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Sup. Ct. No. _____
(CoA 23834-2-III and
24313-3-III)

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CLERK OF SUPREME COURT
STATE OF WASHINGTON
WA

SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY D. DAVIS,

Appellant/Petitioner.

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In the Office of the Clerk of Court
Washington Court of Appeals, Division Three
By _____

In re Personal Restraint of:

ANTHONY DION DAVIS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner, ANTHONY D. DAVIS, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals opinion in the direct appeal of his criminal conviction and appeal in State v. Davis, CoA 23834-2-III, and consolidated personal restraint petition in CoA 24313-3-III, dated May 23, 2006. (A copy of the Court of Appeals decision is attached hereto as Appendix A.) The Court of Appeals granted a motion to publish its opinion by order dated June 29, 2006. (The Order Granting Motion to Publish is attached hereto as Appendix B.)

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals opinion is contrary to this Court's decisions Hughes,¹ Martin,² and Frampton,³ where the Court of Appeals held that the trial court had the authority, prior to the enactment of the so-called Blakely fix legislation, pursuant to RCW 2.28.150 and CrR 6.16(b), to submit a special sentencing

¹ State v. Hughes, 154 Wn.2d 118, 11 P.3d 192 (2005).

² State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980).

interrogatory to the jury despite the sentencing statutes at the time specifically directing the trial court to make any such findings in support of an exceptional sentence?

2. Whether the prosecutor's repeated efforts to pursue impermissible lines of questioning which sought to shift the burden of proof and obscure the jury's obligations was so flagrant as to warrant appellate relief and the Court of Appeals opinion was, therefore, contrary to this Court's decisions in Belgarde,⁴ Huson, Reed, and Easter⁵ and his constitutional right to due process of law that review is warranted?

3. Whether the Court of Appeals opinion there was sufficient evidence to support a conviction for unlawful imprisonment is contrary to the constitutional standards dictated by In re Winship,⁶ and Bender v. Seattle?⁷

4. Whether the Court of Appeals opinion that a police officer's telephone conversation with Mr. Davis was not subject to the protections of the Fifth and Sixth Amendments was contrary to the decisions in Miranda,⁸ his constitutional right to counsel, and

³ State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

⁴ State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).

⁵ State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).

⁶ In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

⁷ Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983).

⁸ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

the procedures dictated by CrR 3.5 and 4.5?

5. Mr. Davis seeks review of that portion of the Court of Appeals opinion rejecting his challenge to the trial court's sentencing authority to extend his probation to three years, to be served under the Department of Corrections and requiring a drug and alcohol evaluation as part of his community custody, as exceeding the authority of the provided by the Legislature and violating his constitutional right to due process of law?

D. STATEMENT OF THE CASE

Mr. Davis was convicted of several felony and misdemeanor offenses arising from an alleged domestic violence incident involving his girlfriend and daughter. CP 45-53. Mr. Davis denied the allegations, testifying he was not present at the time. RP 441-42, 448, 475. The testimony in support of the allegations and Mr. Davis' defense is detailed in the Appellant's Opening Brief (AOB) at 4 to 7 and in the Court of Appeals slip opinion at 2-3, which is hereby incorporated by reference.

(1966).

E. ARGUMENT

1. THE EXCEPTIONAL SENTENCE IMPOSED BASED ON AN INTERROGETORY TO THE JURY PRIOR TO THE ENACTMENT OF BLAKELY-FIX LEGISLATION WAS UNCONSITTUIONAL AND CONTRARY TO THIS COURTS DECISIONS IN *HUGHES*, *FRAMPTON* AND *MARTIN*

On the date of Mr. Davis' alleged offense, and at the time he was tried, the Sentencing Reform Act (SRA) explicitly required the trial court considering the imposition of an exceptional sentence to make the any supporting factual finding. RCW 9.94A.535 (2004). Because the trial occurred after the decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), in which the United States Supreme Court found these provisions of the SRA unconstitutional, the trial court gave a special interrogatory to the jury inquiring whether the victim of the unlawful imprisonment allegation was "particularly vulnerable" and thereafter imposed an exceptional sentence. CP 55, 63; 1/25/05RP 19-25.

On appeal, Mr. Davis challenged the authority of the trial court to create and impose such a procedure in light of clearly contrary legislative direction and this Court's decision in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). The Court of Appeals opined, however, that Hughes was limited to remedies on

remand for those cases before the Court and that the trial court here had the general authority under RCW 2.28.150 and CrR 6.16(b) to develop and implement its own sentencing procedures notwithstanding the contrary Legislative directives in effect at the time. Slip op at 12-13. This Court should accept review because the opinion was contrary to the clear holding of Hughes, Martin, and Frampton, and raises significant questions of constitutional law and the inherent authority of the courts.

a. Hughes was not limited to the question of powers on remand. The Court of Appeals improperly reads Hughes as only relevant to the appropriate remedy in those cases on remand, but in reaching its conclusion this Court specifically construed the same statute at issue here and reached the conclusion that the statute, former RCW 9.94A.535 (2004), “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**, during a separate sentencing phase, or on remand.” 154 Wn.2d at 148-49 (emphasis added). That interpretation of the same statute at issue here is not irrelevant simply because they occurred at different times. The same statutory language Hughes found unequivocally directed the trial judge and only the trial judge to

make findings on aggravating factors still only authorized the trial judge to make such findings here.

Another holding of Hughes which transcends the limits of few cases involved is the Court's holding that Blakely and former RCW 9.94A.535 (2004) together present a situation "distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure." 154 Wn.2d at 151.

b. Neither RCW 2.28.150 nor CrR 6.16 could provide authority in light of contrary Legislative directives in the SRA. The Court of Appeals erroneously relied on RCW 2.28.150 and CrR 6.16 to provide authority to go outside the statutory limits of former RCW 9.94A.535 (2004). RCW 2.28.150 provides:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given, and the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

CrR 6.16 provides that a trial court "may submit to the jury forms for such special findings which may be required or authorized by law."

The Court of Appeals held that the trial court had the

authority to “submit forms to the jury for special findings” under CrR 6.16 and that the procedure used was proper under RCW 2.28.150 because “[a]t the time of Mr. Davis’s trial, there was no specific procedure for imposing an exceptional sentence,” so the court could properly fashion one. Slip op at 13.

The problem with this view is clear from the plain language of the statute and rule. The rule only allows the trial court to submit forms to the jury to make “such special findings which *may be required or authorized by law.*” CrR 6.16 (emphasis added). But there is no applicable law requiring or authorizing a jury to make findings on aggravating circumstances to support use of the rule here. Former RCW 9.94A.535 (2004) did not authorize submitting the issue to the jury. Hughes made clear the statute directed the judge to find the aggravating factors. 154 Wn.2d at 151.

Furthermore, RCW 2.28.150 applies only if the “course of proceeding is not specifically pointed out by statute.” The statute only allows “the courts to adopt suitable procedures to effect their jurisdiction when no procedures are specifically provided.” In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Where the statute is being applied in a situation involving deprivation of a

liberty interest, the statute is strictly construed. Id.⁶

Hughes specifically declared that the very same statutory sentencing scheme at issue here was a “situation. . . distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure.” 154 Wn.2d at 151. In fact, Hughes specifically rejected Division One’s opinion on this point in State v. Harris, 123 Wn.App. 906, 922-26, 99 P.3d 902 (2004), overruled by Hughes, 154 Wn.2d at 153 n. 16. In Harris, Division One held RCW 2.28.150 and CrR 6.16, “envison situations in which the superior courts will use procedures that are not specifically prescribed by statute.” 123 Wn.App. at 923-24. The court then cited cases such as State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), in which this Court held that a statute which did not provide for a jury trial for determining “habitual criminal status” would be unconstitutional and thereafter directed such a procedure. Harris, 123 Wn.App. at 925.

⁶ In State v. Nelson, the Court of Appeals held that, although the superior court had jurisdiction to impose restitution, it could not rely on RCW 2.28.150 to order the defendant’s property sold to pay the restitution. 53 Wn.App. 128, 134-35, 766 P.2d 471 (1988). RCW 2.28.150 did not apply, because the relevant restitution statutes specifically provided a “course of proceeding” by providing that a court could either confine a defendant or modify monetary payments or community service obligations. Id. at 135. The Court went on to find that, even if RCW 2.28.150 was applicable, executing against personal property in order to pay a restitution order was not “most conformable to the spirit of the laws,” as the statute also required. Id. at 135-36.

The Harris Court also found decisions such as Martin and Frampton inapplicable because the statutes in those cases provided no procedure at all for imposing a death penalty on someone who pled guilty. 123 Wn.App. at 926 n.57. In contrast, Harris noted the exceptional sentencing statutes “provide both a penalty and an implementing procedure.” Id. As a result, Division One found “no doubt here, as there was in Frampton and Martin, regarding the Legislature’s intent to provide a procedure.” Id. The Court concluded that in effect, the Blakely decision had have rewritten the statute and eliminated the relevant procedure, which the court could then provide by using the general authority of RCW 2.28.150 and CrR 6.16. 123 Wn.App. at 926-27.

In specifically overruling Harris, Hughes indicated that former RCW 9.94A.535 (2004) was not “silent or ambiguous” as to whether the jury or judge was authorized to find aggravating factors to support an exceptional sentence. 154 Wn.2d at 151. The Court went on:

We recognize that Division One of the Court of Appeals came to the opposite conclusion in State v. Harris. . . However, we disagree with that conclusion as well as the court’s reasoning supporting it - that because there is nothing in the statute to prohibit the procedure and because trial courts have some inherent authority to imply procedures where they are absent, that we could do so here in the face of

legislative intent to the contrary. We reach the opposite conclusion.

154 Wn.2d at 151 n.16.

Thus, this Court has already rejected the very same reasoning used by the court in Mr. Davis' cases. This Court has already rejected the idea that former RCW 9.94A.535 (2004) did not specifically point out a "course of proceeding" so that RCW 2.28.150 applies. This Court has also already implicitly rejected the idea that the fact that Blakely invalidated that "course of proceeding" as unconstitutional somehow removed the proceeding from the statute and created the authority for a court to act under RCW 2.28.150 and CrR 6.16.

Further, this Court has held that Martin and Frampton and similar cases *are* relevant and applicable to interpretation of the scope of former RCW 9.94A.535 (2004). Hughes, 154 Wn.2d at 150-51. Hughes *specifically relied* on those cases and their holdings about the prohibition against judicial creation of procedure not contained in a statute "for the sole purpose of rescuing a statute from a charge of unconstitutionality." 154 Wn.2d at 150-51, quoting, Martin, 94 Wn.2d at 18 (Horowitz, J., concurring).

Notably, the Hughes Court's application of those cases, and its rejection of the arguments in Harris, makes it clear that the

holdings of Martin, Frampton and similar cases are not limited in their application to cases where a statute provided for a procedure but had a “hole” in it somewhere. Hughes establishes that those cases also apply where, as here, the procedure was all-encompassing, but constitutionally infirm. In both situations, the Legislature has written a statute, either without anticipating a need or without anticipating that it would later be found unconstitutional. In both situations, the trial court does not have the authority to add to or amend the statute to patch the hole, regardless whether that hole was created by Legislative oversight or subsequent judicial decision.

Former RCW 9.94A.535 (2004) did not provide a procedure to use in the event the procedure it required was found constitutionally infirm. The statute clearly and unequivocally directed only to the trial court to make findings of fact regarding the aggravating factors necessary to support an exceptional sentence. Washington courts have repeatedly refused to expand the scope of a trial court’s authority beyond statutory limits, even in circumstances where exceptional sentences have been involved.⁹

⁹ See, State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (reversing order because it exceeded the court’s statutory authority); State v. Akin, 77 Wn. App. 575, 892 P.2d 774 (1995) (reversing juvenile sentences where the court exceeded its statutory authority by recommending work ethic camp

As Hughes made clear, neither the courts nor the parties can grant this authority where it is contrary to the specific dictates of the Legislature. 154 Wn.2d at 150, citing Martin, 94 Wn.2d at 9; Frampton, 95 Wn.2d at 476-79.

The trial court's use of such a statutorily unauthorized procedure was improper, in violation of the separation of powers doctrine¹⁰ and constitutional right to due process of law. This Court should therefore grant review and reverse.

2. THE COURT OF APPEALS OPINION THAT IMPROPER QUESTIONING BY THE PROSECUTOR WAS NOT SO FLAGRANT AS TO WARRANT RELIEF WAS CONTRARY TO THE DECISIONS OF THIS COURT AND THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

Mr. Davis identified several lines of inquiry by the prosecutor he contends were improper and so flagrant as to warrant appellate relief. The first area was the prosecutor's implication that Mr. Davis had an obligation to produce witnesses to rebut the State's allegations. RP 465-66, 477-78. The second was the prosecutor's effort to have Mr. Davis testify that other witnesses were lying. CP

without statutory authority); State v. Paine, 69 Wn.App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993) (reversing exceptional sentence because the court had exceeded its statutory authority in ordering it); State v. Theroff, 33 Wn.App. 741, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983) (reversing the sentencing order requiring a payment to a charity as a condition of probation as outside the court's statutory authority).

478-79, 483-84. Each of these forms of inquiry are prohibited because of the likelihood they may infect the jury's consideration of the case and where there is a "substantial likelihood" then relief may be required. State v. Reed, 102 Wn.2d 140, 145-48, 684 P.2d 699 (1984).

The repeated implication that Mr. Davis had an obligation to present evidence or other witness testimony in support of his defense, and the Court of Appeals approval of those actions, is contrary to this Court's decisions defining the scope of the missing witness doctrine. State v. Blair, 117 Wn.2d 479, 488-91, 816 P.2d 718 (1991); State v. Davis, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968). Questions directed at compelling Mr. Davis to comment on other witnesses' testimony and say that they must be lying are equally improper. State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995); State v. Padilla, 69 Wn.App. 295, 302, 846 P.2d 564 (1993).

These improper lines of inquiry are significant because they directly compromise Mr. Davis' ability to obtain a fair trial, "[a]nd 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,

¹⁰ "To create such a procedure out of whole cloth would be to usurp the power of the legislature." Hughes, 154 Wn.2d at 150.

298 P.2d 500 (1956); U.S. Const. Amend 5, 14; WA Const., Art 1, § 3. Even in the absence of an objection at trial, these multiple lines of improper questioning presented a substantial likelihood of affecting the verdict and therefore call for relief upon further review by this Court. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988); State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).

3. THE COURT OF APPEALS OPINION THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR UNLAWFUL IMPRISONMENT IS CONTRARY TO THE CONSTITUTIONAL STANDARDS DICTATED BY IN RE WINSHIP

Mr. Davis has contended throughout these proceedings that there was insufficient evidence of any significant interference with T.B.'s liberty as required to sustain a conviction for unlawful imprisonment. RP 544-47. The testimony established that T.B. felt free to move around within the apartment in a manner inconsistent with the degree of restraint required by the statute and previously dictated by this Court. Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983); Kilcup v. McManus, 64 Wn.2d 771, 777, 394 P.2d 375 (1964).

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;¹¹ Const. art. 1, §§ 3, 21, 22;¹² Jackson v. Virginia, 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). The evidence presented, however, failed to establish the substantial interference particularly in light of the jury's rejection of core aspects of the prosecution's theory at trial. State v. Kinchen, 92 Wn.App. 442, 963 P.2d 928 (1998); State v. Robinson, 20 Wn.App. 882, 582 P.2d 580 (1978), affirmed, 92 Wn.2d 357, 597 P.2d 892 (1979). Mr. Davis requests this Court accept review, therefore, in order to address the constitutionally deficient quantum or proof presented to support his conviction for unlawful imprisonment.

4. THE COURT OF APPEALS OPINION THAT A POLICE OFFICER'S TELEPHONE CONVERSATION WITH MR. DAVIS WAS NOT SUBJECT TO THE PROTECTIONS OF THE FIFTH AND SIXTH AMENDMENTS WAS CONTRARY TO MIRANDA, VIOLATED HIS CONSTITUTIONAL RIGHT TO COUNSEL, AND THE PROCEDURES DICTATED BY CrR 3.5

In his Statement of Additional Grounds challenged the use of his statements, obtained and admitted into evidence in violation

¹¹ The Fourteenth Amendment provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

¹² 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

of his constitutional right to remain silent and be provided counsel. U.S. Const. Amend. 5, 6, 14. Statement of Additional Grounds at 1-3, citing RP 276-300 (incorporated herein by reference). Mr. Davis contends the courts have erred by allowing portions of statements made in the context of his invocation of his right to remain silent after requesting counsel, contrary to, inter alia, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and Dickerson v. United States, 530 U.S. 428, 147 L.Ed.2d 405, 120 S.Ct. 2326 (2000). The failure to respect these important rights secured by both the right to silence and the right to counsel present significant constitutional questions that warrant further review by this Court.

Mr. Davis separately argued that the failure to timely comply with the requirements of CrR 3.5 and 4.5 prejudiced his defense and compromised his right to a fair trial. The legitimacy of this practice in his case and other criminal prosecutions presents an issue of substantial public importance warranting review by this Court.

I, § 22 details specific procedural rights of those accused of committing crimes.

5. THE SENTENCING COURT'S AUTHORITY WAS LIMITED BY STATUTE AND DID NOT PERMIT THE EXTENSION OF HIS PROBATION TO THREE YEARS, TO BE SERVED UNDER DOC SUPERVISION, OR TO REQUIRE A DRUG AND ALCOHOL EVALUATION AS PART OF HIS COMMUNITY CUSTODY, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

In his personal restraint petition Mr. Davis challenged the sentencing court's authority to order drug and alcohol evaluation as part of his community custody challenged the trial court's authority to impose a drug and alcohol evaluation requirement as part of his community custody, the requirement that he serve his misdemeanor sentences under the supervision of DOC. Where the sentencing court exceeds the authority provided by statute, it violates Mr. Davis' right to due process of law. See e.g. In re Benninghoven, 110 Wn.2d 86, 88; 749 P.2d 1302 (1988). For the reasons outlined in Mr. Davis' petition, he contends the sentencing court exceeded the authority provided to it by the Legislature. He requests, therefore that this Court accept review and provided the relief he has requested.

F. CONCLUSION

Mr. Davis requests this Court grant review, reverse his conviction and order a new trial.

DATED this 29th day of July 2006.

Respectfully submitted,

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

David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Petitioner

FILED

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MAY 23 2006

MAY 25 2006

Washington Appellate Project

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 23834-2-III
	)	No. 24313-3-III
Respondent,)	
)	
v.)	
)	
ANTHONY D. DAVIS,)	
)	
Appellant.	)	Division Three
<u>In re Personal Restraint of:</u>)	
)	
ANTHONY DION DAVIS,)	
)	
Petitioner.	)	UNPUBLISHED OPINION

KATO, J. — Anthony Davis was convicted of harassment, unlawful imprisonment, third degree malicious mischief, two counts of fourth degree assault, and violation of a domestic violence protection order. Based on the jury's determination an aggravating factor existed, the court imposed an exceptional sentence on the unlawful imprisonment conviction. Claiming the prosecutor committed misconduct; the evidence did not support the conviction for unlawful imprisonment; and the court erred by imposing an exceptional sentence;

APPENDIX

No. 23834-2-III *State v. Davis*
No. 24313-3-III *PRP of Davis*

Mr. Davis appeals. His personal restraint petition was consolidated with this appeal. We affirm the convictions and dismiss the personal restraint petition.

Mr. Davis lived with his girl friend, Bobbi Dewey, and her seven-year-old daughter, T.B. On May 7, 2004, the couple had argued throughout the day in a series of telephone calls and e-mails.

Ms. Dewey and Mr. Davis arrived home that evening at the same time. T.B. went to her room. Mr. Davis undressed and got into bed, where he ate some dinner. Ms. Dewey was doing laundry. She needed to run a quick errand and asked Mr. Davis if he could watch T.B. while she was out. He refused. Ms. Dewey told him their relationship was not working and he had to move out in two weeks.

Mr. Davis called Ms. Dewey back to the bedroom, where he grabbed her neck and threw her across the room into a nightstand. Mr. Davis grabbed her throat and banged her head into the wall. He threw her into the frame of their iron rod bed and banged her head against the bars.

T.B. heard the commotion and came into the bedroom. Ms. Dewey told her to go for help, but Mr. Davis told her not to go anywhere. T.B. asked Mr. Davis not to hurt her mom. T.B. grabbed Mr. Davis's arm and as he pulled her down, she hit the wall. He threatened them and ordered them to go in the living room. There, he broke a picture frame and threatened to hurt Ms. Dewey.

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Mr. Davis and Ms. Dewey went back to their bedroom, where he broke a light. While picking up some glass, Ms. Dewey cut her hand. Mr. Davis realized she was hurt and helped her clean her wound. He got dressed and left.

Ms. Dewey called 911. Officers Tramell Taylor and Gordon Ennis responded to the apartment. Officer Taylor called Mr. Davis on his cell phone. Mr. Davis said he and Ms. Dewey had argued, but there was nothing wrong with her.

The State charged Mr. Davis by amended information with harassment, second degree assault, and unlawful imprisonment of Ms. Dewey as the victim. It also charged him with second degree assault and unlawful imprisonment of T.B. as the victim. Mr. Davis was charged with third degree malicious mischief and violation of a domestic violence criminal protection order as well. He was convicted of harassment, unlawful imprisonment, third degree malicious mischief, two counts of fourth degree assault (the lesser included offense to second degree assault), and violation of a domestic violence criminal protection order.

Along with the jury instructions, the court gave the jury a special interrogatory asking if Mr. Davis knew or should have known T.B. was particularly vulnerable and incapable of resistance due to extreme youth. The jury answered yes.

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The court imposed standard range sentences on all the convictions except the unlawful imprisonment of T.B. Based upon the jury's response to the special interrogatory, the court imposed an exceptional sentence for that conviction.

This appeal follows.

Mr. Davis asserts the prosecutor committed misconduct while cross-examining him, thus requiring reversal. To prevail on a claim of prosecutorial misconduct, the defendant must establish the impropriety of the conduct and a substantial likelihood the misconduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

Reversal is not required if the defendant did not request a curative instruction that would have obviated the error. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Mr. Davis did not object to any of the questions he now claims were misconduct. Failure to object to an improper remark constitutes a waiver of the error unless the remark is so flagrant and ill intentioned that it resulted in prejudice which could not have been neutralized by an instruction. *Id.* at 86. Only if there is a substantial likelihood the misconduct affected the verdict must a conviction be reversed. *Id.*

The first instance of claimed misconduct occurred when the prosecutor was cross-examining Mr. Davis about his alibi. He had testified he was at Chan's Dragon Inn at the time of the assault. The following exchange took place:

- Q. And the other staff people then, you know them because you go there?
- A. Certainly.
- 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 7th.
- A. You're saying, where are they now?
- Q. Where are they today?
- A. I'd imagine at work or somewhere at home. I don't know.
- Q. They're not here testifying?
- A. Absolutely not.
- Q. Now, it's been stated and in some other testimony that you might have a drinking problem. What would you say to that?
- A. Absolutely not.
- Q. Now, you also said, when you went to Chan's for your dinner, not in the bar, that you talked with friends. Who were they?
- A. Just people. They weren't friends. I said there were people that just was there at that time. It was sort of early is what I said, sort of early. None of the regulars were there. Like I said, I got there after 4:30 sometime, between 5 and 5:30, you know, the drive there. It wasn't people walking around.

Typically the folks that I know are going to be over in the lounge portion of it, not the restaurant.

Report of Proceedings (RP) at 465-66. Mr. Davis claims this exchange impermissibly shifted the burden of proof from the State to him.

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A prosecutor cannot imply a defendant has a duty to present exculpatory evidence. *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). A prosecutor may, however, argue reasonable inferences from the evidence presented and may attack a defendant's exculpatory theory. *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991); *Barrow*, 60 Wn. App. at 872-73. This includes questioning a defendant about the absence of a witness to corroborate an alibi. *State v. Contreras*, 57 Wn. App. 471, 473-75, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990).

Mr. Davis's defense was that he was at Chan's Dragon Inn when the assault occurred. But he presented no testimony corroborating this claim. The prosecutor was entitled to attack his alibi and committed no misconduct.

Mr. Davis also contends it was error for the prosecutor to ask him if witnesses were lying. A prosecutor commits misconduct when her cross examination is designed to compel a witness to express an opinion that another witness is lying. *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Questions asking the defendant if testimony was invented also constitutes misconduct. *State v. Neidigh*, 78 Wn. App. 71, 76, 895 P.2d 423 (1995). Such questions are irrelevant and could prejudice the defendant. *Id.* Moreover, asking one witness whether another is lying "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound

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reason.” *Id.* at 77 (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991)).

Misconduct is prejudicial only when, in context, there is a substantial likelihood it affected the jury’s verdict. *Id.* at 77. “Without a proper objection, request for a curative instruction, or motion for mistrial, the defendant cannot raise the issue of misconduct on appeal unless it was so flagrant and ill intentioned no curative instruction could have obviated the resulting prejudice.” *Id.* “Liar questions and comments are harmless if they ‘were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury.’” *Id.* (quoting *State v. Stover*, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), *review denied*, 120 Wn.2d 1025 (1993)).

The prosecutor asked Mr. Davis about his telephone conversation with a police officer. He and the officer had given different times for the call. The prosecutor said, “So what you’re telling the jury is that that officer lied under oath?” RP at 478. Mr. Davis replied he was just telling the jury what he knew and he was telling the truth.

The prosecutor also asked him about the testimony of a witness living in Ms. Dewey’s apartment building who had heard some noises that night and saw Mr. Davis leaving the area in his car. Claiming he was not in the area, Mr. Davis

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told the prosecutor the witness's testimony was creative. The prosecution asked if the witness lied under oath; Mr. Davis replied, "Absolutely." RP at 483.

The last instance occurred when the prosecutor asked Mr. Davis about T.B.'s testimony. The prosecutor asked him why T.B. made up lies. He replied that she did not lie, but just told her mother's story. He said the story was a lie.

Mr. Davis answered the improper questions. Only once did he agree the witness had lied. For the most part, he simply affirmed he was telling the truth. An objection and curative instruction would have cured any perceived problem, but neither was raised.

Mr. Davis counters that concerns as to these types of questions led to reversal of a conviction in *Padilla*, 69 Wn. App. at 302:

In the end, 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.

Mr. Davis's case also turned on the credibility of witnesses. But in *Padilla*, the defense made a timely objection, which was overruled, to the improper questioning. Here, defense counsel did not object. Because the improper questions could have been cured by an objection and a proper instruction, the misconduct was not so prejudicial as to require reversal.

Mr. Davis claims the evidence was insufficient to support his conviction of unlawfully imprisoning T.B. Evidence is sufficient to support a conviction if, when

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viewed in the light most favorable to the State, it permits any rational trier of fact to have found all the elements of the crime beyond a reasonable doubt. *State v. Atkins*, 130 Wn. App. 395, 401-02, 123 P.3d 126 (2005). When a defendant makes an insufficiency claim, he admits the truth of the State's evidence and all reasonable inferences are viewed in favor of the State and interpreted against the defendant. *State v. Beasley*, 126 Wn. App. 670, 689, 109 P.3d 849, *review denied*, 155 Wn.2d 1020 (2005). We further defer to the trier of fact on issues of credibility, because it is charged with resolving conflicting testimony, evaluating the credibility of witnesses, and generally weighing the persuasiveness of the evidence. *Id.*

"A person is guilty of unlawful imprisonment if he knowingly restrains another person." RCW 9A.40.040(1). Restrain means:

[t]o restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is without consent if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

RCW 9A.40.010(1).

The evidence showed that, upon hearing the commotion in her mother's bedroom, T.B. went to see what was happening. Ms. Dewey told her to go get

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help. Mr. Davis grabbed T.B.'s arm and pulled her to the ground. He then told her to go sit in the living room. T.B. testified she was scared and did not leave. This satisfies the definition of restraint.

Mr. Davis claims T.B. was not restrained because she was free to move around the apartment. He relies on *State v. Kinchen*, 92 Wn. App. 442, 963 P.2d 928 (1998). *Kinchen* involved a parent who was charged with unlawful imprisonment for locking his two sons in an apartment while he was at work. *Id.* at 444-48. The court found there was insufficient evidence to support an unlawful imprisonment conviction because the children had alternative ways to safely leave the apartment. *Id.* at 452.

Here, there were no alternative ways for T.B. to escape. She was able to move about the apartment after the initial altercation, but she was unable to leave and get help. *Kinchen* is inapplicable. The evidence was sufficient to support the conviction.

Mr. Davis next contends the court erred by giving the jury an interrogatory to determine whether an aggravating factor existed to justify an exceptional sentence. The propriety of judge-imposed exceptional sentences was scrutinized in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In *Blakely*, the U.S. Supreme Court held a defendant had a constitutional right to have a jury determine whether the factors permitting an

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exceptional sentence had been proven beyond a reasonable doubt. *Id.* at 301-02.

Here, the trial court gave a special interrogatory to the jury in compliance with *Blakely*, asking it to determine if the facts supported finding an aggravating factor. Mr. Davis challenges this procedure, claiming the court acted without authority in giving the special interrogatory. The legislature has since enacted this same procedure for a jury to determine the existence of an aggravating factor. LAWS OF 2005, ch. 68.

Mr. Davis relies solely on *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), to support his argument. In *Hughes*, our Supreme Court addressed several issues pertaining to *Blakely* and its effects on the exceptional sentence provisions of the Sentencing Reform Act of 1981, ch. 9.94A RCW. The court held the exceptional sentence provisions were still constitutional on their face. *Hughes*, 154 Wn.2d at 134.

In determining the proper remedy for an exceptional sentence violating *Blakely*, the *Hughes* court stated:

As RCW 9.94A.535 currently exists, it allows the court to impose a sentence beyond the standard range when it finds “substantial and compelling reasons justifying” an exceptional sentence. And the statute requires 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.535. It explicitly directs the trial

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court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand. Furthermore, advocates on each side either explicitly or impliedly concede 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 an appeal. To allow exceptional sentences here, we would need to imply a procedure by which to empanel juries on remand to find the necessary facts, which would be contrary to the explicit language of the statute.

Hughes, 154 Wn.2d at 148-49. Mr. Davis relies on this language to claim *Hughes* prohibited the empaneling of juries to determine whether an aggravating factor exists. But Mr. Davis ignores the limited holding of *Hughes*:

We are presented only with the question of the appropriate remedy on *remand*—we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial. But on this limited issue, we agree with petitioners and [the Washington Association of Criminal Defense Lawyers]. Where 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.

Hughes, 154 Wn.2d at 149-50. The trial court here gave a special interrogatory to the jury along with its general instructions at the close of the evidence. *Hughes* is inapplicable.

Mr. Davis contends the court lacked the authority to impose an exceptional sentence using the procedure it did. RCW 9.94A.535 indicates it is the court that must set forth the reasons for an exceptional sentence.

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RCW 2.28.150 provides that "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws." At the time of Mr. Davis's trial, there was no specific procedure for imposing an exceptional sentence. The court fashioned a process that conformed to the law.

CrR 6.16(b) provides the court with the authority to submit forms to the jury for special findings that are either required or authorized by law. This is precisely what the court did. RCW 9.94A.535 permitted the court to enter an exceptional sentence based upon aggravating factors it found to exist. But *Blakely* requires those aggravating factors to be found by a jury. Reading the statute and *Blakely* together, the court submitted a special interrogatory to the jury as to whether an aggravating factor existed. Based on the jury's affirmative answer to that interrogatory, the court found the existence of the aggravating factor and an exceptional sentence was warranted. There was no error.

Mr. Davis has also filed a statement of additional grounds for review. He argues his Fifth Amendment right to remain silent was violated because he was not given *Miranda* warnings prior to a phone conversation with a police officer. Officers must advise defendants of their right to counsel and their right against self-incrimination when "custodial interrogation" begins. U.S. CONST. amend. V.; WASH. CONST. art. I, § 9; *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602,

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16 L. Ed. 2d 694 (1966). "Custodial interrogation" is questioning initiated by police officers when a reasonable person would not feel at liberty to terminate the conversation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). The relevant inquiry is whether, under an objective standard, a reasonable person would believe he was in police custody based on the restriction of the suspect's freedom of movement at the time of questioning. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003).

Mr. Davis's conversation with the officer took place over a cell phone. He was not in the same location as the officer. He could have ended the call at any time. Because he was not in custody, *Miranda* warnings were not required.

Mr. Davis also asserts his right to counsel was violated when the officer continued to question him on the phone after being told he would not make any other statements without an attorney. "The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation." *State v. Stewart*, 113 Wn.2d 462, 478, 780 P.2d 844 (1989). Mr. Davis was not in custody. His Fifth Amendment right to counsel had not attached.

Without explanation, Mr. Davis claims the court's admission of his statements to the officer led to an unfair trial. He argues that because he challenged the officer's testimony and the prosecutor then improperly asked him

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to state whether the officer had lied under oath, his right to a fair trial was violated. Although the prosecutor's actions were improper, Mr. Davis does not show he was so prejudiced as to require reversal. Mr. Davis did not state the officer had lied; rather, he stood by his version of the conversation. This is no basis for reversal.

Mr. Davis also contends the CrR 3.5 hearing was conducted in violation of the rule because it was conducted on the second day of trial instead of before the trial started. He has not articulated why this procedure was prejudicial.

Mr. Davis claims the CrR 3.5 hearing was not the proper way to suppress this evidence because his statements were not a confession. CrR 3.5 applies to statements made by the defendant. The hearing was proper.

He further contends the State wanted the statements suppressed, but failed to submit its request in writing. But the record establishes Mr. Davis was the one who sought to have the statements suppressed. The statements made to the officer on the cell phone were properly the subject of the CrR 3.5 hearing. The procedure used by the court did not prejudice Mr. Davis and the admission of the statements was proper.

Mr. Davis claims the court erred because it did not conduct an omnibus hearing. CrR 4.5 requires the court to conduct such a hearing. One purpose of the hearing is to determine if there are any constitutional issues that need to be

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considered. CrR 4.5(c)(iv). Mr. Davis suggests that because he did not have an omnibus hearing, his constitutional rights with respect to the statements he made during the phone call were not addressed. But the court nevertheless considered these issues at the CrR 3.5 hearing. Reversal is not required.

Mr. Davis has also filed a personal restraint petition that has been consolidated with this appeal. To prevail on his personal restraint petition, he must show that a constitutional error actually and substantially prejudiced him or there was a nonconstitutional error causing a fundamental defect inherently resulting in a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005).

His first issue relates to the exceptional sentence. Aware of *Blakely* and its constraints on imposing exceptional sentences, the court used its discretion to give a special interrogatory to the jury to determine whether an aggravating factor supporting an exceptional sentence existed. The court complied with *Blakely*. There is no constitutional error.

Mr. Davis also contends the officer changed his testimony during the CrR 3.5 hearing. Review of the hearing testimony and trial testimony indicates the officer was consistent. Mr. Davis cannot meet the standard to prevail on his personal restraint petition.

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He next asserts he suffered substantial prejudice when the State amended the information to add five new charges. The State filed its amended information about five months after it filed its initial charges and two and a half months prior to trial. Amendments to an information are liberally allowed prior to trial. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). He shows no prejudice. There is no error.

Mr. Davis contends the court lacked the authority to impose a drug and alcohol evaluation as part of his community custody. A court's decision imposing these conditions is reviewed for an abuse of discretion. *State v. Williams*, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), *review denied*, 140 Wn.2d 1006 (2000).

The victim testified Mr. Davis had been drinking on the night of the incident. Given her statements, the court acted within its discretion to order an evaluation. The court did not err.

Mr. Davis claims the court revoked his driver's license as part of his sentence. But the record reflects his license was not revoked.

He takes issue with serving his probation on the misdemeanor sentences under the supervision of the Department of Corrections. This is permissible under RCW 9.95.204.

Mr. Davis also contests his serving three years probation instead of two. The court suspended his sentence on the four misdemeanor convictions, but

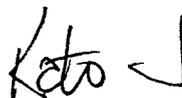
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ordered them to run consecutive to the felony sentences, the effect of which was to give Mr. Davis three years probation rather than two. So structuring his sentence was within the court's discretion. See RCW 9.92.060, .080.

Mr. Davis contends the court erred by revoking his bond. But he did not present any evidence relating to this issue. He fails to establish how the revocation of his bond affected his trial or his judgment and sentence.

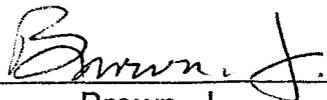
The convictions are affirmed and the personal restraint petition is dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

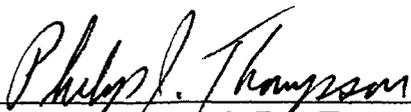


Kato, J.

WE CONCUR:



Brown, J.



Thompson, J. Pro Tem.

FILED

JUN 29 2006

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 23834-2-III
	)	No. 24313-3-III
Respondent,)	
)	
v.)	
)	
ANTHONY D. DAVIS,)	
	)	ORDER GRANTING
Appellant.	)	MOTION TO PUBLISH
)	
<hr/> In re Personal Restraint of:)	
)	
ANTHONY DION DAVIS,)	
)	
Petitioner.)	

THE COURT has considered respondent's motion to publish the court's opinion of May 23, 2006 and the record and file herein, and is of the opinion the motion to publish should be granted. Therefore,

IT IS HEREBY ORDERED that the opinion filed herein on May 23, 2006, be and it is hereby amended by changing the designation in the caption to read "PUBLISHED OPINION".

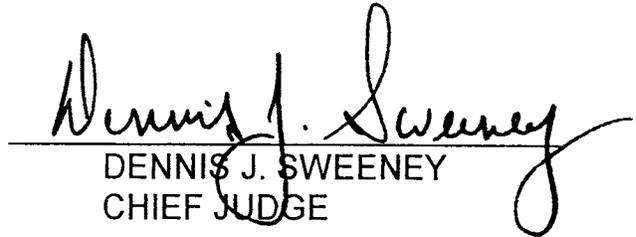
IT IS FURTHER ORDERED that the opinion is amended by deletion on page of the following paragraph in its entirety:

No. 23834-2-III *State v. Davis*
No. 24313-3-III *In re Pers. Restraint of Davis*

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040.

DATED: June 29, 2006

FOR THE COURT:


DENNIS J. SWEENEY
CHIEF JUDGE

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,)	
	)	COA NO. 23834-2-III
RESPONDENT,	)	<i>consolidated with</i> No. 24313-3-III
)	
v.)	
)	
ANTHONY DAVIS,)	
)	
APPELLANT.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 31ST DAY OF JULY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KEVIN MICHAEL KORSMO, SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260-0270	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2006.

X _____
me