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No. 89448-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LETRECIA NELSON,

Petitioner.

ON REVIEW FROM THE PUBLISHED DECISION OF THE COURT
OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO
(Consolidated cases No. 41689-1-II)

Pierce County Superior Court No. 09-1-05453-5
The Honorable Stephanie A. Arend, Trial Judge

SUPPLEMENTAL BRIEF OF PETITIONER LETRECIA NELSON

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The doctrine of "passing control" recognized by this Court in State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), applies even if the momentary handling of contraband occurs in a person's home, because "dominion and control" over the home is only one factor in the "totality of the circumstances" test used to determine if there was "actual possession."

2 A defendant cannot be found guilty of "constructive possession" of a gun brought temporarily and unexpectedly into their home for 15-30 minutes based on the theory that the defendant automatically has "dominion and control" over everything in their home.

3. The "rebuttable presumption" that a person constructively possesses contraband found by police in their house does not and cannot constitutionally extend to apply to contraband not found in the home but only known to have been there for 15-30 minutes unexpectedly one day.

4. Application of the "rebuttable presumption" of constructive possession to cases where the contraband was not found in the home violates state and federal due process mandates requiring the prosecution to shoulder the full burden of proving the essential "possession" element of the crime.

5. The aggravating factor that a crime had a "destructive and foreseeable impact" on someone other than the victim of the crime did not apply because the victim of the rendering crime was the public and there was no evidence that the fears of the families involved amounted to such an impact, and because the impact was the type considered by the Legislature in setting the standard range.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court of appeals err in effectively holding that the Callahan doctrine of "passing control" does not apply when a person has control over the premises where that momentary handling occurred?

2. Should the rebuttable presumption that a defendant constructively possesses contraband found by police in the defendant's home be reserved for its proper purpose or should it be extended to cover all contraband ever in the home, even if it was there for at most a half an hour?

3. Does applying a rebuttable presumption of constructive possession of items found in a defendant's home to cases where the items were not so found violate due process by relieving the prosecution of the full weight of its burden of proving the essential "possession" element of a crime?

   Further, was there "constructive" possession where the defendant was simply renting a home into which a person briefly and unexpectedly brought a stolen gun and the defendant only handled the gun once, in order to put it in a bag so it could be removed from the house?

4. Did the sentencing court err in imposing an exceptional sentence based upon the factor that the crime had a serious, foreseeable impact on others when that aggravating factor was based upon conduct which was necessarily considered by the Legislature in setting the presumptive range for the sentence? Further, did the sentencing court err in imposing the sentence based upon the impact of the crime on others when the victim of the crime was the public and there was insufficient evidence that the impact was any greater than in the typical situation where a defendant renders criminal assistance to someone who has committed murder?

C. STATEMENT OF THE CASE

1. Procedural Facts

Petitioner Letrecia Nelson was charged with six counts of first-degree rendering criminal assistance and one count of possession of a stolen firearm, each with aggravating circumstances alleged that the crime involved "a destructive and foreseeable impact on persons other than the victim" and that it was knowingly committed against a law enforcement officer performing official duties. CP 805-809; RCW 9A.56.140(1), RCW 9A.56.310(1), RCW 9A.76.050(1), RCW 9A.76.070(2)(a), RCW 9.94A.535(3)(r), RCW 9.94A.535(3)(v). At jury trial before the Honorable Judge Stephanie Arend in late 2010, the judge dismissed all but one of the "rendering counts" prior to the case going to the jury. RP 1600-1606. Nelson was ultimately convicted of the single "rendering" count

and the stolen firearm count, with both aggravating factors. CP 1570-74. Judge Arend later imposed an exceptional sentence only for the "rendering" conviction, to run consecutive to the standard-range sentence on the other count. CP 1629-41.

Nelson appealed and, on September 20, 2013, Division Two of the court of appeals affirmed in part and reversed in part in a published opinion. See CP 1646-55; State v. Davis and Nelson, 176 Wn. App. 849, 315 P.3d 1105 (2013), review granted, 179 Wn.2d 1014 (2014).

2. Relevant facts

Petitioner Letrecia Nelson was at home when her nephew, Maurice Clemmons, showed up at her door after shooting and killing four police officers in Lakewood, Washington. When Clemmons arrived, Nelson's daughter said, he said something about having just killed four officers. TRP 307. Clemmons also said he was shot and asked Nelson to get him a shirt and a "plastic bag or something." TRP 307.

While Clemmons was there, Nelson's daughter noted that Nelson was shaking and appeared scared. TRP 381. Indeed, it was unusual to see Nelson so quiet and scared, instead of how she usually was, ordering people around. TRP 384-86.

In all, Maurice Clemmons was at Nelson's home for a scant 15-30 minutes. When he was ready to leave, he asked, "[w]here's the gun?" TRP 316. Eddie Davis, who was at the home, replied that the gun was in the bag on the counter, then went and got the bag for Clemmons. TRP 317.

Later in the day, when police came to her home looking for

Clemmons, Nelson not only told them that she did not know where Clemmons was and had not seen him but also that, if she knew, she probably would not tell them. TRP 502-503. She said what Clemmons had done was wrong and he had gone too far but that he was still her family and she believed he was going to "wind up dead" when police caught up with him. TRP 503-504. Ultimately, after Clemmons was shot and killed by a police officer as Nelson had predicted, Nelson gave a statement to police admitting that Clemmons had shown up with the gun that day, saying he was shot and asking for a bag. TRP 1177. Nelson said she got Clemmons a plastic bag and put the gun into it, saying to Clemmons something like, "[y]ou leaving." TRP 1176.

At trial, the prosecution's theory of Nelson's guilt for possession of the stolen firearm was that she 1) knew it was stolen because Clemmons had told everyone there that it was and 2) was in "possession" of the gun because she "obviously has dominion and control over the belongings in her house while she's there" and thus had such control "over the firearm." TRP 1710. The prosecutor also argued Nelson's guilt for possessing the stolen weapon because Nelson "likely" got the bag for Clemmons and put the gun inside. TRP 1710.

The jury acquitted Nelson of all but one of the different "means" of alleged "rendering criminal assistance," convicting her only for "preventing or obstructing, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of Maurice Clemmons." CP 1574.

D. ARGUMENT

1. MOMENTARY HANDLING OF A GUN SOMEONE BROUGHT INTO YOUR HOME TEMPORARILY AMOUNTS TO "FLEETING POSSESSION" INSUFFICIENT TO SUPPORT A CONVICTION FOR ACTUAL POSSESSION

Under the state and federal due process clauses, the prosecution bears the burden of proving every essential element of a crime, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). In this case, in its published decision, Division Two not only improperly upheld Nelson's conviction for possession of the stolen firearm despite insufficient evidence but also reached its conclusion in a way which impermissibly relieved the prosecution of the full weight of its burden of proof not only for this case but in the future.

Nelson was charged with and convicted of possession of the stolen firearm Clemmons brought into her home that day. CP 805, 1570-75. To prove unlawful possession of a stolen firearm, the prosecution has to prove someone "possesses, carries, delivers, sells, or is in control of a stolen firearm." RCW 9A.56.310(1). Here, because Clemmons told everyone at Nelson's home that the firearm was stolen, the only question was whether Nelson had "possessed" that gun either by her momentary handling of it to put it in a bag ("actual" possession) or based on a theory of "constructive possession."

For "actual" possession, here, the only evidence was Nelson's admission that she had the gun Clemmons had unexpectedly brought into

her home in her hand for a few seconds while she put it in the bag she had gotten at Clemmons' request. In Callahan, supra, this Court made it clear that actual possession of contraband sufficient to support a conviction for that possession does not exist every time someone handles an item. 77 Wn.2d at 29. Instead, this Court held, "possession entails **actual control**, not a passing control which is only momentary handling." 77 Wn.2d at 29 (emphasis added).

This Court also addressed this issue in State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994), in a way which the court of appeals has described as having "refined Callahan." State v. Summers, 107 Wn. App. 373, 28 P.3d 789 (2002), reversed on other grounds, 145 Wn.2d 1015, on remand, 43 P.3d 526 (2002). In Staley, this Court looked at the Callahan analysis of both constructive possession and actual possession. Staley, 123 Wn.2d at 800-801. For actual possession, the Court noted that evidence that someone had momentarily handled an item earlier, without more, was insufficient to support a conviction based on actual possession. Id. To "possess," this Court held, means "to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." Id.

In this case, Division Two dismissed the concept of "passing control" set forth by this Court in Callahan and Staley by simply declaring that Nelson had, in contrast to Callahan, "dominion and control over her own residence" and jurors could therefore "infer" dominion and control over the firearm while it was in her home. Davis/Nelson, 176 Wn. App. at

864. Thus, Division Two conflated the "rebuttable presumption" of possession which applies in some constructive possession cases with the separate question of whether the momentary handling of the gun unexpectedly brought into Nelson's home was sufficient to support a conviction for **actual** possession of that gun. In so doing, Division Two effectively rewrote this Court's decisions in Callahan and Staley to eliminate application of the "passing control" doctrine so long as the momentary handling occurs in the defendant's own home.

Indeed, Division Two then found "actual" possession based upon such passing control, despite the holdings of Callahan and Staley, because Nelson admitted to handling the gun for those brief seconds when she put it in the bag. Davis/Nelson, 176 Wn. App. at 865. Division Two was convinced that Nelson had "made the firearm available for Clemmons' use" by putting it in the bag and thus somehow had "actual" possession of the gun, despite the brevity of her contact and the other facts showing that she was not, in fact, actually possessing the gun as that possession is understood under Callahan and Staley. Id.

But the gun was *already* available for Clemmons' use. Clemmons was the person who stole it and used it to horrific effect at the coffee shop. He was the one who brought it into the home for the 15-20 minutes it was there. And before he left he demanded to know where it was, then took it with him, as the entire time it was treated as his.

Nelson's brief handling of the gun to put it in the bag did not amount to "actual possession" simply because it occurred in her home,

under Callahan and Staley. Division Two erred in so holding and effectively eliminating the application of those two cases to any case where the brief handling of contraband occurs in the defendant's home.

Division Two also concluded that the evidence established "constructive possession" of the gun, because Nelson had "dominion and control" over her own residence and there is a rebuttable presumption that she had similar dominion and control over everything (such as the firearm) inside. Davis/Nelson, 176 Wn. App. at 865. In so extending the "rebuttable presumption" to apply to items **not found** in the home, the court of appeals improperly relieved the prosecution of its burden of proof and effectively overruled caselaw finding that constructive possession is not proven with such scant evidence.

The doctrine of "constructive possession" is intended to avoid the absurd result that someone who truly possesses contraband but is not physically touching it at the time police arrive might not be convicted of that possession due to the happenstance of not being in actual contact with it when police arrive. See, e.g., State v. Spruell, 57 Wn. App. 383, 387, 788 P.2d 21 (1990). As a result, the doctrine allows for conviction when, based upon the totality of the circumstances, the defendant is shown to have had "dominion and control" over the contraband, sufficient to establish possession which is deemed "constructive." See id. In this way, the doctrine relies on "a legal fiction, a pragmatic construct designed to deal with the realities of criminal law enforcement," which do not often involve a defendant actually handling contraband at the moment police

arrive. See e.g., Commonwealth v. Davis, 444 Pa. 11, 15, 289 A.2d 119 (1971).

The idea of "constructive possession" in the Prohibition-era bootlegging cases focused on persons who had control over the premises where there was liquor found. See State v. Spillman, 110 Wash. 662, 188 Pac. 915 (1920). Even then, however, constructive possession was described as "that possession which the law annexes to the legal title or ownership of property, and where there is a right to the immediate, actual possession of property." 110 Wash. at 666-67. The concept was that a person may "have a thing in his possession without having it actually on his person." Id.

In the more modern era, this has translated into an analysis which looks not only at whether someone has "dominion and control" over premises where contraband was found but also on the "totality of the circumstances," of which control over premises is only one part See, State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997); see also State v. Cantabrana, 83 Wn. App. 204, 207-08, 921 P.2d 572 (1996). Indeed, Division Three grappled for a short time with whether it was proper to tell a jury that "constructive possession is defined by showing that the defendant had dominion and control over *either* the drugs *or* the premises in which the drugs were found. First, it found such instruction proper (State v. Ponce, 79 Wn. App. 651, 904 P.2d 322 (1995)) and then it reversed itself, concluding that, in fact, regardless of whether a defendant has dominion and control over premises where a substance was found, that is only one factor in determining whether the prosecution has shown

"dominion and control over the substance," as required. State v. Shumaker, 142 Wn. App. 330, 174 P.3d 1214 (2007).

Cases discussing constructive possession have thus found that the mere fact that someone rents a home does not mean that they are in constructive possession of - and thus criminally liable for - anything someone brings into that home. See State v. Roberts, 80 Wn. App. 342, 353, 908 P.2d 892 (1996). Instead, the fact that contraband is found in someone's home is simply one factor in determining whether "dominion and control" over the home indicates "dominion and control" over the item. Id.

Put another way, "it is not a crime to have dominion and control over the premises where" contraband is found. Tadeo-Mares, 86 Wn. App. at 817. Instead, while having dominion and control over premises where contraband is found raises a presumption of possession of that contraband, the Court looks at all of the relevant facts - the "totality of circumstances" - to determine if the defendant had "dominion and control" over the relevant item. Id.

Here, the gun was not found in Nelson's home. Instead, it was there for a few minutes - at the outside, half an hour. Thus, the basic premise of constructive possession - to avoid a legalistic defense of no "actual" possession of an item found in a home - does not apply.

Further, aside from the few moments when she put it in a bag, there is no evidence that Nelson had "constructive possession" or "dominion or control" over that gun. She was certainly not able to exclude Clemmons from the gun, which he stole and used and then carried in the

home with the intent of taking it with him when he left.

In applying the rebuttable presumption here, the court of appeals extended that presumption far beyond its purposes and relieved the prosecution of the full weight of its burden of proof. The "rebuttable presumption" seems to have its origins in some Prohibition-era cases where liquor was found in the defendants' home and, although their wives claimed ownership, the "man of the family" was deemed responsible and in "possession" because of his role as head of the house. See State v. Arrigoni, 119 Wash. 358, 360, 205 P.7, 25 A.L.R. 310 (1922); see also, State v. Kichinko, 122 Wash. 351, 210 P. 354 (1922). The concept of the rebuttable presumption today remains that a defendant should not escape liability for contraband he owns simply because he was absent when it was found in his home. See Tadeo-Mares, 86 Wn. App. at 815-16.

Prior to this case, however, no Washington appellate court had held in a published decision that the rebuttable presumption of constructive possession of items found in your home applies to contraband **not found in the home** but just brought there for a short time and then taken away.

The distinction is crucial. It makes sense to impose a rebuttable presumption that drugs or items of contraband found by police in someone's home (and presumably there for some time) are at the very least there with that person's knowledge, due to the fact that they were found in that person's home. But imposing such a presumption simply because something is believed to have been in the home for 15-30 minutes one day

does not make similar sense. The facts of this case illustrate the problem. It is undisputed that Nelson did not know that Clemmons was going to shoot and kill four police officers that morning. Nor did she know he was going to bring over the gun. And once Clemmons was there he was in charge, as a shaking and scared Nelson did what he said. See, e.g., TRP 381-84, 1396-97, 1402, 1423-24.

With its ruling, Division Two has contorted the "rebuttable presumption" so that now a person is presumptively in possession of every item of contraband brought into her home, even if she did not ask for it, know about it in advance or want it when it was there. Under Division Two's decision, any time anyone brings any contraband into a home for even a fleeting time, the person who owns the home is presumed criminally liable for "constructive possession" of that contraband, regardless of the facts. That kind of expansion of the law of constructive possession is not proper, despite the understandably strong emotions surrounding this case.

Division Two's decision stretching the doctrine of constructive possession and the rebuttable presumption of such possession when items are found in your home runs afoul of due process as well. This Court has cautioned against use of evidentiary presumptions to relieve the prosecution of its constitutionally mandated burden of proving every essential element of its case, beyond a reasonable doubt. See, e.g., State v. Cantu, 156 Wn.2d 819, 142 P.3d 725 (2006). A "permissive presumption" permits but does not require an inference of the presumed fact, while a mandatory presumption "mandates such inference unless it is rebutted."

156 Wn.2d at 822; see State v. Deal, 128 Wn.2d 693, 699-700, 911 P.3d 996 (1996). While the state may use "evidentiary devices" such as presumptions to "assist it in meeting its burden of proof," such devices run afoul of due process if they serve to relieve the state of its obligation to prove all essential elements of a crime, beyond a reasonable doubt. Deal, 128 Wn.2d at 699; see also, Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 2458-59, 61 L. Ed. 2d 39 (1979).

Where a permissive inference is only *part* of the State's proof of an element, "due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact." Deal, 128 Wn.2d at 700. Thus, using the rebuttable presumption of constructive possession of contraband found in someone's home is permissible only if there is more to support the finding of possession than just the fact that it was that person's home. Under Division Two's published decision here, however, the rebuttable presumption of constructive possession of contraband found in your home has become effectively the *only* proof needed to support a finding of constructive possession. This Court has held that, where a permissive inference amounts to "sole and sufficient" proof of an element, there must be proof that the fact "proven" from that inference must meet a higher standard and show that the inference is true "beyond a reasonable doubt." See State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). And it does not follow beyond a reasonable doubt that a person is in possession of everything in their home, regardless where it was, who brought it, how long it had been there and other factors.

Used properly, the doctrine that "dominion and control over the

premises raises a rebuttable presumption of constructive possession of contraband found therein" is only part of the prosecution's proof that the defendant should be held criminally liable for "possession." See, e.g., Roberts, 80 Wn. App. at 345. But dominion and control over the premises "does not establish dominion and control over the contraband as a matter of law." Id. This Court should so hold and should reverse and dismiss Nelson's conviction for "possession" of that which she did not possess. Further, this Court should hold that the "rebuttable presumption" that you constructively possess everything inside your home does not apply where, as here, the contraband is **not found** in the home but was only there for a brief time. Finally, the Court should reject Division Two's evisceration of the doctrine of "passing control" set forth by the Court in Callahan and Staley and should hold that it may apply in situations where the defendant has "dominion and control" over the premises, based upon the "totality of the circumstances."

2. THE "DESTRUCTIVE AND FORESEEABLE IMPACT" AGGRAVATING FACTOR DID NOT APPLY

In its decision, Division Two upheld the application of one aggravating factor to Nelson's "rendering" conviction, which was "that the offense involved a destructive and foreseeable impact" on someone other than the victim under RCW 9.94A.535(3)(r). SRP 66; CP 1626-28. Before and during trial, Nelson and the others had moved to dismiss that aggravating factor. See, e.g., CP 865-66, 873-74, 1153-59, 1452-60; 8RP 33, 71; TRP 1315-23, TRP 1358.

In ruling on the issue, the trial court first said that the scope of the

aggravating factor was unclear under the law but that it was "fundamentally impossible" to separate out the impact of the "rendering" conduct from the specific crimes that Clemmons - not Nelson or the others - had committed. TRP 1324-25. The judge also said that the case would have been different if the murders were not of people who had "status in the community" or if it had only been one person, but because of the "community outrage" about Clemmons' acts, Nelson was subject to the aggravating factor. TRP 1326. The court later entered written findings of fact and conclusions of law in support of the exceptional sentence, finding that the aggravating factors applied to both crimes, noting that the jury had entered verdicts on those factors, and declaring, "[t]he legislature did not consider these factors in determining the standard range." CP 1628.

In State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000), this Court held that the victim of the crime of rendering criminal assistance is the general public. In its published decision here, Division Two cited the SRA definition of "victim" as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a *direct result* of the crime charged." Davis/Nelson, 176 Wn. App. at 876-77. Division Two then held that the "destructive and foreseeable impact" thus had to be on persons other than those sustaining injury as a direct result of the crime charged. Id. The Court characterized the impact on the family members of the slain officers as a specific impact beyond general societal effect. While rendering assistance to a murderer and delaying his apprehension will "necessarily prolong the anguish of the victim's family" in every case, Division Two held, this case was different

because the families of the victims were also afraid they might be next. Id.

An exceptional sentence must be based upon aggravating factors which are unique to the underlying crime in the particular case, not which inhere in or are common as part of the commission of the charged crime. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986); see State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992). Put another way, the reasons for an exceptional sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense," when the Legislature established the standard range. Nordby, 106 Wn.2d at 518.

Thus, where a defendant was found guilty of vehicular assault, the severity of the injuries could not serve as an aggravating factor even though the victim was in the hospital for several months. State v. Cardenas, 129 Wn.2d 1, 14, 914 P.2d 57 (1996). In reaching this conclusion, this Court noted that the crime of vehicular assault requires "serious bodily injury" which involves "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. Id. As a result, the Court held, even severe injuries were "evidently the type of injuries envisioned by the Legislature in setting the standard range," so that the severity of the injuries could not support an exceptional sentence. 129 Wn.2d at 7.

Further, the fact that there was more than one injury from the same incident was not sufficient. 129 Wn.2d at 9. Because "the very nature of a vehicular assault is that it often results in multiple injuries from this single act," the multiple injuries inflicted by the defendant's drunk driving in

Cardenas "did not distinguish the crime from the typical vehicular assault" and so could not justify the exceptional sentence. 129 Wn.2d at 9.

Similarly, here, the "foreseeable and destructive impact" upon which the court relied as an aggravating factor was inapplicable in this case, not only because the victim of the crime was the "public" but also because of the very nature of the crime for which Nelson was convicted. The crime of rendering criminal assistance requires that the defendant must know that the person she is assisting has committed a crime and "**is being sought by law enforcement for the same.**" See State v. Anderson, 63 Wn. App. 257, 818 P.2d 40 (1991), review denied, 118 Wn.2d 1021 (1992) (emphasis added); see RCW 9A.76.070(1). Further, the mental state element of the crime of rendering is that the defendant have the intent to "**prevent, hinder, or delay the apprehension or prosecution** of another person he knows has committed a crime." RCW 9A.76.050 (emphasis added).

Thus, by definition, when someone commits the crime of rendering, they cause delay and difficulty in the apprehension or prosecution of the perpetrator of a crime. That is, in fact, the entire purpose for which the crime exists - to render criminal the causing of such hindrance or delay.

Further here, the crime for which Nelson was convicted was first-degree, which contemplated that the person to whom assistance was given had committed a serious crime, including, specifically, murder. RCW 9A.76.070(1). As a result, at the time the Legislature crafted the standard

range, presumptive sentence for this crime, they were contemplating that the defendant would have aided someone in the most heinous and serious of crimes. Because the crime of rendering necessarily contemplates that the defendant's acts will have caused delay in apprehension or prosecution of a person who has committed the crime, the effects of such delay were already included as part of the Legislature's calculation of the proper sentence for the crime - in this case 12-14 months in custody.

Notably, the trial court did not make any finding that Nelson's failure to tell the police she had seen Clemmons had some specific, unusual effect of delaying or causing problems, as opposed to the usual case where the defendant helps delay or hinder capture or prosecution of someone who commits murder. And the fact that, by refusing to tell police the truth, Nelson prevented them from apprehending Clemmons sooner is exactly the very kind of delay in apprehension considered by the legislature in setting the standard range.

The theory of the crime of criminal assistance, sometimes called being "an accessory after the fact," is that the defendant's acts are akin to obstruction of justice, a crime for which it is the public interest which is harmed, not a particular person. See United States v. Balano, 618 F.2d 624 (10th Cir.), cert. denied, 449 U.S. 840 (1980), overruled in part and on other grounds by Richardson v. United States, 468 U.S. 317, 325-26, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984) ("accessories after the fact '(obstruct) justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime'"). By definition, any time anyone commits this crime, they have delayed the apprehension of

someone who has committed murder. The resulting impact on the community and the families of the officers Clemmons killed is exactly the kind of impact which is expected when there is "rendering." See, State v. Johnson, 69 Wn. App. 528, 529, 849 P.2d 662 (1993), affirmed, 124 Wn.2d 57 (1994); State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

There was definitely evidence in the record that the family members were afraid they might be unsafe while Clemmons was at large because they did not know if the officers had been shot at random or were specifically targeted. See TRP 241-42, 246. But Clemmons shot only officers, not any of the other non-police patrons at the coffee shop. There was nothing in the record indicating that he was targeting officers and their families, so that the fear the families raised would be a "foreseeable and destructive impact" caused by Nelson's "rendering" and would be different than that which would exist in any other similar case. This Court should so hold.

E. CONCLUSION

The crimes Maurice Clemmons committed in shooting and killing four police officers were horrific and awful. Were he still alive, he would face proper punishment for those acts. Ms. Nelson, however, should not be punished for what Clemmons did but for her own actual acts, based on her own culpability. The prosecution did not establish that Nelson had either actual or constructive possession of the stolen firearm Clemmons unexpectedly brought to Nelson's home for 15-30 minutes that day. Nor did it establish that Nelson's acts of "rendering" had a "destructive and foreseeable impact" not normally associated with causing delay in apprehension of someone who has committed murder. For these reasons and the reasons stated herein, this Court should revers and dismiss the conviction for possession of a stolen firearm and should hold that the exceptional sentencing factor did not support the sentence in this case.

DATED this 7th day of April, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
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CERTIFICATE OF SERVICE BY EMAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached documentf to opposing counsel by email to their official filing email, pcpatcecf@co.pierce.wa.us., to counsel for codefendant Davis (Stephanie Cunningham) through email at sccattorney@yahoo.com. and by first-class mail, postage prepaid, to Letrecia Nelson, DOC 346425, WCCW, 9601 Bujacich Rd. NW, Gig Harbor, WA. 98332-8300.

DATED this 7th day of April, 2014.

/s/ Kathryn Russell Selk
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APPENDIX A

REFERENCES TO LOWER COURT RECORD

There are 34 volumes of transcript, some containing multiple days and only some chronologically paginated. The volumes will be referred to in the attached pleading as follows:

the volume containing both proceedings of January 7, 2010, as "1RP;"
January 26, 2010, as "2RP;"
March 4, 2010, as "3RP;"
March 17, 2010, as "4RP;"
March 31, 2010, as "5RP;"
April 14, 2010, as "6RP;"
April 20, 1010, as "7RP;"
April 29, 2010, as "8RP;"
May 7, 2010, as "9RP;"
June 7, 2010, as "10RP;"
June 25, 2010, as "11RP;"
June 30, 2010, as "12RP;"
July 14, 2010, as "13RP;"
August 5, 2010, as "14RP;"
September 7, 2010, as "15RP;"
the two chronologically paginated volumes containing the proceedings of September 8 and 9, 2010, as "16RP;"
October 11, 2010, as "17RP;"
October 12, 2010, as "18RP;"
October 26, 2010, as "19RP;"
the chronologically paginated volumes containing the proceedings of October 28, November 2-4, 8-10, 15-18, 22, 29 and 30, December 1-2 and 6, 2010, as "TRP;"
the proceedings of January 14, 2011, contained in the same volume as January 19, 2011, but separately paginated, as "SRP;"
the proceedings of January 19, 2011, contained in the same volume as January 14, 2011, but separately paginated, as "SRP2."

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Attached please find the supplemental brief on behalf of Ms. Nelson.

Thank you!

Sincerely,

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