience or petty annoyance. State v. Robinson, 20 Wn.App. 882, 582 P.2d 580 (1978), affirmed 92 Wn.2d 357, 597 P.2d 892 (1979). Sending T.B. to another room out of prudence is the form of inconvenience that does not rise to the level of a criminal offense. Whatever physical contact may have occurred between T.B. and Mr. Davis, it did not present the material interference required by the law.

d. Reversal is the appropriate remedy. Where the prosecution fails to present sufficient evidence to support a conviction, the appropriate remedy is to reverse with directions to dismiss the charge. State v. Spruell, 57 Wn.App. 383, 788 P.2d 21 (1990). Anything less runs contrary to the constitutional bar against double jeopardy. Burks v. United States, 437 U.S. 1, 98 S.Ct 2141, 57 L.Ed.2d 1 (1978).

3. THE EXCEPTIONAL SENTENCING PROVISIONS OF THE SRA WERE UNCONSTITUTIONAL AND NEITHER THE COURT NOR THE PARTIES HAD THE AUTHORITY TO PERMIT TRIAL OR IMPOSITION OF AN EXCEPTIONAL SENTENCE.

a. The exceptional sentence provisions of the SRA requiring the trial court to find aggravating facts by a preponderance of the evidence were unconstitutional. RCW 9.94A.535, as it existed at the time of the alleged offense, at trial and sentencing, permitted the court to impose a sentence beyond the standard range only after it found “substantial and compelling reasons justifying” an exceptional sentence. The statute further required that “[w]henver a sentence outside the standard sentence range is imposed the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.525. The statute explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial or during a separate sentencing phase. State v. Hughes, 154 Wn.2d 118, 149, 11 P.3d 192 (2005).

In Blakely v. Washington, however, the United States Supreme Court held the exceptional sentence procedures dictated

by the SRA that required the sentencing judge to find certain aggravating facts by a preponderance of the evidence violated the Sixth Amendment right to jury. 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In the face of an express directive from the Legislature to utilize a procedure that would be unconstitutional, the trial court chose to pose the factual questions to the jury by special interrogatory.

b. Neither the court nor the parties had the authority to alter the procedures dictated by the SRA. The Washington Supreme Court held that the exceptional sentence provisions of the SRA are facially constitutional, but recognized that various exceptional sentences imposed under those procedures violated the accuseds' Sixth Amendment rights. State v. Hughes, 154 Wn.2d at 126. Having made that determination, the Supreme Court went on to note that "no procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after appeal." Id. at 149.

The Court observed that it had "consistently held that the fixing of legal punishments for criminal offenses is a legislative

function.” Id. (quoting State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986)). “[I]t is the function of the legislature and not of the judiciary to alter the sentencing process.” Id. (quoting State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975)). The Court ultimately concluded, “[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.” State v. Hughes, 154 Wn.2d at 150.

In Mr. Davis’s case, the trial court sought to avoid the constitutional infirmity of the SRA’s exceptional sentence procedures by posing a special interrogatory to the jury regarding the potential aggravating factor. CP 39.<sup>5</sup> As Hughes subsequently made clear, however, neither the courts nor the parties can grant provide this authority where it is contrary to the specific dictates of the Legislature. 154 Wn.2d at 150 (citing State v. Martin, 94 Wn.2d 1, 9, 614 P.2d 164 (1980); State v. Frampton, 95 Wn.2d 469, 476-

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<sup>5</sup> The instruction provided in pertinent part:

79, 627 P.2d 922 (1981) (request for new procedure should be directed to the legislature).

Faced with the legislature's omission, we concluded that we did "not have the power to read into the statute that which we may believe the legislature has omitted, be it an intentional or inadvertent omission... it would be a clear judicial usurpation of legislative power for us to correct that legislative oversight."

Hughes, 154 Wn.2d at 150 (quoting Martin, 94 Wn.2d at 8) (emphasis added).

This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such finds to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Hughes, 154 Wn.2d at 151-52. The creation and implementation of the sentencing procedures used here was no less a usurpation and beyond the authority of the trial court.

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If you find that the State has proved beyond a reasonable doubt that the defendant knew or should have known that the victim was particularly vulnerable and incapable of resistance due to extreme youth when the crime of UNLAWFUL IMPRISONMENT, as charged in Count V, was committed, it will be your duty to answer the special verdict "yes".

CP 39.

c. The parties didn't have the power to stipulate to new exceptional sentencing procedures. A defendant simply "cannot empower a sentencing court to exceed its statutory authorizations." In the Matter of the PRP of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005) (quoting State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980)). Mr. Davis's potential acquiescence to instructing the jury on the aggravating factor does not alter the result that the court lacked the authority to convene such a procedure. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 619 (2002).

The error here was a "legal error," not merely a matter of the exercise of judicial discretion. "[W]aiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence." West, 154 Wn.2d at 213 (quoting Goodwin, 146 Wn.2d at 874). Such waiver would not preclude appellate review. Neither would the doctrine of invited error bar review. Washington courts have held that even where a defendant clearly invited the challenged sentence by participating in the plea agreement, to the extent that he or she "can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review. State v. Phelps, 113 Wn.App. 347, 354, 57 P.3d

624 (2002); State v. Gronnert, 122 Wn.App. 214, 224-25, 93 P.3d 200 (2004).

d. This court must vacate the exceptional sentence and remand a sentence within the standard range. Because the sentencing court did not have the authority to charge the jury with the fact-finding prior to the imposition of an exceptional sentence, the sentence as to Count V in this case cannot stand. In the absence of a statutorily prescribed sentencing mechanism that is constitutionally sound, the parties were similarly powerless to give the sentencing court authority vested elsewhere by the Legislature. Without a valid mechanism to impose an exceptional sentence at the time of Mr. Davis's offense, the superior court was without authority to impose the exceptional sentence herein.

F. CONCLUSION.

For the reasons stated herein, Mr. Davis respectfully requests this Court reverse his conviction and sentence and remand the case for further proceedings in the superior court as appropriate.

DATED this 21st day of July 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

DAVID L. DONNAN (19271)  
Washington Appellate Project (91052)  
Attorneys for Appellant

IN THE COURT OF APPEALS IN THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	COA NO. 23834-2-III
v.	)	
	)	
ANTHONY DAVIS,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF JULY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN KORSMO, DPA  
SPOKANE COUNTY PROSECUTOR'S OFFICE  
1100 W. MALLON AVENUE  
SPOKANE, WA 99260-0270

[X] ANTHONY DAVIS  
SPOKANE COUNTY JAIL  
1116 W. BROADWAY  
SPOKANE, WA 99260

**SIGNED** IN SEATTLE, WASHINGTON, THIS 21<sup>ST</sup> DAY OF JULY, 2005.

X \_\_\_\_\_ 

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FILED