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NO. 20927-0-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

OCTAVIO GONZALES-FLORES,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	iii
STATUTES	iii
RULES AND REGULATIONS	iv
OTHER AUTHORITIES	iv
IDENTITY OF PETITIONER	1
STATEMENT OF RELIEF SOUGHT	1
ISSUES PRESENTED FOR REVIEW.	1
STATEMENT OF THE CASE	1
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	5
CONCLUSION	17
APPENDIX "A"	

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 1596 L. Ed.2d 403 (2004)	1, 5, 14, 15
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004)	5, 13, 14
<i>Personal Restraint of Tortorelli</i> , 149 Wn. 2d 82, 93 (2003).....	10
<i>State v. Alkire</i> , 124 Wn. App. 169, 100 P.3d 837 (2004).....	16
<i>State v. Amezola</i> , 49 Wn. App. 78, 87, 741 P.2d 1024 (1987).....	9
<i>State v. Atkinson</i> , 75 Wn. App. 515, 878 P.2d 505 (1994)	11
<i>State v. Galisia</i> , 63 Wn. App. 833, 822 P.2d 303, <i>review denied</i> 119 Wn. 2d 1003, 832 P.2d 487 (1992).....	9
<i>State v. Green</i> , 94 Wn. 2d 216, 616 P.2d 628 (1980)	10
<i>State v. Hollis</i> , 93 Wn. App. 804, 970 P.2d 815, <i>review denied</i> , 137 Wn.2d 1038 (1990).....	1, 4, 5, 6, 8, 17
<i>State v. Hortman</i> , 76 Wn. App. 454, 886 P.2d 234, <i>review denied</i> , 126 Wn.2d 1025 (1995).....	17
<i>State v. Hughes</i> , 154 Wn.2d 118 (2005)	14
<i>State v. Hystad</i> , 36 Wn. App. 42, 49, 671 P.2d 793 (1983)	9
<i>State v. King</i> , 113 Wn. App. 243, 54 P.3d 1218 (2002).....	12
<i>State v. Kinneman</i> , 120 Wn. App. 327, 84 P.3d 882, <i>review denied</i> , 152 Wn.2d 1022 (2004).....	17
<i>State v. Landon</i> , 69 Wn. App. 83, 91, 848 P.2d 724 (1993)	9
<i>State v. Ose</i> , 156 Wn.2d 140 (2005)	16
<i>State v. Salinas</i> , 119 Wn. 2d 192, 829 P.2d 1068 (1992).....	10

<i>State v. Sanchez</i> , 69 Wn. App. 255, 848 P.2d 208, <i>review denied</i> , 122 Wn.2d 1007 (1993).....	17
<i>State v. VanWoerden</i> , 93 Wn. App. 110, 117, 967 P.2d 14 (1998).....	7
<i>State v. Werry</i> , 6 Wn. App. 540, 548, 494 P.2d 1002 (1972)	9

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment	1, 13, 17
---	-----------

STATUTES

RCW 9.94A.535.....	1, 15
RCW 9.94A.535(2)(e).....	15
RCW 9.94A.535(2)(e)(i).....	15
RCW 9.94A.535(2)(e)(ii).....	15
RCW 9.94A.535(2)(e)(iv).....	15
RCW 9.94A.535(2)(e)(v).....	15
RCW 9.94A.535(2)(i)	15
RCW 9.94A.589(1)	15
RCW 35.05.452(3).....	11
RCW 69.50.401(f).....	5, 6
RCW 69.50.505(5).....	11

RULES AND REGULATIONS

ER 801(d)(2)(v)..... 3, 10
RAP 13.4(b)(1)..... 17
RAP 13.4(b)(3)..... 17
RAP 13.4(b)(4)..... 17

OTHER AUTHORITIES

WEBSTER'S ENCYCLOPEDIA UNABRIDGED
DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)..... 7

1. IDENTITY OF PETITIONER

OCTAVIO GONZALES-FLORES requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Gonzales-Flores (“Octavio”) seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated August 1, 2006. (Appendix “A” 1-14)

3. ISSUES PRESENTED FOR REVIEW

a. Should the case of *State v. Hollis*, 93 Wn. App. 804, 970 P.2d 815, *review denied*, 137 Wn.2d 1038 (1990) be overruled on the basis of a strained interpretation of statutory language?

b. Was it harmless error to admit alleged co-conspirator statements made by Octavio’s wife in violation of his confrontation rights under the Sixth Amendment to the United States Constitution?

c. May an exceptional sentence be imposed by a trial court under the multiple offense policy of RCW 9.94A.535 in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 1596 L. Ed.2d 403 (2004)?

4. STATEMENT OF THE CASE

The Gonzales-Flores family was the target of an intensive drug interdiction by the North Central Washington Drug Task Force (“Task Force”). The investigation occurred during the months of July, August and September 2001. (RP 96, ll. 8-10; RP 98, ll. 4-5; RP 122, ll. 2-23; RP

123, ll. 1-14; RP 135, ll. 7-8; ll. 14-21; RP 158, ll. 10-12; ll. 13-23; RP 221, ll. 4-22; RP 237, ll. 8-10)

The Task Force used a CI later identified as Lorin Hutton. (RP 88, ll. 16-20). Mr. Hutton was working off criminal charges pursuant to a CI agreement. (RP 94, ll. 3-8)

The CI made controlled buys on July 26, 2001, July 31, 2001, August 3, 2001, August 14, 2001, August 24, 2001 and September 25, 2001. Octavio was identified as being present at each of these buys. (RP 107, ll. 11-24; RP 124, ll. 17-20; RP 135, ll. 7-8; RP 158, ll. 10-12; RP 229, ll. 4-17; RP 241, ll. 20-25; RP 243, ll. 22-25)

The State filed an Information charging Octavio with six counts of delivery of a controlled substance, two counts of involving a minor in a drug transaction; and one count of possession with intent to deliver a controlled substance. The Information was filed on October 1, 2001. (CP 12-16).

The charge of involving a minor in a drug transaction (Counts II and IV) alleged dates of July 26, 2001 and July 31, 2001. (CP 13-14)

The surveillance conducted by the Task Force was incomplete. They never personally observed any of the transactions. (RP 99, ll. 4-8; RP 134, l. 12 to RP 135, l. 4; RP 159, ll. 10-18; RP 241, ll. 17-19; RP 261, ll. 1-11; RP 276, l. 8 to RP 277, l. 5; RP 280, ll. 1-2)

Octavio does not speak English. The CI did not speak Spanish. Octavio's wife, Sandra, acted as an interpreter during all of the charged transactions. (RP 451, ll. 15-18; ll.20-24; RP 453, ll. 13-14)

After the initial controlled buy on July 26, 2001, the CI was wired for sound. The tapes of the additional controlled buys from the Gonzales-Flores family were transcribed and read into evidence. The tapes were also played for the jury at Octavio's request. None of the taped conversations identified Octavio by name. (RP 118, ll. 14-21; RP 133, ll. 24-25; RP 154, ll. 12-24; RP 308, ll. 12-16; RP 528, ll. 10-21; RP 531, l. 18 to RP 533, l. 21; RP 537, ll., 8-14; RP 538, ll. 19 to RP 539, l. 6; RP 540, l. 22 to RP 541, l. 3; RP 549, l. 25 to RP 550, l. 18; RP 551, ll. 10-22; RP 554, ll. 11-19; RP 557, l. 4 to RP 560, l. 5; RP 562, ll. 6-16; RP 563, ll. 12-20; RP 565, ll. 10-16; RP 569, ll. 4-24; RP 571, ll. 1-2; RP 572, ll. 9-10; RP 573, l. 18 to RP 574, l. 10; RP 576, l. 15 to RP 577, l. 16)

In addition to the testimony of the CI, the transcripts of the tapes, and the tapes, the State also introduced evidence of additional controlled buys by the CI when Octavio was not present. The buys occurred on August 10, 2001 and August 21, 2001. They involved Arnulfo Flores and Sandra Flores. Defense counsel did not object to the testimony concerning these buys. (RP 148, ll. 1-15; RP 149, ll. 6-20; RP 218, ll. 6-24)

The trial court ruled that statements made by Sandra Flores to the arresting officers and at a forfeiture hearing were admissible under the co-conspirator exception to the hearsay rule. ER 801(d)(2)(v). The

statements implicated Octavio. The defense objected to the statements. (RP 252, ll. 12-25; RP 254, ll. 7-12; RP 254, l. 25 to RP 255, l. 3; RP 396, ll. 18-21; RP 399, ll. 6-12; RP 400, l. 9 to RP 402, l. 15)

Octavio testified at trial. He admitted one count of delivery of a controlled substance and the count involving possession with intent to deliver (Counts VIII and IX). (RP 61, ll. 10-18; RP 671, l. 22 to RP 672, l. 7; RP 692, l. 20 to RP 693, l. 24; RP 708, ll. 15-24; RP 708, ll. 15-24; RP 710, ll. 8-12)

A motion to dismiss Counts II and IV (involving a minor in a drug transaction) was made at the end of the State's case. The trial court reserved ruling on the motion. (RP 582, l. 17 to RP 583, l. 24; RP 584, ll. 1-2).

The defense gave its opening statement and presented testimony from Arnulfo Flores before the trial court entered its decision on the motion to dismiss Counts II and IV. (RP 587 to RP 642) The trial court questioned the decision in *State v. Hollis, supra*; posited that the statute contemplated accomplice liability; but then denied the motion. (RP 642, ll. 6-25; RP 644, ll. 15-20)

The jury found Octavio guilty on all nine (9) counts. The verdict was entered on February 12, 2002. (CP 108-110)

Octavio was sentenced on February 19, 2002. The trial court imposed an exceptional sentence running two (2) of the convictions

consecutive to the other convictions which were directed to run concurrently. (CP 114, 124; CP 125-127)

A Notice of Appeal was filed on February 27, 2002. (CP 113)

After Octavio filed his initial brief the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) was decided by the Supreme Court.

The Supreme Court also decided *Blakely v. Washington, supra*, after Octavio's brief was filed.

Octavio filed a Motion for Supplemental Briefing which was granted.

The Court of Appeals affirmed Octavio's convictions by an unpublished opinion on August 1, 2006. The Court determined that Octavio's right of confrontation was violated, but the error was harmless.

The Court declined to overrule the *Hollis* case. It also determined no *Blakely* violation occurred.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. RCW 69.50.401(f)

RCW 69.50.401(f) was enacted by LAWS OF 1987, Ch. 458, Sec. 4.

The statute provides:

It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. . . .

The only case interpreting the word “involve” is *State v. Hollis*, *supra*. The *Hollis* Court recognized that the Legislature did not define the word “involve.” It cited WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1191 (1969) at 811:

The ordinary meaning of “involve” is “to enfold or envelop so as to encumber ... to draw in as a participant ... to oblige to become associated (as an unpleasant situation)[.]”

The *Hollis* Court went on to hold at 812:

The involving a minor in a drug transaction statute does not require that the minor actually participate in the drug transaction. In fact, the minor’s culpability and actions – which are proscribed under other statutes – are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant’s affirmative acts. A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves – i.e., surrounds, encloses, or draws in – a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction.

The trial court questioned the validity of the *Hollis* case. However, it did not grant Octavio’s motion to dismiss.

Octavio contends that the *Hollis* case was erroneously decided. He asserts that the statute requires the adult to actively involve the minor in

the drug transaction. Mere presence is not enough. He urges the Court to carefully scrutinize the statutory language.

The words selected by the Legislature to define the offense have a clear and definite meaning. Even though the Legislature did not define those words, individuals of common understanding know their meaning based upon everyday use.

“Compensate” means to pay.

“Threaten” implies force and/or duress.

“Solicit” means to request or ask.

Each of the words implies some type of action by the adult toward the minor. Common sense dictates that the word “involve” also requires some type of action by the adult toward the minor. See: *State v. VanWoerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998) (recognizing the continued validity of the doctrine of *noscitur a sociis*).

The definition of the word “involve” as contained in WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.) supports Octavio’s argument:

involve ... 1. to include as a necessary circumstance, condition, or consequence; imply; entail: ... 2. to engage or employ. ... 8. to combine inextricably ... 9. to implicate, as in guilt or crime, or in any matter or affair. ... 12. to envelop or enfold, as if with a wrapping. ...

The correct application of the definition necessarily requires active participation by the adult toward the minor. The *Hollis* Court's decision indicates the minor's presence is all that is required.

A careful review of the testimony concerning the presence of Jessica Chapa, Sandra Flores' thirteen-year-old daughter, reveals that she was not involved in the transactions of July 26 or July 31, 2001. (RP 108, ll. 7-18; RP 109, ll. 18-22).

Detective Brown testified that the CI informed him that when he went to the Gonzales-Flores cabin on July 26 he observed Sandra Flores and her daughter standing together near the driveway. Octavio was standing off by himself. (RP 107, ll. 11-15)

On cross-examination the CI testified that the July 26 transaction occurred inside the cabin. Octavio was in a bedroom. Sandra Flores went to the bedroom, obtained the drugs, and returned to give it to him. The daughter was on a couch in the living room. (RP 451, l. 25 to RP 452, l. 12; RP 483, ll. 3-20; RP 484, ll. 5-14)

The CI also indicated that Jessica Chapa was present at the July 31, 2001 controlled buy. (RP 455, ll. 18-20) His testimony was that she was "in the general area." (RP 457, ll. 9-10)

The CI described the July 31 transaction as occurring inside the cabin. Jessica was again on the couch. Octavio was in the kitchen. Sandra Flores went into the kitchen, then returned and handed the

controlled substance to the CI who was in the living room. (RP 486, ll. 7-12; RP 487, ll. 8-12)

There was no direct testimony that Jessica Chapa knew what was occurring. (RP 452, ll. 7-16)

There was no direct testimony that Jessica Chapa saw any controlled substance.

Octavio contends that cases dealing with accomplice liability and constructive possession can provide guidance in analyzing this issue.

The law is clear that mere presence, in and of itself, does not make a person an accomplice to a crime. *State v. Landon*, 69 Wn. App. 83, 91, 848 P.2d 724 (1993). Even presence, combined with knowledge that a crime is occurring, is insufficient to establish accomplice liability. *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303, *review denied* 119 Wn. 2d 1003, 832 P.2d 487 (1992).

Furthermore, the law is well settled in connection with the fact that mere proximity, momentary handling, and knowledge are insufficient to establish constructive possession. *State v. Amezola*, 49 Wn. App. 78, 87, 741 P.2d 1024 (1987); *State v. Werry*, 6 Wn. App. 540, 548, 494 P.2d 1002 (1972); *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

In the absence of some activity on the part of Jessica Chapa during the course of the described transactions, there was insufficient evidence to establish that Octavio involved her in them. Octavio was not in the same room with her on either July 26 or July 31.

Octavio acknowledges that the role of the appellate court, upon a challenge to the sufficiency of the evidence, is limited to a determination of whether a rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980).

A challenge to the sufficiency of the evidence raises a question of constitutional magnitude. The State is required to prove its case beyond a reasonable doubt. *Personal Restraint of Tortorelli*, 149 Wn. 2d 82, 93 (2003) (citing *State v. Baeza*, 100 Wn. 2d 487, 488, 670 P.2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970))).

The evidence concerning the involvement of Jessica Chapa in either drug transaction, and particularly as to the July 26 buy, was so scanty as to barely merit consideration.

Interpreting all reasonable inferences from the evidence in favor of the State and most strongly against Octavio, it is evident that the State did not establish that he involved Jessica Chapa in any drug transaction. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992).

B. Co-Conspirator Statements

ER 801(d)(2)(v) states:

A statement is not hearsay if –

...

(2) *Admission by Party-Opponent.* The statement is offered against a party and is ...
(v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The trial court admitted statements made by Sandra Flores. The statements were made after her arrest on September 25, 2001. Octavio was arrested the same date.

The trial court also admitted statements made by Sandra Flores at a forfeiture hearing on November 29, 2001. Those statements were made over two (2) months after the date of arrest.

Before admitting the statement of a coconspirator under ER 801(d)(2)(v), the trial court must first determine whether the State has shown with substantial independent evidence a prima facie case of conspiracy. *State v. St. Pierre*, 111 Wn. 2d 105, 118, 759 P.2d 383 (1988). The trial court must also find that the statements were made during the course and in furtherance of the conspiracy. *St. Pierre*, at 118-19. ... However, statements made with the purpose of assisting the police, and not in furtherance of the conspiracy, are not admissible under the coconspirator exemption. *United States v. Alonzo*, 991 F.2d 1422, 1426 (8th Cir. 1993) ...

State v. Atkinson, 75 Wn. App. 515, 519, 878 P.2d 505 (1994).

The statements made at the forfeiture hearing were also testimonial in nature. A person testifying at a forfeiture hearing is placed under oath. RCW 35.05.452(3); RCW 69.50.505(5).

Sandra Flores' statements to the arresting officers on September 25, 2001 were made to assist the police. They were not made in furtherance of the conspiracy. Therefore, they were not admissible under the co-conspirator exemption to the hearsay rule.

The conspiracy was at an end following the arrest of the Gonzales-Flores family on September 25, 2001. The State established that a conspiracy existed. Unfortunately, none of the statements admitted were made in furtherance of that conspiracy.

Courts generally interpret the "in furtherance" requirement broadly. *State v. Baruso*, 72 Wn. App. 603, 615, 865 P.2d 512 (1993). A statement meant to induce further participation in the conspiracy or to inform a coconspirator about the status of the conspiracy is sufficient. [Citations omitted.]

On the other hand, casual, retrospective statements about past events do not fall within the coconspirator exception because they do not further the conspiracy. *Baruso*, 72 Wn. App. At 614-15 (citing *State v. Anderson*, 41 Wn. App. 85, 105, 702 P.2d 481 (1983), *rev'd in part on other grounds*, 107 Wn. 2d 745, 733 P.2d 517 (1987)). But statements relating past events are admissible under the rule as long as they facilitate the criminal activity of the conspiracy. [Citations omitted.]

State v. King, 113 Wn. App. 243, 280-81, 54 P.3d 1218 (2002).

The statements made by Sandra Flores were statements relating to past events. They were not statements made to facilitate the criminal

activity of the conspiracy. Rather, they constituted a confession. They also implicated Octavio.

The trial court's ruling that the statements were admissible as co-conspirator statements was erroneous. Furthermore, admission of the statements violated Octavio's confrontation rights under the Sixth Amendment to the United States Constitution as recognized by the Court of Appeals.

Crawford succinctly noted at 541 U.S. 69 that:

We leave for another day any effort to spell out a comprehensive definition of "testimonial." **Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police investigations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.**

(Emphasis supplied.)

The statements were the only corroborating evidence of the CI's testimony that Octavio was involved in the activities charged in Counts I through VII of the Information. No law enforcement officer or other witness ever observed him in any of the activities described by the CI as to those Counts.

As *Crawford* notes at 541 U.S. 28:

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a

defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

The Court of Appeals determination that this error was harmless runs counter to the Sixth Amendment as interpreted in *Crawford*.

C. Exceptional Sentence

The Supreme Court clearly delineated the need for a jury to determine the facts in order to impose an exceptional sentence. The *Blakely* Court stated at 542 U.S. 303:

Our precedents make clear ... that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. ... In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

The trial court imposed consecutive sentences on Octavio. The *Blakely* decision does not directly address consecutive sentences.

Recently, in *State v. Hughes*, 154 Wn.2d 118, 139-40 (2005) it was determined that the imposition of consecutive sentences by a judge, without a factual determination of the basis for those consecutive sentences by a jury, contravened a criminal defendant’s Sixth Amendment right to have a jury determine the existence of those facts beyond a reasonable doubt.

RCW 9.94A.589(1) provides, in part: “Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.”

RCW 9.94A.535 authorizes departure from the SRA Guidelines. However, the various bases for departure are the same bases condemned by the *Blakely* decision.

It appears that the trial court imposed the exceptional sentence under RCW 9.94A.535(2)(e) which states:

The current offense was a major violation of the Uniform Controlled Substances Act, Chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

- (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
- (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

....

The trial court’s Conclusions of Law in support of the exceptional sentence are based upon RCW 9.94A.535(2)(e)(i), (ii), (iv), (v), and (2)(i).

RCW 9.94A.535(2)(i) is the multiple offense policy aggravating factor.

Octavio asserts that *State v. Ose*, 156 Wn.2d 140 (2005) clearly delineates the need to submit the issue of multiple offenses to a jury for a factual determination as to whether they merit imposition of an exceptional sentence.

Octavio concedes that these multiple offenses increase his offender score beyond the maximum of nine (9).

Given the purpose of the multiple offense policy, the mere presence of multiple offenses does not justify an exceptional sentence on the basis that the sentence is clearly too lenient. Rather, an exceptional sentence is permitted when the rules for sentencing multiple current offenses mean that “some extraordinarily serious harm or culpability resulting from multiple offenses ... would not otherwise be accounted for in determining the presumptive sentencing range.” Because the highest offender score accounted for in the sentencing grid is 9, the highest standard range reflects only that level of criminal history – it does not reflect additional convictions. In such situations, “[b]oth public policy and the stated purposes of the SRA demand full punishment for each current offense.” Extraordinarily serious harm or culpability is therefore “automatically” established whenever an offender score greater than 9 is combined with multiple current offenses, because “a standard sentence would result in “free” crimes – crimes for which there is no additional penalty.”

State v. Alkire, 124 Wn. App. 169, 174, 100 P.3d 837 (2004) (quoting *State v. Fisher*, 108 Wn.2d 419, 428, 730 P.2d (1967); *State v. Smith*, 123 Wn.2d 51, 56 n.4, 864 P.2d 1371 (1993))

Octavio contends that in his particular case the State's conduct in conducting the multiple buys over an extended period of time counteracts the increased offender score as calculated by the trial court. *See: State v. Sanchez*, 69 Wn. App. 255, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234, *review denied*, 126 Wn.2d 1025 (1995); *State v. Kinneman*, 120 Wn. App. 327, 84 P.3d 882, *review denied*, 152 Wn.2d 1022 (2004).

6. CONCLUSION

The *Hollis* case needs to be revisited. Its premise that an adult does not have to actively "involve" a minor in a drug transaction is flawed.

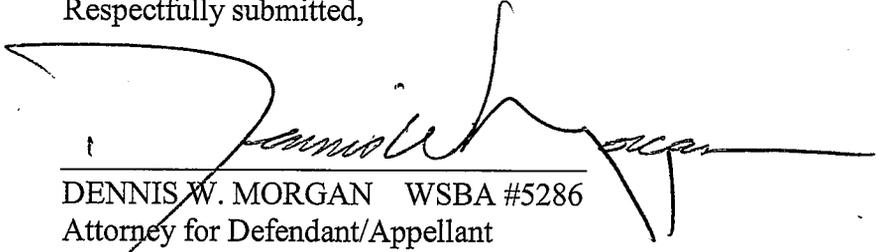
The violation of Octavio's Sixth Amendment confrontation right was not harmless error. The statements by his wife were critical to the State's case since they were needed to corroborate the CI's testimony.

Octavio's exceptional sentence was based upon the multiple offense policy of the SRA. The jury did not make the necessary factual determination of whether the policy was met.

Octavio respectfully asks the Court to accept his petition for review under RAP 13.4(b)(1), (3) and (4).

DATED this 31st day of August, 2006.

Respectfully submitted,



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APPENDIX “A”

FILED

AUG - 1 2006

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. 20927-0-III
)	
Respondent,)	
)	
v.)	Division Three
)	
OCTAVIO GONZALES FLORES,)	
)	
Appellant.)	UNPUBLISHED OPINION

KATO, J.—Octavio Gonzales Flores was convicted of six counts of delivery of a controlled substance, two counts of involving a minor in a drug transaction, and possession with intent to deliver. The court imposed an exceptional sentence. He claims the evidence did not support his convictions for involving a minor in a drug transaction; the court improperly admitted certain evidence, and erred by imposing an exceptional sentence. We affirm.

In 2001, the North Central Washington Narcotics Task Force conducted an investigation of the Flores family. During July, August, and September, the task force used a confidential informant (CI) to make several controlled buys of cocaine.

The CI purchased various amounts of drugs on July 26, July 31, August 3, August 14, August 24, and September 25, 2001, from Mr. Flores. Mr. Flores spoke Spanish and the CI spoke English, so Mr. Flores's wife, Sandra, interpreted for the pair. With the exception of the July 26 controlled buy, the CI wore a wire to record the audio of the transactions. The task force conducted an aerial surveillance of the September 25 buy.

The CI also conducted controlled buys on August 10 and August 21, 2001. Although Mr. Flores was not present at either transaction, his wife and his brother, Arnulfo, were there.

On August 10, the CI identified Mr. Flores and Ms. Flores in separate photo montages.

On September 25, the task force executed a search warrant on Mr. Flores's residence and arrested Ms. Flores. She spoke to the police and told them about the drug operations that she, Mr. Flores, and Arnulfo had conducted. She admitted her daughter was present during some of the transactions. The police later arrested Mr. Flores. A search incident to arrest revealed cocaine and some recorded money the task force had given the CI earlier that day.

The State charged Mr. Flores with six counts of unlawful delivery of a controlled substance, two counts of involving a minor in a drug transaction, and unlawful possession of a controlled substance with intent to deliver.

Mr. Flores testified at trial and admitted to one count of delivery of a controlled substance and the unlawful possession count. The jury convicted on all charges. The court imposed an exceptional sentence. This appeal follows.

Mr. Flores contests his convictions for involving a minor in a drug transaction. The CI purchased cocaine from Mr. Flores on July 26 and July 31 at the Flores residence. On July 26, the CI contacted Ms. Flores, who was sitting with her daughter outside the residence. She translated his request for drugs to Mr. Flores in front of the child. On July 31, the CI contacted Ms. Flores inside her residence. Mr. and Ms. Flores talked to the child during this transaction. There was no effort to hide either transaction from her.

At the close of the State's case in chief, Mr. Flores moved to dismiss the two counts of involving a minor in a drug transaction. The court denied the motion.

Former RCW 69.50.401(f) (2001) makes it unlawful to "compensate, threaten, solicit, or in any other manner involve a person under the age of

eighteen years in a transaction unlawfully to manufacture, sell or deliver a controlled substance.”

Mr. Flores argues the term “involve” requires some sort of participation by the minor. Division One of this court has rejected this argument:

The involving a minor in a drug transaction statute does not require that the minor actually participate in the drug transaction. In fact, the minor’s culpability and actions—which are proscribed under other statutes—are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant’s affirmative acts. A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves—i.e., surrounds, encloses, or draws in—a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction.

State v. Hollis, 93 Wn. App. 804, 812, 970 P.2d 813, review denied, 137 Wn.2d 1038 (1999). Mr. Flores urges this court to reject *Hollis*, arguing the statute should require the minor act in some way in order for him to be culpable. But the statute has no such requirement. It criminalizes the adult’s actions, not the minor’s. By allowing a minor to be present during a drug transaction, an adult violates the statute.

Mr. Flores asserts *Hollis* erroneously criminalized mere presence. He cites cases involving accomplice liability to argue that mere presence, or even presence coupled with knowledge, is insufficient for accomplice liability. Mr.

Flores, however, was charged with involving a minor in a drug transaction. The child's presence at the transactions involved her in them. Her actions need not rise to the level of an accomplice to satisfy former RCW 69.50.401(f). Mr. Flores's argument fails.

He further contends the evidence was insufficient to support his convictions of involving a minor in a drug transaction. When a defendant challenges the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

The evidence showed that during two of the controlled buys, Ms. Flores's daughter was present. This is sufficient to support the convictions.

Mr. Flores next contests the admission of Ms. Flores's statements at trial. When the police arrested Ms. Flores, she told them about the transaction on September 25 and the drug operations she and Mr. Flores had conducted. She acknowledged her daughter was present during some of the transactions.

The court also admitted statements Ms. Flores made at a forfeiture hearing. She said she and Mr. Flores sold cocaine and lived primarily off the proceeds from the sales. Mr. Flores claims the admission of Ms. Flores's statements was error.

Mr. Flores claims these statements were admitted under ER 801(d) as statements made by a co-conspirator. Review of the record, however, establishes the statements were admitted under ER 804(b)(3).

A statement by an unavailable declarant may be admitted if it is against her interest. ER 804(b)(3). Under this rule, a hearsay statement against one's interest is admissible "because it is presumed that one will not make a statement damaging to one's self unless it is true." *State v. Roberts*, 142 Wn.2d 471, 495, 14 P.3d 713 (2000) (quoting 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.06[1] (1997 & Supp. 1999)). But this type of statement is not regarded as a firmly rooted exception to the hearsay rule. *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d 948 (1990). Accordingly, such evidence must be excluded absent a showing of particular guaranties of trustworthiness. *Id.*

There are three requirements that must be met in order for a court to properly allow a hearsay statement into evidence pursuant to ER 804(b)(3):

(1) the declarant is unavailable; (2) the declarant's statement tends to expose the declarant to criminal liability so that a reasonable person in the same position would not have made the statement unless convinced of its truth; and (3) corroborating circumstances clearly indicate the statement is trustworthy.

Whelchel, 115 Wn.2d at 715-16.

In general, our courts apply the nine *Ryan*¹ factors to determine the reliability of hearsay statements. It is not necessary that all the *Ryan* factors be present. Rather, the court must be satisfied after weighing the various factors that the balance weighs in favor of reliability. *State v. Hutcheson*, 62 Wn. App. 282, 292-93, 813 P.2d 1283 (1991), *review denied*, 118 Wn.2d 1020 (1992). Here, the court properly determined Ms. Flores was unavailable because Mr. Flores had asserted the marital privilege. ER 804(a)(1). Her statements

¹ *Ryan* discussed various factors to be used in evaluating the reliability of out-of-court declarations. These include: (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of past fact; (7) whether cross-examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

exposed her to criminal liability. The court also considered the *Ryan* factors, which demonstrated the statements were trustworthy. The court did not err by admitting the evidence under ER 804(b)(3).

Mr. Flores further argues the admission of Ms. Flores's statements violated his confrontation rights as set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford* held "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. The Court noted the Sixth Amendment applies to those who "bear testimony," and testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

There are three "formulations of [the] core class" of testimonial statements. *Id.* These include "*ex parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and "statements that were made under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51-52 (citations omitted).

The statements made by Ms. Flores to the police and at the forfeiture hearing were testimonial. Under *Crawford*, the right confrontation is therefore implicated for their admission. There was no confrontation of Ms. Flores and the statements were thus inadmissible.

But this error is subject to a harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd sub nom. Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). The CI identified Mr. Flores. There was police surveillance implicating him. When he was arrested, Mr. Flores had money recorded by the police and given to the CI to buy drugs. The untainted evidence was so overwhelming that the admission of Ms. Flores’s statements was harmless error.

Mr. Flores next claims the court erred in several of its evidentiary rulings. He claims the court should not have admitted (1) evidence of two drug transactions that involved his brother and his wife; (2) testimony that drug dealers

do not typically keep drugs at their residences; (3) testimony from the CI about a statement made by Mr. Flores; and (4) the audio tapes and the transcripts of these tapes. He did not object, however, to any of this testimony at trial.

Therefore, he has waived any claim the evidence was admitted in error. ER 103(a)(1); RAP 2.5(a); *State v. O'Neill*, 91 Wn. App. 978, 993, 967 P.2d 985 (1998).

Mr. Flores objects to the imposition of an exceptional sentence. He was convicted of nine offenses and had an offender score of 18 for each offense. The delivery (six counts) and possession (one count) convictions had standard ranges of 108-120 months, while the involving a minor in a drug transaction (two counts) convictions had ranges of 60 months.

The court imposed 120 months on five of the delivery counts and 60 months for the two counts of involving a minor in a drug transaction convictions, one of the delivery counts, and the possession count. The court ordered the possession conviction and one of the convictions for delivery, each with a 60 month term, to run consecutive to the other counts, but concurrent with each other. This resulted in an exceptional sentence of 180 months. The court listed several reasons for imposing an exceptional sentence. It found, pursuant to former RCW 9.94A.535(2)(e)(i) (2004), the current offenses were major offenses

of the Uniform Controlled Substances Act because it involved more than three sales. The court also found the amounts involved were substantially greater than amounts for personal use, and Mr. Flores was a in a high position of the drug distribution hierarchy. It also found the crimes involved a high degree of sophistication. Finally, the court found the multiple offense policy resulted in a sentence that was clearly too lenient. Mr. Flores claims error.²

In *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the U.S. Supreme Court held a defendant had a constitutional right to have a jury determine whether the factors permitting an exceptional sentence had been proven beyond a reasonable doubt. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The statutory maximum for purposes of *Apprendi* analysis "is the maximum sentence a judge may impose *solely on the basis of*

² Mr. Flores's opening brief claims the court erred by imposing an exceptional sentence for his convictions of involving a minor in a drug transaction. But review of the record clearly shows the court did not impose the exceptional sentence for these offenses. He also argues that because the convictions involving the minor should be reversed, the sentence is no longer warranted. Those convictions, however, were proper.

the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 542 U.S. at 303.

The State concedes all the factors need to be found by a jury. But it claims that the finding of a major violation of the Uniform Controlled Substances Act was indeed made by the jury, so the exceptional sentence should be upheld.

When the reviewing court overturns one or more aggravating factors but is convinced the trial court would have imposed the same sentence based upon the factor that is upheld, the court may affirm the sentence. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). The issue is whether imposition of the exceptional sentence based on a major violation of the Uniform Controlled Substances Act can withstand a *Blakely* challenge.

Former RCW 9.94A.535(2)(e)(i) permitted the imposition of an exceptional sentence if the current offense was a major violation of the Uniform Controlled Substances Act. If the current offense involved at least three separate transactions in which controlled substances were sold, a major violation existed. Former RCW 9.94A.535(2)(e)(i). The content of the statute has not changed. Now, however, it has been recodified at RCW 9.94A.535(3)(e)(i). RCW 9.94A.535(3) now sets forth aggravating factors that must be considered by a

jury and imposed by the court. This change reflects the legislature's intent to comply with *Blakely*.

Mr. Flores was involved in at least three separate transactions in which controlled substances were sold. Since the findings of guilt by the jury on those counts give the court the basis to impose the exceptional sentence, the State argues the jury made the requisite factual findings in accord with *Blakely*.

Mr. Flores counters the State was able to ensure an exceptional sentence by conducting multiple buys. But the statute permits an exceptional sentence if the current offense involves three or more sales of drugs. Mr. Flores has not challenged the content of the statute. The State's argument is persuasive.

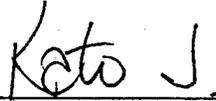
Because the facts supporting the exceptional sentence were found by a jury, there was compliance with *Blakely*. Moreover, the record indicates the court would have imposed the same exceptional sentence based only on this factor.

Affirmed.

A majority of the panel has determined this opinion will not be printed in

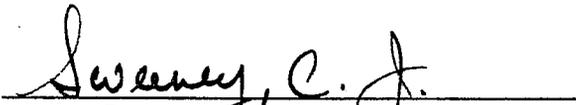
No. 20927-0-III
State v. Flores

the Washington Appellate Reports, but it will be filed for public record pursuant to
RCW 2.06.040.



Kato, J.

WE CONCUR:



Sweeney, C.J.



Kulik, J.