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No. 61462-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARILEA R. MITCHELL,

Appellant.

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

The Honorable Thomas J. Wynne

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u>	1
B.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
C.	<u>STATEMENT OF THE CASE</u>	4
D.	<u>ARGUMENT</u>	7
1.	INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT MS. MITCHELL’S CONVICTION FOR CRIMINAL MISTREATMENT IN THE FIRST DEGREE, AS CHARGED	7
a.	<u>The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of criminal mistreatment in the first degree</u>	7
b.	<u>The State presented insufficient evidence to establish Ms. Mitchell “assumed the responsibility to provide to a dependent person the basic necessities of life,” an essential element of the crime of criminal mistreatment in the first degree, as charged</u>	8
c.	<u>The proper remedy is reversal of the conviction</u> ..	12
2.	INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE EXCEPTIONAL SENTENCE ABOVE THE STANDARD RANGE BASED ON “PARTICULAR VULNERABILITY”	13
a.	<u>An exceptional sentence based on the aggravating factor of “particular vulnerability” requires proof beyond a reasonable doubt the victim had a particular vulnerability and that vulnerability was a substantial factor in the commission of the offense</u>	13

b.	<u>The State did not establish beyond a reasonable doubt S.A. was particularly vulnerable or that a particular vulnerability was a substantial factor in the offense</u>	14
c.	<u>The proper remedy is reversal of the sentence and remand for resentencing</u>	18
3.	THE TRIAL COURT ACTED WITHOUT AUTHORITY WHEN IT IMPOSED A SENTENCE THAT INCLUDED A TERM OF COMMUNITY CUSTODY AND THAT EXCEEDED THE TEN-YEAR STATUTORY MAXIMUM FOR THE OFFENSE	19
a.	<u>The trial court erroneously imposed a term of community custody, even though community custody is not authorized for criminal mistreatment in the first degree</u>	20
b.	<u>The trial court erroneously imposed a term of confinement and community custody that exceeded the ten-year statutory maximum for the offense</u>	22
E.	<u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

United States Constitution

Amend. XIV 2, 7

Washington Constitution

Art. I, sec. 3 2, 7

United States Supreme Court Decisions

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed.2d 1
(1979) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 7

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560
(1970) 7

Washington Supreme Court Decisions

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989) 7

In re Postsentence Review of Leach, 161 Wn.2d 180, 163 P.3d
782 (2007) 19, 20

State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987) 21

State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996) 18-19

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 20

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 13-14

State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997) 14

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 12

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 12

<u>State v. Hundley</u> , 126 Wn.2d 418, 895 P.2d 403 (1995)	7
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005)	10
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 729 (2001)	10
<u>State v. Law</u> , 154 Wn.2d 85, 110 P.3d 717 (2005)	14
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005)	10
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	7
<u>State v. Speaks</u> , 119 Wn.2d 204, 829 P.2d 1096 (1992)	23, 24
<u>State v. Suleiman</u> , 158 Wn.2d 280, 143 P.3d 795 (2006)	13
<u>State Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002)	9

Washington Court of Appeals Decisions

<u>State v. Barnett</u> , 104 Wn. App. 191, 16 P.3d 74 (2001)	15-16
<u>State v. Bray</u> , 52 Wn. App. 30, 756 P.2d 1332 (1988)	11
<u>State v. Brown</u> , 45 Wn. App. 571, 726 P.2d 60 (1986)	11
<u>State v. Drummer</u> , 54 Wn. App. 751, 775 P.2d 981 (1989)	18
<u>State v. Guerin</u> , 63 Wn. App. 117, 816 P.2d 1249 (1991)	21
<u>State v. Hooper</u> , 100 Wn. App. 179, 997 P.2d 936 (2000)	17
<u>State v. Hudnall</u> , 116 Wn. App. 190, 64 P.3d 687 (2003) ...	21-22, 23
<u>State v. Jackmon</u> , 55 Wn. App. 562, 778 P.2d 1079 (1989)	16, 17
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	20
<u>State v. Ross</u> , 71 Wn. App. 556, 861 P.2d 473 (1993)	16
<u>State v. Serrano</u> , 95 Wn. App. 700, 977 P.2d 47 (1999)	16-17

<u>State v. Skillman</u> , 60 Wn. App. 837, 809 P.2d 756 (1991)	21, 22
<u>State v. Smith</u> , 139 Wn. App. 600, 161 P.3d 483 (2007)	21
<u>State v. Spruell</u> , 97 Wn. App. 383, 788 P.2d 21 (1990)	12
<u>State v. Vermillion</u> , 66 Wn. App. 332, 832 P.2d 95 (1992)	18, 19
<u>State v. Williamson</u> , 84 Wn. App. 37, 924 P.2d 960 (1996)	11

Statutes

Ch. 9A.20	22
Ch. 69.50	20
Ch. 69.52	20
RCW 9.94A.120	21
RCW 9.94A.411	20
RCW 9.94A.505	19, 22, 23
RCW 9.94A.535	13
RCW 9.94A.585	14
RCW 9.94A.712	20
RCW 9.94A.715	20
RCW 9.94A.728	20
RCW 9.94A.750	22
RCW 9.94A.753	22
RCW 9.94A.850	20
RCW 9A.20.021	22

RCW 9A.08.010	11
RCW 9A.42.010	9
RCW 9A.42.020	5, 8, 11, 22
RCW 9A.44.130	20
RCW 18.51.010	9
RCW 70.128.010	9
RCW 74.34.020	9

A. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to prove beyond a reasonable doubt Ms. Mitchell “assumed the responsibility to provide to a dependent person the basic necessities of life,” an essential element of criminal mistreatment in the first degree, as charged.

2. In the absence of proof beyond a reasonable doubt, the trial court was clearly erroneous in entering Finding of Fact 2, “Aggravating circumstance #1, that the victim was particularly vulnerable, was proven beyond a reasonable doubt.”

3. The trial court exceeded its authority when it imposed an exceptional sentence that included a term of community custody, in the absence of statutory authority to impose community custody for criminal mistreatment in the first degree.

4. The trial court exceeded its authority when it imposed a sentence including a term of community custody above the ten-year statutory maximum sentence for criminal mistreatment in the first degree.

5. In the absence of proof beyond a reasonable doubt of every essential element of the offense, the trial court erred in entering Finding of Fact 1, “That the defendant is guilty beyond a

reasonable doubt of the crime of criminal mistreatment in the first degree, as charged in the information.”

6. To the extent it could be considered a Finding of Fact, in the absence of proof beyond a reasonable doubt, the trial court erred in entering Conclusion of Law 2, “The defendant is guilty of the crime as charged in the information, and aggravating Circ. #s 1, and 3.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process provisions of the Fourteenth Amendment to the United States Constitution and of Article I, section 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of criminal mistreatment in the first degree, as charged in the instant case, was Ms. Mitchell “assumed the responsibility to provide to a dependent person the basic necessities of life.” A “dependent person” is defined as has a mental or physical disability or is of extreme advanced age. RCW 9A.42.010(4). In the absence of evidence to establish S.A. was a “dependent person” or that Ms. Mitchell assumed responsibility to provide to a dependent person the basic necessities of life, was her right to due process violated when she

was convicted for criminal mistreatment in the first degree, as charged? (Assignments of Error 1, 5, 7)

2. An exceptional sentence above the standard range may be based on the victim's "particular vulnerability" only if the defendant knew or should have known of the victim's particular vulnerability and that vulnerability was a substantial factor in the commission of the offense. Here, the Court found S.A. was particularly vulnerable because he had issues with food prior to living with Ms. Mitchell and her co-defendant, even though there was no evidence this alleged vulnerability was a factor, much less a substantial factor, in the commission of the offense. Was the trial court clearly erroneous when it imposed an exceptional sentence above the standard range based, in part, on its finding S.A. was particularly vulnerable? (Assignment of Error 2, 6)

3. A court can impose a sentence, including a term of community custody, only as authorized by the Sentencing Reform Act (SRA). The SRA does not authorize community custody for the offense of criminal mistreatment in the first degree. Did the court exceed its authority when it imposed a term of community custody following Ms. Mitchell's release from total confinement on the offense? (Assignment of Error 3)

4. The SRA requires a court to impose a sentence, including a term of community custody, which does not exceed the statutory maximum for the offense and further requires a court to give credit for all time served solely on that offense. Here, the court imposed a term of confinement and community custody for ten years, the statutory maximum, starting from the date of sentencing, even though Ms. Mitchell already had been confined solely on this offense for 366 days. Did the court exceed its authority when it imposed a sentence providing a term of confinement and community custody beyond the statutory maximum for the offense?

(Assignment of Error 4)

C. STATEMENT OF THE CASE

For the first three years of his life, S.A. (DOB 10/22/2005) alternately lived with either his biological mother or a family friend. 12/17/07RP 19¹; 12/18/07RP 280; Supp CP __, sub. no. 47 (Ex. 59 at 25). S.A. was not fed on a regular basis while living with his mother who suffered from drug problems. 12/18/07RP 280.

In December 2005, S.A. moved in with his biological father, Danny Abegg, and appellant Marilea Mitchell. 12/17/07RP 20; 12/18/07RP 280. S.A. exhibited some behavioral problems,

¹The Verbatim Report of Proceedings consists of four volumes and will be referred to by date, followed by "RP" and the page number.

including food hoarding, which Mr. Abegg attributed to his lack of regular food while living with his biological mother. 12/18/07RP 281; Supp. CP __, sub. no. 47 (Ex. 59 at 20-23).

On March 7, 2007, at the request of Child Protective Services, three deputies from the Snohomish County Sheriff's Office went to the home of Ms. Mitchell and Mr. Abegg to check on the welfare of S.A., who was reportedly starving and in need of medical attention. 12/18/07RP 229. S.A. was transported first to Providence Medical Center in Everett, Washington, and then to Children's Hospital and Regional Medical Center in Seattle, Washington, where he was diagnosed with as suffering from serious, severe malnutrition, chronic muscle wasting, peripheral edema, abnormal blood chemistry, and an ulcer on his left foot. 12/17/07RP 51, 137, 171-72.

Ms. Mitchell was charged by an amended information filed in Snohomish County Superior Court with one count of criminal mistreatment in the first degree, in violation of RCW 9A.42.020. CP 26-27. The information alleged she committed the offense while "being at the time a person who has assumed the responsibility to provide to a dependent person the basic necessities of life." CP 26. The information also alleged the offense was aggravated by (1) the

victim's particular vulnerability, (2) deliberate cruelty, (3) an ongoing pattern of abuse against a member of the household, (4) deliberate cruelty against a household member, and (5) egregious lack of remorse. CP 26.

Ms. Mitchell waived her right to trial by jury and the case proceeded to a bench trial with Mr. Abegg as co-defendant. CP 52; 12/17/07RP 4-7. The court found both Ms. Mitchell and Mr. Abegg guilty of criminal mistreatment in the first degree, as charged in the information. CP 23; 12/19/07RP 417-19. Based on Ms. Mitchell's offender score of '0', she faced a standard range sentence of 31-41 months. CP 8. However, the court found aggravating factors (1) and (3) beyond a reasonable doubt and imposed an exceptional sentence above the standard range of ninety-six months followed by community custody "from release until 3/13/2018." CP 23-24, 6-18; 12/19/07RP 419-21, 3/14/08RP 21-24.

Ms. Mitchell timely appealed. CP 21-22.

D. ARGUMENT

1. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT MS. MITCHELL'S CONVICTION FOR CRIMINAL MISTREATMENT IN THE FIRST DEGREE, AS CHARGED.

a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of criminal mistreatment in the first degree. The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Salinas, 119 Wn.2d 192, 210, 829 P.2d 1068 (1992).

b. The State presented insufficient evidence to establish Ms. Mitchell “assumed the responsibility to provide to a dependent person the basic necessities of life,” an essential element of the crime of criminal mistreatment in the first degree, as charged. By amended information, the State charged Ms. Mitchell with criminal mistreatment in the first degree:

committed as follows: That the defendant, on or about the 1st day of December, 2006 through the 7th day of March, 2007, being at the time a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, did recklessly cause great bodily harm to that child or dependent person, by withholding any of the basic necessities of life; proscribed by RCW 9A.42.020, a felony;

CP 26 (emphasis added). Following a bench trial, the court entered

Finding of Fact 1:

That the defendant is guilty beyond a reasonable doubt of the crime of criminal mistreatment in the first degree as charged in the information.

CP 23 (emphasis added). The court also entered Conclusion of

Law 2, which concluded, in pertinent part:

The defendant is guilty of the crime as charged in the information,

CP 24 (emphasis added).

There was no evidence Ms. Mitchell withheld the basic necessities of a “dependent person” or that S.A. was a “dependent person.” A “dependent person” is defined as:

“Dependent person” means a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4). By contrast, a “child” is defined as:

“Child” means a person under eighteen years of age.

RCW 9A.42.010(3). S.A. was born on October 22, 2002, and, therefore, was a “child,” not a “dependent person.”

When interpreting a statute, courts must first look to the “plain meaning” of the statutory language, as the clear expression of legislative intent. State Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Campbell & Gwinn, 146 Wn.2d at 10. Accord

State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 729 (2001). “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

In context, the Legislature drew a clear distinction between a “dependent person” and a “child.” The two terms are separately and distinctly defined and, therefore, refer to two separate and distinct groups of people. See State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005) (“[T]he Legislature is deemed to intend different meanings when it uses different terms.”). As statutorily defined, a “dependent person” is one who either has a disability or is of advanced age. A “child,” on the other hand, is any person, regardless of ability or disability, is less than eighteen years old. Here, the State neither alleged nor did the court find S.A. was physically or mentally disabled.² Accordingly, there was no evidence whatsoever that Ms. Mitchell assumed the responsibility for a “dependent person,” as charged.

²The court based its finding of particular vulnerability solely on S.A.’s issues with food, thereby rejecting the State’s allegation he was more vulnerable because of malnutrition. Compare 12/19/07RP 388-89 with 12/19/07RP 419-420 and 3/14/08RP 22.

A criminal defendant may not be convicted for an uncharged offense. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). If an “information alleges only one alternative . . . it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial.” State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996), citing State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

The criminal mistreatment statute sets forth several alternative means of committing the offense. RCW 9A.42.020(1) provides:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Again, however, the information clearly charged only one of the several alternative means and the court’s findings and conclusion clearly referred to the offense “as charged in the information.”

The State presented insufficient evidence to support the conviction beyond a reasonable doubt.

c. The proper remedy is reversal of the conviction.

Ms. Mitchell's conviction for criminal mistreatment of a "dependent person" was based on insufficient evidence. A conviction based on insufficient evidence cannot stand. State v. Spruell, 97 Wn. App. 383, 389, 788 P.2d 21 (1990). To retry Ms. Mitchell for the same conduct would violate the prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996), quoted with approval in State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of sufficient evidence to establish the essential element that Ms. Mitchell "assumed the responsibility to provide to a dependent person the basic necessities of life," her conviction for criminal mistreatment in the first degree must be reversed and the charge dismissed.

2. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE EXCEPTIONAL SENTENCE ABOVE THE STANDARD RANGE BASED ON "PARTICULAR VULNERABILITY."

a. An exceptional sentence based on the aggravating factor of "particular vulnerability" requires proof beyond a reasonable doubt the victim had a particular vulnerability and that vulnerability was a substantial factor in the commission of the offense. RCW 9.94A.535(3)(b) authorizes a court to impose an exceptional sentence above the standard range if the trier of fact finds beyond a reasonable doubt "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." To justify an exceptional sentence based on particular vulnerability, the State must prove "(1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (emphasis in original). See also State v. Gore, 143 Wn.2d 288, 318, 21 P.3d 262 (2001) ("In order for the victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular

vulnerability and the vulnerability must be a substantial factor in the commission of the crime.”).

A challenge to an exceptional sentence is governed by RCW 9.94A.585(4), which provides in pertinent part:

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find . . . that the reasons supplied by the sentencing court are not supported by the record which was before the judge

A challenge to the reasons supplied to the sentencing judge is reviewed under the “clearly erroneous” standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); State v. Ha’mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

b. The court’s finding that S.A. was particularly vulnerable and his particular vulnerability was a substantial factor in the offense was clearly erroneous. The State alleged several aggravating factors, including that S.A. was particularly vulnerable due to his age, his increasing weakness from lack of food, and his issues with food as a result of food deprivation by his biological mother. CP 26; 12/19/07RP 388-89; 3/14/08RP 5-6. The court found S.A. was particularly vulnerable because of his issues with food only, not because of his age or physical weakness.

“[T]he evidence reflects that [S.A.] came into their home with issues regarding food and regarding the hoarding of food. He already had particular vulnerabilities in regard to eating food, and they knew that.”

12/19/07RP 419-20. Nonetheless, there was no evidence whatsoever that either Ms. Mitchell or Mr. Abegg withheld food because of S.A.’s issues with food or otherwise exploited those issues. Rather, Mr. Abegg stated he sometimes withheld dinner as a form of punishment, as he was punished when he was a child and as did Ms. Mitchell at his request. Supp CP ___, sub. no. 47 (Ex. 59 at 52, 55, 61-62, 63). It may be noted, there was no evidence S.A. was punished for hoarding food. Also, Mr. Abegg did not feel “connected” to S.A. that made him both mad and sad. 12/18/07RP 264; Supp CP ___, sub. no. 47 (Ex. 59 at 61-62). Therefore, S.A.’s pre-existing food issues were not a “substantial factor” in the offense.

In State v. Barnett, the defendant was convicted of multiple offenses against his girlfriend committed over a two-week period of time. 104 Wn. App. 191, 202, 16 P.3d 74 (2001). At sentencing, the trial court found the victim was particularly vulnerable because she was seventeen years old and the defendant waited until she was alone before he broke into her home. Id. On appeal, Division

Three disagreed that those facts constituted “particular vulnerability,” and stated:

Ms. M was home alone. But that was not the reason he chose her as a victim. See State v. Ross, 71 Wn. App. 556, 565-66, 861 P.2d 473 (1993), 883 P.2d 329 (1994) (defendant selected victims who were alone in offices because they were vulnerable). Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime. The evidence does not support a finding of particular vulnerability.

Id. at 205.

Again, in State v. Serrano, the defendant was convicted of murder of a coworker who was allegedly having an affair with his wife. 95 Wn. App. 700, 702-03, 977 P.2d 47 (1999). The trial court found the coworker was particularly vulnerable because he was shot while he was in the air in an “orchard ape,” a caged platform on a hydraulic lift, and could not run or otherwise protect himself. 95 Wn. App. at 710-11. On appeal, Division Three again disagreed that those facts constituted “particular vulnerability, and stated:

Whatever the nature of the victim’s vulnerability, the vulnerability must be ‘a substantial factor in the accomplishment of the crime.’ State v. Jackmon, 55 Wn. App. 562, 566-67, 778 P.2d 1079 (1989). Here, although it may be true that Mr. Gutierrez was vulnerable because he was above the ground in an “orchard ape,” the record does not suggest this vulnerability was a substantial factor in the shooting.

The sentencing court's reliance on this factor was clearly erroneous.

Id. at 712.

Yet again, in State v. Jackmon, the defendant was convicted of attempted murder in the first degree of a former employer. 55 Wn. App. 562, 564, 778 P.2d 1079 (1989). The trial court found the victim was particularly vulnerable because he was disabled due to a broken ankle. 55 Wn. App. at 565. On appeal, this Court disagreed that the broken ankle justified a finding of particular vulnerability, and stated:

We therefore limit the application of this aggravating factor to cases where the defendant not only knew or should have known of the victim's disability at the time of the offense, but also the victim's disability must have rendered the victim more vulnerable to the particular offense than a nondisabled victim would have been.

Id. at 567. See also State v. Hooper, 100 Wn. App. 179, 187, 997 P.2d 936 (2000) (“particularly vulnerable” finding not justified when victim assaulted while using the telephone because victim “equally vulnerable” regardless of using the telephone).

So, too, here, there was no evidence Ms. Mitchell chose to withhold food because of S.A.’s pre-existing food issues or that those issues made him more vulnerable to malnourishment than a

child without those issues or that his vulnerability was a substantial factor in the offense. Rather, he was “equally vulnerable” regardless of his issues. The trial court’s finding to the contrary was clearly erroneous.

c. The proper remedy is reversal of the sentence and remand for resentencing. Ms. Mitchell’s exceptional sentence, erroneously based in part on “particular vulnerability,” must be reversed and remanded for a new sentencing hearing. Where a sentencing judge gives both a proper and an improper basis for imposition of an exceptional sentence, reversal is required unless the reviewing court is satisfied the court would have imposed the same sentence regardless of the improper basis. State v. Vermillion, 66 Wn. App. 332, 349, 832 P.2d 95 (1992), quoting State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989).

Here, the trial court stated, “I am finding Factors 1 [particularly vulnerable] and 3 [domestic violence manifested by multiple acts over a prolonged period of time] beyond a reasonable doubt, and I’m finding that either of those factors, independent of each other, would justify an exceptional sentence.” 12/19/07RP 422 (emphasis added). By contrast, in State v. Cardenas, the Washington Supreme Court disapproved two of the three

aggravating factors relied upon by the court below, yet upheld the exceptional sentence based on the lower court's finding that any one of the aggravating factors would support the exceptional sentence. 129 Wn.2d 1, 12, 914 P.2d 57 (1996). In the absence of evidence the court would have imposed the same exceptional sentence based on a single aggravating factor, reversal and remand for resentencing is required. Vermillion, 66 Wn. App. at 349.

3. THE TRIAL COURT ACTED WITHOUT AUTHORITY WHEN IT IMPOSED A SENTENCE THAT INCLUDED A TERM OF COMMUNITY CUSTODY AND THAT EXCEEDED THE TEN-YEAR STATUTORY MAXIMUM FOR THE OFFENSE.

The trial court sentenced Ms. Mitchell to ninety-six months of confinement followed by community custody "from release until 3/14/2018." CP 12. When an individual is convicted of a felony, the sentencing court may impose punishment only as authorized by the SRA. RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (sentencing court only has authority as provided by the Legislature). A challenge to a sentence imposed without statutory authority, including the conditions of community custody, may be raised for the first time on

appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999);

State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

a. The trial court erroneously imposed a term of community custody, even though community custody is not authorized for criminal mistreatment in the first degree. RCW 9.94A.715(1) provides, in pertinent part:

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(10)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.

Criminal mistreatment in the first degree is not a sex offense, a violent offense, a crime against a person under RCW 9.94A.411(2),³ a felony offense under chapter 69.50 or 60.52, or a violation of RCW 9A.44.130(10)(a). Accordingly, the court exceeded its authority when it imposed a term of community custody for this offense.

³RCW 9.94A.411(2) presents an exhaustive list of "crimes against persons" which cannot be expanded by judicial gloss. In re Postsentence Review of Leach, 161 Wn.2d at 185.

An exceptional period of community custody may be imposed only where the SRA authorizes community custody for that offense. As Division Two stated in State v. Guerin, “We note that the community supervision must first be permitted by statute.” 63 Wn. App. 117, 120 n.4, 816 P.2d 1249 (1991). In State v. Skillman, Division Two struck community placement provisions as not authorized by statute, and stated:

[S]ince the inception of the SRA neither community placement nor community supervision has been authorized as an element of a prison sentence, either standard or exceptional, except in those situations where community placement is required by RCW 9.94A.120(8)(a).

State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987) is not to the contrary. In that case, the Supreme Court held that where community supervision was authorized as an element of the sentence, the trial court could impose reasonable conditions of supervision not listed in the authorizing statute. It did not hold that the trial court could include community supervision as an element of a sentence when there was no statutory authority to do so.

60 Wn. App. 837, 841, 809 P.2d 756 (1991). See also, State v. Smith, 139 Wn. App. 600, 604, 161 P.3d 483 (2007) (sentencing court may impose an exceptional period of community custody “when a statute authorizes community custody.”); State v. Hudnall, 116 Wn. App. 190, 196-97, 64 P.3d 687 (2003) (“trial courts may impose exceptional terms of community placement that do not

exceed the statutory maximum when community placement is authorized.”).

Because the SRA does not authorize imposition of community custody for the offense of criminal mistreatment in the first degree, that condition must be stricken. See Skillman, 60 Wn. App. at 841.

b. The trial court erroneously imposed a term of confinement and community custody that exceeded the ten-year statutory maximum for the offense. RCW 9.94A.505(5) provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4) [pertaining to length of jurisdiction for restitution], a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

Criminal mistreatment in the first degree is a Class B felony with a statutory maximum sentence of ten years. RCW 9A.20.021(1)(b), RCW 9A.42.020. Therefore, even assuming the sentencing court in the present case had authority to impose community custody, the court could not impose a period longer than ten years total for both incarceration and community custody. See State v. Hudnall, 116 Wn. App. at 195 (“A trial court may not impose a sentence, including any term of community supervision, community

placement, or community custody, that exceeds the statutory maximum for the crime.”).

Further, RCW 9.94A.505(6) provides a sentencing court must “give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced (emphasis added).” Electronic home monitoring is a form of partial confinement for which a sentencing court must give credit. State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992).

At the sentencing hearing held on March 14, 2008, the court imposed a term of confinement followed by a period of community custody “from release until 3/14/2018.” CP 12. Ms. Mitchell, however, had been in custody solely on the present offense for almost one year prior to the sentencing hearing. She was arrested and booked into Snohomish County Jail on March 9, 2007 and released two days later on March 11, 2007. Supp. CP ___, sub. no. 4, p.2; RP 265, 267. On March 16, 2007, she was again arrested and taken into custody where she remained until May 23, 2007, when she was released on electronic home monitoring. Supp. CP ___, sub. no. 24. She remained on electronic home monitoring continuously until the conclusion of the trial on December 19, 2007,

when she was incarcerated pending sentencing on March 14, 2008. Supp. CP ___, sub. no. 67. Therefore, she was confined solely on the present charge for a total of 366 days at the time of sentencing for which she must be given credit. With a total maximum sentence of ten years, Ms. Mitchell must be released from all terms of confinement no later than March 13, 2017.

Because the term of confinement and community custody exceeded the ten-year statutory maximum for criminal mistreatment in the first degree, Ms. Mitchell's sentence must be reversed and remanded for sentencing within the statutory maximum. See Speaks, 119 Wn.2d at 209.

E. CONCLUSION

There was insufficient evidence to prove beyond a reasonable doubt Ms. Mitchell "assumed the responsibility to provide to a dependent person the basic necessities of life," a necessary element of criminal mistreatment in the first degree, as charged. There was also insufficient evidence to prove beyond a reasonable doubt S.A. was particularly vulnerable and his vulnerability was a substantial factor in the commission of the offense, an aggravating factor relied upon by the court to justify an exceptional sentence. Finally, the court acted without authority

when it imposed a term of community custody for the offense of criminal mistreatment in the first degree and when it imposed a term of both confinement and custody that exceeded the ten-year statutory maximum for the offense. For the foregoing reasons, Ms. Mitchell requests this Court reverse and dismiss her conviction or, alternatively, reverse her sentence and remand for sentencing as authorized by the SRA.

DATED this 20th day of August 2008.

Respectfully submitted,



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

STATE OF WASHINGTON,)

Respondent,)

NO. 61462-2-I

MARILEA MITCHELL,)

Appellant.)

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 26TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 26TH DAY OF AUGUST, 2008.

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