43159-9-II

89342-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

ROBERT C. KINNAMAN
Appellant

43159-9-II

On Appeal from Grays Harbor County Superior Court
Cause number 12-1-7-0

The Honorable F. Mark McCauley

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The plea of guilty to the special allegation was not knowing, intelligent and voluntary.

2. The trial court did not have a factual basis upon which to accept a plea of guilty to endangerment by eluding.

3. Appellant's conviction for endangerment subjected him to double jeopardy in violation of the Fifth Amendment and Wash. Const. art 1, § 9.

4. The trial court erroneously denied Appellant's motion to withdraw his involuntary plea to endangerment.

5. The sentencing court lacked factual basis for imposing an aggravated sentence for endangerment.

6. The sentencing court lacked statutory authority to impose a 12-month enhancement.

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B. Issues Pertaining to Assignments of Error

1. Where the Statement on Plea of Guilty conflates the elements of the predicate offense with those of a special allegation, the defendant is not informed of the consequences of his plea and a guilty plea to both charges is involuntary.

2. Does the record contain a sufficient factual basis to enable Appellant to understand how his conduct satisfied the elements of endangerment by eluding?

3. Does the constitutional protection against double jeopardy preclude multiple convictions for both eluding and endangerment where the facts establish no more than mere reckless driving?

4. The trial court erroneously held Appellant to a manifestly involuntary plea.

5. Appellant's pleas to the predicate offense of eluding and the special allegation of endangerment are severable.

6. Despite the absence of any admissible evidence in the record other than facts admitted by the defendant, the court relied on hearsay in police reports for the factual basis for the plea.

7. Withdrawal of the plea is the sole remedy where the court imposes an unlawful sentence.

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III. INTRODUCTION

Robert C. Kinnaman pleaded guilty to driving recklessly while attempting to elude a pursuing police vehicle. He also pleaded guilty to a special sentencing enhancement for endangering one or more persons. The sentencing court later denied his request to withdraw his plea to the enhancement.

While maintaining his guilty plea to eluding, Mr. Kinnaman challenges the sentencing enhancement on substantive and procedural grounds:

- His guilty plea to the special allegation was not knowing, intelligent and voluntary.
- Convicting him on both charges violated double jeopardy.
- The sentence lacks a factual basis.
- The sentence is contrary to the specific terms of the Sentencing Reform Act (SRA).

The questions presented are whether a plea of guilty to a special allegation of endangerment by eluding is involuntary where the accused is erroneously informed that the elements of attempting to elude include actual endangerment, and where he was misinformed as to the existence of evidence that any person was actually endangered, and also whether the

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imposition of a sentence enhancement less than that authorized by the SRA entitles Appellant to withdraw the plea.

IV. STATEMENT OF THE CASE

Appellant Robert C. Kinnaman pleaded guilty to attempting to elude a pursuing police vehicle. CP 1, 4,13; RP 6, 7. He also pleaded to a special sentencing enhancement allegation in the erroneous belief that the State possessed admissible evidence that he had endangered one or more Department of Transportation (DOT) workers who were present when the pursuit passed through a highway construction zone. RP 6, 7.

At sentencing, Mr. Kinnaman maintained his plea of guilty to attempting to elude but sought to retract his statement on plea of guilty and withdraw his plea to the special allegation of endangerment. RP 21. He now disputed the existence of any evidence of endangerment beyond the mere fact of eluding. Kinnaman informed the court he had pleaded guilty to endangerment based solely on the erroneous belief that the prosecutor had statements from one or more DOT workers asserting that they had perceived themselves to have been in danger or that they actually were endangered. RP 7, 21-22. He had since learned that this was false. RP 21. Rather, the DOT workers had stated merely that they witnessed his failure to stop while being pursued. RP 21.

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The court refused to permit a change of plea on the special allegation. RP 22. The court stated that the prosecutor was not required to produce any evidence unless the matter went to trial. Since Kinnaman had pleaded guilty, the court believed the absence of evidence supporting the factual basis for endangerment was immaterial. RP 22-23. Accordingly, the court entered a finding that Kinnaman had endangered people's lives. RP 23.

Kinnaman's standard range sentence for eluding was 14-18 months. The court imposed an exceptional sentence of 30 months. CP 28. This included the top of the standard range plus an enhancement of twelve months. RP 23, 24. The Judgment and Sentence does not reflect the imposition of an exceptional sentence. CP 28. Specifically, the court does not state that it found aggravating factors. CP 28, para. 2.4

Mr. Kinnaman maintains his guilty plea to eluding, but appeals the sentencing enhancement.

V. ARGUMENT

1. THE PLEA OF GUILTY TO THE SPECIAL ALLEGATION WAS INVOLUNTARY.

The prosecutor erroneously included the essential element of endangerment by eluding in the elements of attempt to elude, thus misrepresenting the nature of the charge and the consequences of the plea.

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A guilty plea that is based on misinformation of the sentencing consequences is not knowing or voluntary. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Thus, a guilty plea is not voluntary unless it is offered with 'an understanding of the nature of the charge.' CrR 4.2(d). Accordingly, due process requires that a defendant be informed of the nature of the offense charged. Otherwise a guilty plea is not knowing, intelligent, and voluntary. *State v. Osborne*, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984). Notice of the true nature of the charge is "the first and most universally recognized requirement of due process." *Osborne*, 102 Wn.2d at 93, quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 85 L. Ed. 859 (1941).

This means the plea form must include all relevant direct consequences of the plea. *State v. Rawson*, 94 Wn. App. 293, 296-97, 971 P.2d 578 (1999). At minimum, the defendant must be made aware of "the acts and the requisite state of mind in which they must be performed to constitute a crime." *In re PRP of Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980), quoting *State v. Holsworth*, 93 Wn.2d 148, 153 n. 3, 607 P.2d 845 (1980); a*ccord, State v. Chervenell*, 99 Wn.2d 309, 318, 662 P.2d 836 (1983). Otherwise — and especially where, as here, the defendant states that he would not have agreed to plead guilty if he had been fully informed — the plea cannot stand. *Rawson*, 94 Wn. App. at 296-97, citing *State v.*

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Acevedo, 137 Wn.2d 179, 202, 970 P.2d 299 (1999) (failure to include community placement condition).

Here, Mr. Kinnaman was misinformed about the nature of the crime. Specifically, the Statement on Plea of Guilty misstates the elements of attempt to elude by incorporating the definition of endangerment by eluding — that the "individual threaten physical harm to third persons." [sic]. CP 4. Endangerment is not an element of attempting to elude. It is an element of endangerment by eluding.

Attempt to Elude: The elements of attempt to elude are that (a) a driver of a motor vehicle (b) willfully fails or refuses to immediately bring his or her vehicle to a stop and (c) drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle after being signaled to stop. RCW 46.61.024(1). The State must prove all three elements, including driving recklessly, in order to convict. *State v. Tandecki*, 120 Wn. App. 303, 308-09, 84 P.3d 1262 (2004).

Endangerment by Eluding: In addition, the prosecutor may attach a special allegation of endangerment by eluding to every charge of attempting to elude, provided sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by

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the actions comprising the crime of attempting to elude. RCW 9.94A.834(1).

This Court reviews questions of statutory interpretation de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The mandatory first step in statutory construction is to read the statute. *Roggenkamp*, 153 Wn.2d at 161. If the language is unambiguous, the Court must rely solely on the statutory language. *Id.*, citing *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000). If the statutory language is amenable to more than one reasonable interpretation, then it is deemed to be ambiguous. *Id.*, citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). In that case, the rule of lenity requires the statute to be construed in a light most favorably to the defendant. *State v. Harris*, 39 Wn. App. 460, 464-65, 693 P.2d 750 (1985).

The criminal code defines recklessness. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur. RCW 9A.08.010(1)(c). Moreover, recklessness as an element of a criminal offense is established if the accused person acted "intentionally or knowingly." RCW 9A.08.010(2). In other words, a showing of recklessness is not specific to any person or persons. It describes the state of mind of the actor, not the effect of his conduct.

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The offense of reckless endangerment, by contrast, occurs when a person "recklessly engages in conduct … that creates a substantial risk of death or serious physical injury to another person." RCW 9A.36.050(1).

Accordingly, the SRA requires by its express terms that, in order to enhance a sentence under the endangerment by eluding provisions of RCW 9.94A.834, the court must make a finding that the conduct constituting the attempt to elude endangered one or more persons. RCW 9.94A.533(11). That is, proof of reckless driving sufficient to support a conviction for attempting to elude is not sufficient to prove that "a person or persons" were endangered by the conduct.

Endangerment requires proof that a particular person, or more than one person, was actually endangered. Similarly, the term "another person" in the context of reckless endangerment does not mean "any" person. *State v. Graham*, 153 Wn.2d 400, 406, 103 P.3d 1238 (2005). In *Graham*, the State argued that the legislature intended the reckless endangerment statute, RCW 9A.36.050(1), to criminalize a defendant's reckless endangerment of a particular individual, not just a general category of possible persons. *Graham*, 153 Wn.2d at 405. The Court of Appeals agreed and held that the reckless endangerment statute "proscribes conduct that places at risk not simply *any* person but '*another*

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person.'" *Graham*, 153 Wn.2d at 406. The Supreme Court agreed. *Graham*, 153 Wn.2d at 407-08.

Likewise, this Court has construed driving in a reckless manner in the vehicular assault statute that punishes conduct that causes "substantial bodily harm to another" as requiring proof of harm to a particular person, not merely risk of harm in general. *State v. Ramos*, 152 Wn. App. 684, 695, 217 P.3d 384 (2009).

The Legislature is presumed not to include superfluous language in statutes so that, wherever possible, the courts must accord meaning to every word. *Roggenkamp*, 153 Wn.2d at 621. Likewise, the legislature is presumed to attach different meanings to different words, especially when used in the same statute. *Roggenkamp*, 153 Wn.2d at 625 (discussing the different meanings of "reckless driving" and "driving in a reckless manner.") Here, if a mere showing of reckless driving were sufficient to establish the sentencing enhancement for endangerment, RCW 9.94A.834(1) is superfluous in its entirety. It is not sufficient. The prosecutor must make a showing that sufficient admissible evidence exists, not only that the defendant drove recklessly, but that, in so doing, he actually endangered a person or several persons.

By conflating the elements of the two offenses, the Statement on Plea of Guilty led Mr. Kinnaman into the false belief that, by pleading

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guilty to the reckless driving element of attempt to elude, he necessarily admitted physically endangering one or more persons as charged in the special allegation of endangerment. This is false.

Contrary to Mr. Kinnaman's misunderstanding of the law as presented in the Statement on Plea of guilty, reckless driving simply involves driving rashly and heedlessly and without regard to the consequences. *Roggenkamp*, 153 Wn.2d at 622. By this standard, proof of recklessness does not require that any particular consequence be proved or that any person actually be endangered. *State v. Ridgely*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007), citing Laws of 2003, ch. 101, § 1.

Accordingly, Mr. Kinnaman's plea to the endangerment allegation was not knowing, intelligent and voluntary, and the court erred in denying his request to withdraw that part of the plea.

The remedy is to vacate the sentencing enhancement for endangerment by eluding.

2. THE RECORD DOES NOT ESTABLISH A FACTUAL BASIS FOR ENDANGERMENT BY ELUDING.

As a corollary to the requirement that a voluntary guilty plea be based on a correct statement of the elements of the offense, the defendant must also understand how his conduct satisfies those elements. *State v.*

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R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006); *see also Keene*, 95 Wn.2d at 209. An inadequate factual basis negates this understanding. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 645, 106 P.3d 244 (2005). A plea is not truly voluntary unless the defendant "possesses an understanding of the law in relation to the facts." *State v. Berry*, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005), quoting *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). A factual basis sufficient to support a guilty plea requires sufficient evidence for a jury to conclude that the defendant is guilty. *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008). In finding a factual basis for a guilty plea, the court must find the evidence in the record. *Osborne*, 102 Wn.2d at 95. The facts need not be established by the defendant's admissions; any reliable source may be used, provided, however, that the material the trial court relies on is made part of the record. *Id.*

The purpose behind the factual basis requirement is to protect defendants who, like Mr. Kinnaman, are otherwise likely to plead guilty without realizing that their conduct "does not actually fall within the charge." *Berry*, 129 Wn. App. at 65, quoting 13 Royce A. Ferguson, Jr., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 3713, 91-92 (3rd ed.2004). That is precisely what happened here. Kinnaman pleaded guilty to endangerment without understanding that driving

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heedlessly of the consequences does fall within the charge of endangerment unless one or more persons was in fact endangered.

RCW 9.94A.834(1) requires the existence of admissible evidence because of the mandatory provision that "the court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime[.]" RCW 9.94A.834(1). In finding a factual basis for a guilty plea, the court must find the evidence in the record. *Osborne*, 102 Wn.2d at 95. But the court cannot make a finding of fact without considering the evidence. And that requires the State to produce admissible evidence and that such evidence actually be admitted at the hearing. The intent of the legislature in this context is plain. In order to distinguish an endangerment inquiry from sentencing proceedings that can be conducted outside the Rules of Evidence under ER 1101(c), the legislature included in RCW 9.94A.834(1) the express requirement that the State produce "admissible evidence."

That did not happen here. Defense counsel and the prosecutor mentioned something about some sort of involvement of DOT workers. RP 7, 14. The record does not show the nature of this evidence or whether it was admissible. Certainly, at no point was that evidence offered or admitted. Mr. Kinnaman refuted this evidence at sentencing, asserting

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that the statements said merely that the workers had witnessed the chase through the construction zone. RP 21. Therefore, the court was not competent to enter the requisite finding that the special allegation was proven because "a person or persons" was endangered.

Where the State fails to carry its burden of proof on an essential intent element, the sole remedy is to reverse and dismiss the charge . "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Therefore, the Court should reverse the conviction the special allegation and dismiss the prosecution.

In addition to fatally compromising the voluntariness of Kinnaman's plea, conflating the elements of eluding and the special allegation relieved the State of its burden to establish endangerment with proof that one or more persons was in fact endangered.

3. THE SENTENCE ENHANCEMENT VIOLATES DOUBLE JEOPARDY.

A double jeopardy analysis leads to the same result. The double jeopardy provisions of both the state and federal constitutions prohibit

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multiple punishments for the same offense.[1] U.S. Const. amend. V; Const. art. 1, § 9; *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). A double jeopardy claim is a question of law that are reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

Where the legislature enacts statutes permitting cumulative punishments for the same conduct, double jeopardy prohibits the sentencing court from prescribing greater punishment than the legislature intended." *State v. Kelley*, 168 Wn.2d 72, 76-77, 226 P.3d 773 (2010)., quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). That is, whether the same conduct comprises separate offenses hinges upon whether the legislature intended them to be separate. *In re Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010), citing *State v. Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005).

Two offenses are the same for double jeopardy purposes unless "each requires proof of a fact which the other does not." *State v. Calle*, 125 Wn.2d 769, 778, 888 P.2d 155 (1995); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Mr. Kinnaman contends that his principle precludes punishing him for both attempt to

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[1] Fifth Amendment to the United States Constitution: "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb."
Article I, section 9 of the Washington State Constitution: "No person shall ... be twice put in jeopardy for the same offense."

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elude and endangerment by eluding absent facts establishing more than mere recklessness.

In *Francis*, double jeopardy was violated where a defendant pleaded guilty to first degree robbery based on second degree assault and also to second degree assault based on the same conduct. *Francis*, 170 Wn.2d at 523. Here, Mr. Kinnaman pleaded guilty to attempting to elude, of which an essential element is reckless driving, and also to endangerment by eluding, based on the same conduct.

As discussed, by the plain language of the statute, endangerment by eluding requires more than mere recklessness, because the offense of attempt to elude already includes the element of driving recklessly. RCW 46.61.024(1). To prevail on a special allegation of endangerment by eluding, the state must prove beyond a reasonable doubt that the accused endangered one or more persons other than himself or the pursuing law enforcement officer. RCW 9.94A.834(2); RCW 9.94A.533(11).

A special allegation of endangerment by eluding requires the State to produce evidence that sets the defendant's conduct apart from the recklessness inherent in any eluding offense. *See, e.g., State v. Randhawa*, 133 Wn.2d 67, 77, 941 P.2d 661 (1997). The Court reasoned in *Randhawa* that reckless driving cannot be inferred from excessive speed. *Id.* at 77. Likewise, here, actual endangerment of one or more persons

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cannot be inferred from driving with reckless disregard of potential danger. That means that the State must prove that "one or more persons" were threatened with physical injury. RCW 9.94A.834(1). The State did not do that here.

By requiring the proof that a person was endangered, the legislature signaled its intent that not every attempt to elude constitutes endangerment. Enhancing the sentence without proving additional facts violated double jeopardy.

4. THE COURT ERRED IN ENFORCING THE INVOLUNTARY PLEA.

Even though the court has accepted a guilty plea, it still must allow the defendant to withdraw the plea if necessary to correct a manifest injustice. CrR 4.2(f); *State v. A.N.J.*, 168 Wn.2d 91, 106-107, 225 P.3d 956 (2010); *State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974. Specifically, the court has a duty to ascertain that the defendant possessed sufficient information to be able to understand the law in relation to the facts and to appreciate the nature of the charge against him. *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987); *Clements*, 125 Wn. App. at 645.

Here, the misrepresentation of the nature of the charge combined with the State's failure to include in the record any evidence that any

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person was actually endangered, plus the defendant's unequivocal repudiation of the existence of any such evidence, cast sufficient doubt upon the voluntariness of the plea to require the court to inquire. Mr. Kinnaman informed the court that his plea to the special allegation was based on a misunderstanding of the law and the evidence. Nevertheless, the court effectively declared that Kinnaman was bound by his pleas both to the predicate offense and to the enhancement, regardless of whether his plea was truly knowing, intelligent and voluntary. RP 23.

This was reversible error.

5. THE PLEA TO THE SPECIAL ALLEGATION IS SEVERABLE FROM THE PLEA TO THE PREDICATE OFFENSE.

Kinnaman challenges solely the special allegation conviction and maintains his plea of guilty to attempting to elude.

A guilty plea does not waive a double jeopardy challenge when the court erroneously enters multiple convictions or sentences for the same offense. *Francis*, 170 Wn.2d at 532, citing *State v. Hughes*, 166 Wn.2d 675, 681 n.5, 212 P.3d 558 (2009). A defendant may challenge one conviction of a multi-conviction plea agreement on double jeopardy grounds and maintain his guilty plea to the other. *Francis*, 170 Wn.2d at

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532, discussing *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008).

While the defendant may withdraw a plea, no comparable provision in either the ABA Standards or our court rules provides for the withdrawal of a plea on the State's motion. *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). A defendant cannot be placed in a position in which he must again bargain with the state to his disadvantage. He is entitled to retain the benefits he gained as a result of the plea negotiation, including that he could not be charged with a more grievous offense. *Id.* at 585.

State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006), which holds that multiple pleas made in the same proceeding are not severable, is distinguishable. There, the defendant pleaded guilty to multiple counts of first degree robbery and also to deadly weapon enhancements that were based on the same evidence. *Bisson*, 156 Wn.2d at 511. Here, by contrast, the State was required to support the endangerment enhancement with proof of additional facts. RCW 9.94A.834(1).

State v. Turley, 149 Wn.2d 395, 69 P.3d 338 (2003), is also distinguishable. There, the appellant wished to withdraw both pleas and the Court affirmed the trial court's ruling that he could withdraw only one. *Turley*, 149 Wn.2d at 396. Here, Mr. Kinnaman does not seek to

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withdraw both pleas. And, because the State failed to establish a factual basis for the enhancement, the doctrine of double jeopardy permits him to withdraw only that plea while maintaining his plea of guilty to eluding.

6. THE AGGRAVATED SENTENCE LACKED A FACTUAL BASIS.

Analysis under the principles of the Sentencing Reform Act also requires vacation of the sentence enhancement.

Facts supporting an aggravated sentence, other than the fact of a prior conviction, must be determined pursuant to the provisions of RCW 9.94A.537. RCW 9.94A.535. That is, a trial court may not impose an aggravated sentence unless it finds substantial and compelling reasons for doing so. RCW 9.94A.537(6).

On appeal, the SRA provides that an aggravated sentence is reviewed to see if the reasons for imposing it are supported by the record. RCW 9.94A.585(4). That is, whether a legally justified factual basis for the sentence can be found in the record that was before the judge. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Reversal is appropriate if the reviewing court finds:

(1) using a clearly erroneous standard, that the reasons supplied by the sentencing court are not supported by the record;

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(2) using a de novo standard, that those reasons do not justify a sentence outside the standard sentence range for that offense. *State v. Suleiman*, 158 Wn.2d 280, 291 n. 3, 143 P.3d 795 (2006); or

(3) using an abuse of discretion standard, that the sentence imposed was clearly excessive or too lenient. *State v. Branch*, 129 Wn.2d 635, 645-46, 919 P.2d 1228 (1996), quoting *State v. Garza*, 123 Wn.2d 885, 889, 872 P.2d 1087 (1994).

Here, (1) and (2) apply. The court's reasons are not supported by the record, and the reasons do not support the sentence.

Factors that are inherent in the crime may not be relied upon to justify an exceptional sentence. *State v. Ferguson*, 142 Wn.2d 631, 647, 16 P.3d 1271 (2001) (finding of deliberate cruelty is an improper basis for an aggravating circumstance where intent to do bodily harm was an element of the charged offense); David Boerner, SENTENCING IN WASHINGTON § 9.6 (1985). Specifically, the court may not rely on an element of the charged offense to justify an exceptional sentence. *Ferguson*, 142 Wn.2d at 648, n. 78 (citing cases).

A court may depart from the standard range and impose an exceptional sentence if it finds inherent factors that distinguish the offense from others in the same category. *Ferguson*, 142 Wn.2d at 647-48. But that is not what this court did. The court's sole basis for imposing an

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aggravated sentence for an attempt to elude was a finding of actual endangerment under RCW 9.94A.834. RP 22.

The Record Properly Before the Sentencing Court Was Insufficient to Support the Special Finding. In his repudiated statement on plea of guilty, Mr. Kinnaman admitted to the elements of eluding, including the spurious element of endangerment (please see Issue 1). Plea Agreement, CP 11, para. 11. In doing so, however, he did not acquiesce to the court's considering police reports to establish a factual basis. *Id.* He did not agree that the sentencing court could consider any additional facts whatsoever. CP 14, para. 1.6.

The court nevertheless based the aggravated sentence on unsupported allegations in a Statement of Prosecuting Attorney (CP 18). RP 23. But the prosecutor's statement is not admissible evidence, contrary to RCW 9.94A.834(1). Rather, the prosecutor's statement is inadmissible hearsay to which no exception applies. The alleged facts the prosecutor recites merely reflect out-of-court statements by a declarant named Deputy Schrader. CP 19. The prosecutor's statement does not show to whom these statements supposedly were made, or how many intermediate transmissions Schrader's statements underwent before being related to the prosecutor for inclusion in his statement. *Id.*

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As discussed in Issue 2, supra, the legislature has expressly mandated that a sentencing enhancement for endangerment by eluding must be supported by admissible evidence, thus removing enhancement proceedings from the general exception of ER 1101(c), whereby some sentencing proceedings are not subject to the Rules.[2]

Moreover, even if facts supporting this sentence could be found in the record before this judge, for the reasons discussed in Issues 1, 2 and 4, supra, this Court's de novo review will show that those reasons do not justify the sentence. The court merely recited facts which, while arguably egregious, constituted no more than reckless driving.

The remedy is to vacate the sentencing enhancement.

7. THE SRA DOES NOT AUTHORIZE A 12-MONTH SENTENCE ENHANCEMENT.

Finally, the sentence enhancement imposed here is contrary to law because of a mutual mistake. The sole remedy is to allow Mr. Kinnaman to withdraw that part of the plea.

The Sentencing Reform Act (SRA) must be strictly construed. The sentencing court lacks authority to impose punishment less than that authorized by the SRA. *State v. Barber*, 170 Wn.2d 854, 870, 248 P.3d 494 (2011). When a sentence is unlawful, the plea is invalid. *Barber*, 170

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[2] The Evidence Rules need not be applied at sentencing. ER 1101(c)(3).

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Wn.2d at 857. This includes a mutual mistake that results in an agreement to a sentence that is contrary to law. *Barber*, 170 Wn.2d at 859. In cases of mutual mistake, where the parties have agreed to a sentence that is contrary to law, the remedy is to permit the defendant to withdraw his plea. *Barber*, 170 Wn.2d at 873. The remedy should be implemented in such a way as to restore him as nearly as possible to the status quo ante. *Barber*, 170 Wn.2d at 879.

The SRA authorizes an enhancement of one year and one day, not 12 months. RCW 9.94A.533(11). But the plea agreement called for a 12-month enhancement. CP 15. The consequences of the plea set forth in the statement on plea of guilty include a 12-month enhancement. CP 5. A 12-month enhancement was Mr. Kinnaman's understanding. *Id.*; RP 6. Twelve months was the understanding of the court. RP 7. Twelve months was the understanding of defense counsel. RP 19. Twelve months is what the prosecutor recommended. CP 21. And 12 months is what the court actually imposed at sentencing. RP 23-24.

Permitting the defendant to withdraw his plea is the only remedy the court has authority to impose. *Barber*, 170 Wn.2d at 873. That is, a prosecutor may not correct the error simply by inserting the lawful sentence in the Judgment and Sentence, as was done here. CP 27. *See,*

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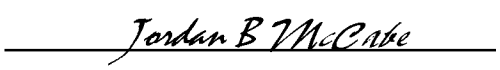
e.g., Barber, where neither the State nor the Department of Corrections could correct an erroneous sentence. *Barber*, 170 Wn.2d at 857.

Likewise, here, the remedy for a sentence in excess of the court's statutory authority is to permit withdrawal of the plea.

V. CONCLUSION

The Court should vacate the sentencing enhancement and dismiss the special allegation.

Respectfully submitted this August 13, 2012.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Appellant's Brief electronically via the Division II upload portal: gfuller@co.grays-harbor.wa.us.

A hard copy was also mailed this day, first class postage prepaid, to:

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