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No. 61462-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARILEA R. MITCHELL,

Appellant.

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

The Honorable Thomas J. Wynne

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. MS. MITCHELL DID NOT ASSUME THE RESPONSIBILITY TO PROVIDE FOR A "DEPENDENT PERSON," AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE 1

 2. S.A. WAS NOT "PARTICULARLY VULNERABLE" 8

 3. THE UNAUTHORIZED SENTENCE OF COMMUNITY CUSTODY AND WITHOUT CREDIT FOR TIME SERVED MUST BE REVERSED 11

B. CONCLUSION 12

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 109
L.Ed.2d 408 (1990) 2-3

Washington Supreme Court Decisions

City of Seattle v. Allison, 148 Wn.2d 75, 59 P.3d 85 (2002) 5

In re Postsentence Review of Leach, 161 Wn.2d 180, 163 P.3d
782 (2007) 11

In re Swanson, 115 Wn.2d 21, 804 P.2d 1 (1990) 5

Pub. Util. Dist. No. 1 of Pend Oreille County v. State Dep't of
Ecology, 146 Wn.2d 778, 51 P.3d 744 (2002) 5

State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996) 10-11

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) 5

State v. Gonzales-Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008) 3

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 8

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) 6

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) 5

State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006) 7

State v. Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991) 5

State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005) 2

State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992) 12

State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006) 8

Washington Court of Appeals Decisions

Deaconess Medical Ctr. v. Dep't of Revenue, 58 Wn. App. 783,
795 P.2d 146 (1990) 6

State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986) 7

State v. Bynum, 76 Wn. App. 262, 884 P.2d 10 (1994) 7

State v. Goldman, __ Wn. App. __, 195 P.3d 98 (2008) 8

State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007) 2

State v. Swanson, 116 Wn. App. 67, 65 P.3d 343 (2003) 3

State v. Vermillion, 66 Wn. App. 332, 832 P.2d 95 (1992) 10

State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996) 8

Statutes

RCW 9.94A.411 11

RCW 9.94A.505 11-12

RCW 9.94A.715 11

RCW 9A.42.010 1

RCW 9A.42.020 4

RCW 18.51.010 1

RCW 70.128.010 1

RCW 74.34.020 1

A. ARGUMENT

1. MS. MITCHELL DID NOT ASSUME THE RESPONSIBILITY TO PROVIDE FOR A "DEPENDENT PERSON," AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE.

The State charged Ms. Mitchell with committing criminal mistreatment in the first degree by the alternative means of "being at the time a person who has assumed the responsibility to provide to a dependent person the basic necessities of life." CP 26. 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). At trial, the State did not present any evidence to establish S.A. was a dependent person, rather than a child. Therefore, the State failed to establish Ms. Mitchell assumed the responsibility to care for a dependent person, an essential element of the offense as charged.

The State argues the terms “child” and “dependent person” are not mutually exclusive, and now characterizes S.A. as a physically and mentally disabled dependent person. Br. of Resp. at 11-15. This characterization renders the term “child” superfluous, contrary to basic rules of statutory construction. When construing a statute, courts are to read statute as a whole and avoid rendering any terms superfluous.

When interpreting a statute, our primary objective is to carry out the legislature's intent. To determine intent, we first look to the statute's language. While the court may not look beyond unambiguous statutory language, the court must read the statute as a whole and harmonize each provision. In harmonizing provisions, we give meaning to every word the legislature includes in a statute so as to avoid rendering any included words superfluous.

State v. Nam, 136 Wn. App. 698, 704, 150 P.3d 617 (2007)

(citations omitted). Here, the Legislature drew a clear distinction between “child” and “dependent person” by separately defining the two distinct groups of people. “[T]he Legislature is deemed to intend different meanings when it uses different terms.” State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005).

Moreover, the doctrine of ejusdem generis provides that when both specific and general words appear in a sequence, the specific words modify and limit the general words. Hughey

v. United States, 495 U.S. 411, 419, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); State v. Gonzales-Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). The definition of “dependent person” specifies several categories of persons presumed to be dependent: residents of a nursing home, residents of an adult family home, and frail elder or vulnerable adults. RCW 9A.42.010(4). These categories involve adults only. Therefore, pursuant to the doctrine of eiusdem generis, the Legislature intended to draw a clear distinction between an adult “dependent person” and a “child.”

The related doctrine of expressio unius est exclusio alterius provides that “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the Legislature.” State v. Swanson, 116 Wn. App. 67, 76, 65 P.3d 343 (2003). Here, the stark contrast in the definitions of “child” and “dependent person” underscores the Legislature’s intent to designate two separate and distinct categories of persons. The State’s argument to the contrary should be rejected.

Assuming, arguendo, “child” and “dependent person” are not mutually exclusive, the trial court did not find that S.A. was

physically or mentally disabled. Rather, the court characterized S.A. only as a “four-year-old.” 12/19/07RP 418.

The State incorrectly contends the criminal mistreatment statute imposes a duty of care on “three categories of persons.” Br. of Resp. at 14. Actually, the statute imposes a duty on four categories of persons: 1) “a parent of a child,” 2) “the person entrusted with the physical custody of a child or dependent person,” 3) “a person who has assumed the responsibility to provide to a dependent person the basic necessities of life,” and 4) “a person employed to provide to the child or dependent person the basic necessities of life.” RCW 9A.42.020(1). The State apparently overlooked the first category, “a parent of a child.” Of these four categories, the first category imposes a duty of care only to a child, the second and fourth categories impose a duty of care to both a child and a dependent person, while the third category, at issue here, imposes a duty of care only to a dependent person. These varying duties of care further underscore the Legislature’s intent to draw a clear distinction between “child” and “dependent person.”

The State relies on the rule of statutory construction that courts are to construe a statute to avoid an absurd result to argue

that the Legislature must have intended to impose a duty of care to disabled children. Br. of Resp. at 13-14. Yet the Legislature clearly did not impose a duty of care to parents of a dependent person. A reviewing court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). The presence of a requirement in one statute and its omission in another related statute indicates a difference of legislative intent. Pub. Util. Dist. No. 1 of Pend Oreille County v. State Dep’t of Ecology, 146 Wn.2d 778, 797, 51 P.3d 744 (2002). See also City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (“Under the ‘plain meaning’ rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.”); State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d. 855 (1991) (“[W]here the Legislature uses certain statutory language in one instance, and difference language in another, there is a difference in legislative intent.” (quoting In re Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990))).

Alternatively, the State argues the distinction between “child” and “dependent person” is ambiguous. Br. of Resp. at 13-14. A statute is ambiguous when it is subject to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). Where a statute is ambiguous, the rule of lenity requires the reviewing court to interpret the statute in favor of the defendant. Id. at 601. Therefore, if the criminal mistreatment is ambiguous on this point, the rule of lenity requires limiting the term “dependent person” to adults only.

The State also argues the trial court did not enter “any actual ‘findings of fact.’” Br. of Resp. at 8-9. Yet the findings the State now seeks to disavow are the very findings it drafted and presented to the court for entry. CP 23-24. The “invited error” doctrine prohibits a party from contesting a finding it proposed. Deaconess Medical Ctr. v. Dep’t of Revenue, 58 Wn. App. 783, 786, 795 P.2d 146 (1990).

The State mistakenly argues the lack of findings justifies this Court to “look at the trial court’s oral decision to determine whether

the court's verdict¹ is supported by the evidence." Br. of Resp. at 9. This argument conflates a review of the oral ruling to interpret written findings with a review of the record to determine whether the written findings are supported by the evidence. Compare State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) ("an appellate court may use the trial court's oral ruling to interpret written findings and conclusions") with State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) ("A challenged finding will be upheld if supported by substantial evidence in the record."). Since the State cannot contend its own written findings were unsupported by the record, the State's review of the record is inappropriate.

In light of the lack of evidence to establish beyond a reasonable doubt that Ms. Mitchell "assumed the responsibility to provide to a dependent person the basic necessities of life," the charged alternative means of committing criminal mistreatment, her conviction cannot stand. 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

¹The verdict, memorialized in Conclusion of Law 2, as proposed by the State, provided, in pertinent part:

The defendant is guilty of the crime as charged in the information. . . .
CP 24 (emphasis added).

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). See also State v. Goldman, ___ Wn. App. ___, 195 P.3d 98 (2008) (“Simply put, the State charged one crime and proved another. And now it wants to amend the information and again prove the same crime it proved during Mr. Goldsmith’s first trial. We conclude that this violates constitutional prohibitions against double jeopardy.”).

Reversal is required.

2. S.A. WAS NOT “PARTICULARLY VULNERABLE.”

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). Accord 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.”).

Here, the trial court did not find that S.A.’s alleged vulnerability about food was a “substantial factor” in the offense. Rather, the court signed the State’s proposed finding of fact that merely provided:

2. Aggravating Circumstance #1, that the victim was particularly vulnerable, was proven beyond a reasonable doubt.

CP 23. A review of the court’s oral ruling to interpret the written findings reveals only that the court found Mr. Abegg and Ms. Mitchell were aware of S.A.’s food issues and Mr. Abegg had no connection with S.A. 12/119/07RP 415, 419-20. Again, the State proposed this finding and the State cannot now scour the record for evidence to bolster this finding when such evidence was not referenced in the court’s oral ruling.

The State’s argument that Ms. Mitchell withheld food in response to S.A.’s food issues is purely speculative. For example, the State writes, “S.A.’s fear [that he would be in trouble for eating] could reasonably lead him to act out by hoarding food, causing the defendant and Abegg to withhold even more food from him (emphasis added).” Br. of Resp. at 18. Again, “the only

explanation for withholding food from S.A. was that he was hoarding food and Abegg thought putting food out for him was too expensive (emphasis added).” Br. of Resp. at 19. This argument is based on speculation, is not part of the court’s oral ruling or written findings, and should be disregarded.

The trial court’s finding that S.A. was particularly vulnerable was unsupported by any finding that his food issues were a substantial factor in the commission of the offense. An exceptional sentence based on both a proper and an improper aggravating factor must be reversed unless the reviewing court is satisfied the court would have imposed the same sentence regardless of the improper factor. State v. Vermillion, 66 Wn. App. 332, 349, 832 P.2d 95 (1992). Here, the trial court imposed the exceptional sentence based on two aggravating factors, particular vulnerability and domestic violence manifested by multiple acts over a prolonged period of time, and stated, “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 three aggravating factors, yet upheld the exceptional sentence based on the trial 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, this matter must be reversed and remanded for a new sentencing hearing.

3. THE UNAUTHORIZED SENTENCE OF
COMMUNITY CUSTODY AND WITHOUT
CREDIT FOR TIME SERVED MUST BE
REVERSED.

The State concedes that trial court acted without authority when it imposed a term of community custody. Br. of Resp. at 22-23. This concession is well-taken. Criminal mistreatment is not included in the exhaustive list of offenses for which a court can sentence an offender to community custody. See RCW 9.94A.411(2), .715(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 185, 163 P.3d 782 (2007).

The State further concedes Ms. Mitchell is entitled to credit for time served prior to sentencing, including time on electronic home detention. Br. of Resp. at 23. This concession is also well-taken. A defendant is entitled to credit for all time served on a particular offense, including time on home monitoring. See RCW

9.94A.505(6); State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992).

Ms. Mitchell's sentence to community custody and without credit for time served must be reversed.

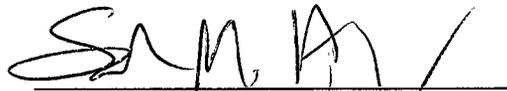
B. CONCLUSION

The State presented insufficient evidence to prove Ms. Mitchell failed to provide the basic necessities of life to a dependent person, an essential element of the crime charged. In addition, the exceptional sentence based on particular vulnerability must be reversed as the court did not find S.A.'s alleged particular vulnerability was a substantial factor in the offense. Moreover, the trial court acted without authority when it imposed a term of community custody and without credit for time served. Based on the foregoing arguments and the arguments set forth in the Brief of Appellant, Ms. Mitchell respectfully requests this Court reverse her

conviction for criminal mistreatment in the first degree, or,
alternatively, reverse her sentence and remand for a new
sentencing hearing.

DATED this 22nd day of December 2008.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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

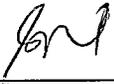
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|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 61462-2-I |
| |) | |
| MARILEA MITCHELL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2008, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | MARILEA MITCHELL 314067 WASHINGTON CC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332 | (X) () () | U.S. MAIL HAND DELIVERY _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 23RD DAY OF DECEMBER, 2008.

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STATE OF WASHINGTON

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711