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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EDDIE DAVIS, APPELLANT
LETRECIA NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 09-1-05374-1
No. 09-1-05453-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the Court of Appeals correctly reject defendants' challenge to the sufficiency of the evidence that they each "possessed" a stolen firearm when the evidence showed that each of defendants had constructive possession of the firearm for several minutes as well as actual possession of the weapon for a shorter period of time?
2. Did the Court of Appeals properly find that the aggravating factor that "the offense involved a destructive and foreseeable impact on persons other than the victim" was applicable to defendants' convictions for rendering criminal assistance in the first degree?
3. Should the term "victim" in the phrase "persons other than the victim" in RCW 9.94A.535(3)(r) be construed to refer only to a specific victim, if any, identified by the elements of the crime as such construction is consistent with legislative intent and other provisions of the SRA?

B. STATEMENT OF THE CASE.

This case arises out of the defendants' rendering of criminal assistance to Maurice Clemmons, who murdered four Lakewood Police Officers in a Forza Coffee shop on November 29, 2009. The jury found

Defendant Nelson guilty of rendering criminal assistance in the first degree and possessing a stolen firearm. (LN)CP¹ 1570, 1571. The jury found Defendant Davis guilty of rendering criminal assistance in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree. (ED)CP 450-452. On all of the charges pending against both defendants, the State alleged the crimes were aggravated by the following circumstances: 1) the offense involved a destructive and foreseeable impact on persons other than the victim, RCW 9.94A.535(3)(r); and, 2) the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, RCW 9.94A.535(3)(v). (ED)CP 13-18, (LN)CP 805-809. The jury also returned special verdicts finding both alleged aggravating circumstances applicable to all convictions. (LN)CP 1572-1574; (ED)CP 453-455.

At sentencing for Nelson, the court imposed an exceptional sentence of 60 months on the rendering conviction (standard range 12+-14 months), and a standard range 14 month sentence on the possessing a stolen firearm count, but then imposed another exceptional sentence by running the terms consecutively for a total confinement sentence of 74

¹ The clerk's papers have been numbered serially in the index for three defendants, only two of whom are before this court for review. Some clerk's papers pertain to a single defendant, while others apply to all. When a clerk's paper applies to both defendants it will be referenced as "CP." If the clerk's paper pertains to only one defendant, then that defendant's initials will appear parenthetically before the "CP."

months. (LN)CP 1629-1641, 1626-1628 (findings of fact). At sentencing for Davis, the court imposed an exceptional sentence of 60 months on the rendering conviction (standard range 41-54 months based upon an offender score of 6), a standard range 43 month sentence on the possessing a stolen firearm count (offender score of 5), and a standard range sentence of 22 months on the unlawful possession of firearm (offender score of 5), but then imposed another exceptional sentence by running the term on the rendering conviction consecutive to the statutorily mandated consecutive sentences on the two firearm convictions, for a total confinement sentence of 125 months. (ED)CP 468-480, 465-467(findings of fact).

Defendants appealed, challenging the sufficiency of the evidence on "possession" of the firearm in unlawful possession and possession of stolen firearm convictions and that their exceptional sentences had a proper legal and factual basis. In a published decision, the Court of Appeals rejected defendants' challenge to the sufficiency of the evidence and found that the exceptional sentences imposed under RCW 9.94A.535(3)(r) on defendants' convictions for rendering criminal assistance were legally and factually justified. *State v. Davis*, 176 Wn. App. 849, 315 P.3d 1105 (2013). The court found the evidence did not support application of this aggravating factor to defendants' convictions for possession of a stolen firearm or to Davis's conviction for unlawful possession of a firearm. Additionally the court found the law enforcement victim aggravating factor in RCW 9.94A.535(3)(v) was legally

inapplicable to the rendering convictions and unlawful possession of a firearm and that there was insufficient evidence to support its applicability to the possession of a stolen firearm convictions.

Defendants sought review in this court on the sufficiency challenge and the applicability of RCW 9.94A.535(3)(r) to defendants' convictions for rendering criminal assistance; the State petitioned for cross review of the determination that the record provided a basis for upholding the aggravating factor in RCW 9.94A.535(3)(v) on the possession of a stolen firearm convictions. This Court granted defendants petitions, but denied cross review. *State v. Davis*, 179 Wn.2d 1014, 318 P.3d 280 (2014).

Due to the page limit on supplemental briefs, the State asks this court to refer to the statement of the case presented in the State's response brief for a detailed recitation of facts or to the opinion filed below for an overview of the case. The State cites to relevant portion of the record in its argument sections below.

C. ARGUMENT.

1. THE COURT OF APPEALS CORRECTLY REJECTED DEFENDANTS' CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE THAT THEY EACH "POSSESSED" A STOLEN FIREARM.

The applicable standard of review for a criminal defendant's challenge to the sufficiency of the evidence is whether, 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.2d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

Both defendants challenge their convictions for possession of a stolen firearm and Davis also challenges his conviction for unlawful possession of a firearm, arguing that there was insufficient evidence to find that either of them possessed the firearm in question.

The jury was instructed that to convict a defendant of the crime of possessing a stolen firearm, each of the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the 29th day of November, 2009, the defendant possessed, carried, delivered, sold or was in control of a stolen firearm;

- (2) That the defendant acted with knowledge that the firearm had been stolen;
- (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in the State of Washington.

CP 408-449 (Instruction No. 27 (Nelson), and No. 33 (Davis)). The jury was instructed as to the possession element of an unlawful possession of a firearm charge on Davis as follows: "(1) That on or about the 29th day of November, 2009, the defendant knowingly had a firearm in his possession or control[.]" CP 408-449 Instruction No. 32. Finally the jury was given the following instruction defining possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was

located. No single one of these factors necessarily controls your decision.

CP 408-449 (Instruction No. 20).

Either actual or constructive possession is sufficient to convict a defendant of unlawful possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it. *Jones*, 146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)).

Dominion and control can be established by circumstantial evidence. *State v. Chavez*, 138 Wn. App. 29, 34, 156 P.3d 246 (2007). In a review of whether there is sufficient evidence of dominion and control, the court looks at “the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the [prohibited items] and was thus in constructive possession of them.” *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

On review, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors. *Partin*, 88 Wn.2d at 906; *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). One important factor the court has recognized is having actual dominion and control over the premises where the prohibited item

is found. *See, e.g., State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor); *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (same). A defendant's actual control over the premises where a prohibited item is located creates an inference of dominion and control over the prohibited item. *Turner*, 103 Wn. App. at 523. It stated:

When the sufficiency of evidence is challenged on the basis that the State has shown dominion and control only over the premises, and not over [the prohibited item], courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the [prohibited item].

Id. (quoting *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996)). In addition to a residence, an automobile can constitute the "premises" for this inquiry. *State v. Turner*, 103 Wn. App. 515, 520–21, 13 P.3d 234 (2000) (citing *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)).

Aside from actual control over the premises, another important factor the court considers is whether the defendant had knowledge of the prohibited item's presence. *State v. Turner*, 103 Wn. App. at 524. "Thus, where there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go the jury." *Id.*

The courts have recognized other factors including close proximity, the ability to exclude others, and having immediate access to the prohibited item. *State v. Edwards*, 9 Wn. App. 688, 690, 541 P.2d 192 (1973) (considering proximity as one factor and exclusion of others as another factor); *State v. Wilson*, 20 Wn. App. 592, 596, 581 P.2d 592 (1978); *Jones*, 146 Wn.2d at 333 (holding immediate access to the prohibited item a factor). No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). Most of these factors alone will generally not be sufficient to establish dominion and control. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). Finally, while the ability to exclude others is a factor, dominion and control need not be exclusive to establish constructive possession. *Wilson*, 20 Wn. App. at 596; *State v. Weiss*, 73 Wn.2d 372, 378, 438 P.2d 610, 613 (1968).

In this case, the Court of Appeals found the evidence was sufficient and upheld the jury's finding that both Nelson and Davis had possession of Officer Richard's stolen service firearm. The Court of Appeals found the evidence was sufficient to support the finding of possession for each defendant on theories of both actual and constructive possession. *State v. Davis*, 176 Wn. App. 849, 863-67, 315 P.3d 1105 (2013). The determination should be upheld.

Following the murders at the Forza, Maurice Clemmons left with Richard's weapon in his possession. RP 233. He contacted Davis to transport him in Davis's Bonneville to Nelson's home in Pacific. RP 1081-82. Maurice Clemmons brought the gun inside Defendant Nelson's home and immediately announced that he had taken the gun from one of the officers that he killed, thereby informing² both defendants of the true owner of the stolen gun. RP 3-7, 333, 380. Thus, both defendants had knowledge of the firearm's existence and its stolen nature. RP 312, 1088.

The evidence establishes that Maurice Clemmons did not maintain actual possession of this firearm nor maintain dominion and control over it while his wounds were being cared for at Nelson's home, because he later asked about the location of the gun. RP 316. The issue for the jury was who did have actual possession or dominion and control over the gun while Maurice Clemmons did not.

The firearm was in Defendant Nelson's house for between 10 to 15 minutes. RP 284. As she has dominion and control over the contents of her house and knowledge of the firearm, the Court of Appeals found this sufficient evidence to support the jury's finding that that she also had dominion and control over the firearm for that period of time. *Davis*, 176 Wn. App. at 864. Evidence that Nelson's not only knew of the gun but

² It is reasonable to infer that both defendants heard this statement as they were in the same room with Maurice and Cecily Clemmons could hear this statement even though she was in an adjoining room when Maurice made it.

also that she " actually possessed the firearm by picking it up, putting it in the Tommy Hilfiger bag, and putting the bag on a counter," *see* RP 1175-76, 1201, was sufficient to support the jury's verdict on the basis of actual possession. *Davis*, 176 Wn. App. at 864. This evidence also demonstrates her dominion and control over the firearm as she placed the gun in a container which hid it from view from Maurice Clemmons. Nelson fails to show error in the analysis of the Court of Appeals or that this evidence is insufficient under the above cited authority.

The Court of Appeals found evidence sufficient to show that Davis had both dominion and control over the firearm as well as actual possession of it. *Davis*, 176 Wn. App. at 866. Davis knew the location of the gun when Maurice Clemmons asked for it. RP 314, 320, 383. The Court of Appeals noted that because no one was claiming to be in actual possession or control of the gun while it was on the counter, this weighs in favor of a determination that there was shared dominion and control over it. It was reasonable to find that Davis shared dominion and control over the gun because he took actual possession of it when, after telling Maurice where it was located, he retrieved the bag with the gun from the counter and delivered it to Maurice Clemmons. RP 320. This shows that he had the knowledge of it and the ability to take immediate possession and control- factors which show he was in constructive possession of the gun while it was on the counter. Again Davis had actual possession of the gun while he carried it from the counter to Maurice Clemmons. At that point,

Maurice left with the gun in Davis's car and then drove to a nearby mall. RP 971-73, 998, 1011. Again, Davis had dominion and control over the contents of his vehicle, which he knew included the gun, so he was again in constructive possession of the gun. Davis fails to show error in the analysis of the Court of Appeals or that this evidence is insufficient under the above cited authority.

Defendants complain that the evidence showed only fleeting possession which was insufficient under *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) to establish actual possession. But the Court of Appeals addressed the holding of *Callahan*, noting that it had been clarified by a subsequent decision in *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994):

Subsequently, our Supreme Court clarified the Callahan court's reference to "passing control" of an object:

Callahan did not create a legal excuse for possession based on the duration of the possession. Rather, evidence of brief duration or "momentary handling" goes to the question of whether the defendant had "possession" in the first instance. *Depending on the total situation, a "momentary handling," along with other sufficient indicia of control over the drugs, may actually support a finding of possession.*

State v. Davis, 176 Wn. App. at 864, citing *State v. Staley*, 123 Wn.2d at 804 (emphasis added in opinion below). The court below did not ignore or misconstrue this court's holdings but found the facts below to be distinguishable from those in *Callahan*.

Considering all of these factors and viewing the evidence most favorably toward the State and against the defendants, this Court should affirm the decision below finding the evidence is sufficient to uphold Davis's and Nelson's convictions for unlawful possession of a stolen firearm and Davis's conviction for unlawful possession of a firearm.

2. THE COURT BELOW PROPERLY FOUND THE AGGRAVATING FACTOR THAT "THE OFFENSE INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM" WAS APPLICABLE TO DEFENDANTS' CONVICTIONS FOR RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE.

The Sentencing Reform Act (SRA) requires a trial court to impose a sentence within the standard range in most cases, *see* RCW 9.94A.505(2)(a)(i), but allows a court to depart from the standard range "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An appellate court will uphold a trial court's reasons for imposing an exceptional sentence so long as the reasons are not clearly erroneous. *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986); *State v. Vaughn*, 83 Wn. App. 669, 675, 924 P.2d 27 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997). The reviewing court will reverse a trial court's findings only if substantial evidence does not support its conclusion. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d

1238 (1991). When an aggravating factor is found by a jury, the same standards used to test sufficiency of the evidence for a finding of guilt on a substantive crime are employed when testing the sufficiency of the evidence supporting an aggravating factor. *See generally State v. Suleiman*, 158 Wn.2d 280, 291, n. 3, 143 P.3d 795 (2006). Questions of statutory interpretation are review de novo. *State v. Sweat*, ___ Wn.2d ___, ___ P.3d ___ (2014) (opinion at p. 3, Case No. 88663-6, decided April 3, 2014), *citing State v. Alvarado*, 164 Wn.2d 556, 561 192 P.3d 345 (2008).

A court cannot base an exceptional sentence on a factor that does not distinguish the defendant's behavior from that inherent in all crimes of that type. *Vaughn*, 83 Wn. App. at 675.

The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors, and in some instances the Legislature limited the use of a particular aggravator to a certain crime or type of crime. *See e.g.*, RCW 9.94A.535(3)(c) (violent offense), (u) (burglary), (u)(i)(A) (theft or possession of stolen property in the first or second degree). But in many instances, the Legislature put no limitation as to which current offenses the aggravating circumstance might be applied.

In the case now before the Court, the State alleged, and the jury found, that defendants' crimes of rendering criminal assistance were aggravated by the following circumstance: the offense involved a destructive and foreseeable impact on persons other than the victim, RCW

9.94A.535(3)(r). Defendants challenge the jury's finding of this aggravating factor and its legal applicability to the crime of rendering criminal assistance. The Court of Appeals found the finding was supported by evidence and that defendant's "actions caused a destructive impact on the slain officers' families not normally associated with the underlying crime" and upheld the applicability of this factor to defendants' convictions for rendering. *Davis*, 176 Wn. App. at 880. The Court of Appeals correctly found this factor applicable to defendants' crimes and that aspect of the decision below should be affirmed.

As noted above, in some instances the Legislature has specifically limited certain aggravating factors to a particular crime or type of offense. It did not, however, put any such limitation on the aggravating circumstance that "the offense involved a destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r). Thus, defendants cannot point to any Legislative prohibition against using this aggravator on the crime of rendering criminal assistance.

The goal of statutory interpretation is to determine and carry out the intent of the Legislature. *Sweat, supra*, (Opinion at p.3). This case asks the court to construe the word "victim" in RCW 9.94A.535(3)(r) and in particular how that aggravator would apply with respect to the crime of rendering criminal assistance. This Court recently dealt with a similar issue in *Sweat*. In that case, this court had to construe the term "victim" as used in RCW 9.94A.535(3)(h)(i) and whether the definition of "victim"

found in RCW 9.94A.030(53) should apply. The definitional section of the SRA defines a "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." RCW 9.94A.030(53). This court noted that the general definition section in RCW 9.94A.030(53) contained a statement that the definitions apply throughout the chapter "[un]less the context clearly requires otherwise." *Id.* (Opinion at p. 5). This court went on to note that "the term 'victim' appears 28 times in RCW 9.94A.535" and that careful reading was needed to ascertain when the legislature intended a different definition of the word than that found in RCW 9.94A.030(53). It concluded in *Sweat*, that the definition of "victim" in RCW 9.94A.030 was not the proper definition to be applied to the term "victim" as used in RCW 9.94A.535 (3)(h)(1) as that required a broader interpretation. *Id.*

This case asks the court to construe the proper meaning of the term "victim" in the aggravating factor that the offense involved "a destructive and foreseeable impact on persons other than the victim" found in RCW 9.94A.535(3)(r). First, it is clear that the definition of "victim" in RCW 9.94A.030(53) should not be used in construing the term "victim" in this aggravating factor. If that definition were to be applied then this aggravating factor could only be applied to a person who: 1) suffered a "destructible and foreseeable impact" from a crime; but, 2) *did not* have "sustained emotional, psychological, physical, or financial injury to person or property" as a result of the crime. As there is no "destructive and

foreseeable impact" from a crime that would not *also* be an "emotional, psychological, physical or financial injury," this factor could never be applied. To use the definition of "victim" in RCW 9.94A.030(53) to construe the term "victim" in RCW 9.94A.535(3)(r) would be to render that aggravating factor meaningless. It is clear the Legislature intended a different meaning of the term "victim" as used in this aggravating factor.

Defendants' primary argument is that because rendering does not have a particular victim under the elements of the offense -but is a crime against society or the general public, that there is no one left to be the "persons other than the victim" as described in the aggravating factor. They contend that the impact on the general public, including the impact on the victims' families, has already been taken into consideration by the legislature in the setting of the standard range rendering this aggravating circumstance inapplicable to the facts of this case.

In response to this argument, the court must consider that *every* crime is a crime against society – even those that have a more particularized victim under the elements of the crime, such as murder, assault or rape. See *e.g.*, *State v. Haddock*, 141 Wn.2d 103, 111, 3 P.3d 733, 736 (2000) ("we recognize that all crimes victimize the public in a general sense"); RCW 10.99.010 (Legislature finding that domestic violence is a serious crime against society as well as the particular victim). The state constitution directs that all prosecutions are brought in the name of "the State of Washington" which reflects that society is harmed when

someone does not maintain his or her behavior within the bounds of the criminal law. WA Const. Art. 27, §5; *see also State v. Gentry*, 125 Wn.2d 570, 680, 888 P.2d 1105 (1995) (Johnson, J., dissenting) (observing that a criminal prosecution is not a private right of action on behalf of the victim; rather, the prosecutor represents the citizens of the State to “deter, punish, restrain, and/or rehabilitate those whose actions are so dangerous or offensive that they are an affront to a civilized society”).

Thus, to adopt defendants’ analysis would be to eliminate applicability of this aggravating circumstance to any crime because the general public or society is always a “victim” of every crime. Such a construction would result in the factor requiring showing an injury to “persons other than society” rendering the statutory provision meaningless as there are no “persons” who are not included within the term of “society.” Thus, when construing the term “victim” in the phrase “persons other than the victim” in RCW 9.94A.535(r), it must be to someone other than society as a whole because “society” is always harmed by any criminal acts.

As noted in *Sweat*, there is a difference between who qualifies as a “victim” under the elements of an offense, and qualifies as a victim under the SRA. *See also State v. Davison*, 116 Wn.2d 917, 921, 809 P.2d 1374 (1991) (a person need not be the “victim” under the elements of the substantive crime to fall within this statutory definition under the SRA). When the Legislature enacts an offense with an element that, for example,

is committed against "another person," it knows that proof of this crime requires proof of victim in an identifiable person. The Legislature also recognized, however, that people may be harmed by a crime even though they may not be identified as a "victim" under the elements of the offense. Consequently, it defined a "victim" under the SRA as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged" thereby making such victims eligible for restitution and to speak at sentencing even though they were not a "victim" under the elements of the crime. RCW 9.94A.030(53). When a crime has a specific victim as part of the elements of the offense, generally the harm to that victim has been contemplated by the Legislature in both defining the crime and in the setting of the standard range. But while the Legislature may contemplate the possibility of persons who will fall within the broader SRA definition of "victim," it cannot know if every crime will actually create such victims or precisely who those persons would be. This broader group of SRA victims cannot be foreseen by the Legislature in the same manner as the "victim" that is described by the elements of an offense, so the impact on this group cannot have been taken into account in the setting of the standard range. Instead, the Legislature allowed for restitution in every case and for that possibility that additional punishment might be imposed if it can be shown that the defendant's offense involved a "destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r).

The term “victim” in the phrase “persons other than the victim” in RCW 9.94A.535(3)(r) should be properly construed to refer to a specific victim, if any, identified by the elements of the crime. When so construed, this aggravating factor applies to persons other than the victim that the legislature took into account when defining the crime and setting of the standard range for the offense – which is an appropriate class to consider for when imposing an exceptional sentence. If the crime does not have a specific victim under the elements, then it must be shown that there was a destructive and foreseeable impact on some specific person or persons for the circumstance to apply. Again the legislature did not take this impact into account when setting the standard range.

This interpretation is consistent with cases construing a pre – *Blakely* version of the SRA finding harm to the community or others to be a proper aggravating factor. The Washington Supreme Court has upheld community impact reasonably foreseeable to the defendant as an aggravator justifying an exceptional sentence, but held that the impact on others must be of a destructive nature not normally associated with the commission of the offense in question. *State v. Johnson*, 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994). Johnson was involved in a “gang” drive-by shooting that occurred in the immediate vicinity of a public elementary school that was in session. There was testimony that witnesses to the shooting included children about to be released from school, and their parents, and there was evidence that after the shooting children were afraid

to attend school and parents feared for the safety of their children while at school. *Johnson*, 124 Wn.2d at 74-75. The court concluded that it was reasonably foreseeable to the defendant, who lived across the street from the school, that the children and their parents, who were not the intended victims of his acts, would be traumatized by them, and that this resulting trauma distinguished the case from other assaults. 124 Wn.2d at 75-76; *see also State v. Jackson*, 150 Wn.2d 251, 275-76, 76 P.3d 217 (2003) (community impact aggravating factor applicable to Jackson's murder of his nine year old daughter when he had reported that she was last seen in her front yard heading to school and this created considerable fear in the students and parents of students at the victim's school - many of whom stopped allowing their children to walk to school). 150 Wn.2d at 275-276.

Turning to the case before the court, the Court of Appeals was unclear as to whether the crime of rendering criminal assistance has a specific victim or is a crime against society. At one point in the opinion below, it seems to identify law enforcement as being a specific victim because it was law enforcement that had been prevented, hindered or delayed in the apprehension of Maurice Clemmons. *Davis*, 176 Wn. App. at 877. If "law enforcement" is the statutory "victim" of rendering criminal assistance then clearly the slain officer's families would fall within the term "persons other than the victim," thereby making RCW 9.94A.535(3)(r) applicable to the destructive impact defendants' crimes brought upon them. But the opinion also states that "the general public is

the victim of rendering criminal assistance." *Id.* at 878. As argued above, this court should not construe "victim" in RCW 9.94A.535(3)(r) to mean "general public" as the general public is always a victim of every crime and that would render this provision meaningless. Rather this court should construe RCW 9.94A.535(3)(r) to required proof of a harm to an identified person or persons who is not a "victim" under the elements of the offense but would fall within the statutory definition of "victim" under RCW 9.94A.030(53). The victims' families certainly fall within that category.

Defendants have failed to show any reason why -as a matter of law- the aggravator set forth in RCW 9.94A.535(3)(r) cannot be applied to their crime of rendering criminal assistance in the first degree. The facts of this case show that it was properly applied.

Although the Court of Appeals properly upheld this factor as applying to defendants' crimes of rendering based upon the harm to the victims' families, this Court should review the lower court's determination of the "destructive impact" on local law enforcement officers and the citizens of Lakewood had already been taken into consideration by the legislature in the setting of the standard range. The Court of Appeals erred by including factors that the Legislature did not take into account when setting the standard range.

To be guilty of rendering criminal assistance in the first degree, the defendants had to assist "a person who has committed ...murder in the first degree or any class A felony or equivalent juvenile offense." RCW

9A.76.070. The Legislature set its standard range based upon giving aid or assistance to a person who had committed a single murder; it did not take into consideration when setting the standard range, someone giving aid or assistance to a person who had committed *four* murders. The facts presented here are clearly more egregious than those anticipated by the Legislature and accounted for in the standard range. Next, the elements of the crime do not take into account the nature of the victim and the impact that can have. The murder of a law enforcement officer has a greater detrimental impact on the public's sense of security because the public views law enforcement officers as a protective barrier between it and crime. Law enforcement officers are trained in the use of force, armed, and under a duty to protect. When a trained, armed officer is murdered in the line of duty it will cause a greater detrimental impact on the public's sense of security than, for example, if the murderer was on the run after killing a family member. When *four* trained, armed officers are murdered at a single location and time, then the audacity of such a crime is going to have a huge negative impact on the community's sense of security. Here there was evidence of the negative impact this crime had on the sense of security of the residents Lakewood and, also, on the sense of security of other local law enforcement officers, who believed that there was a killer on the loose targeting law enforcement officers. RP 675, 682-83, 1236, 1241. None of this detrimental impact was accounted for in the standard range set by the Legislature, yet the Court of Appeals rather summarily

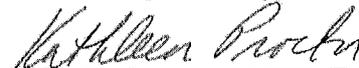
rejected its consideration as being "necessarily considered" by the Legislature in the setting of the standard range. *See Davis*, 176 Wn. App. at 877-78. This was error. This crime was not a typical rendering assistance in the first degree and its impact on the citizens of Lakewood and local law enforcement officers went well beyond that accounted for in the standard range. This court should uphold this aggravating factor for these reasons as well.

D. CONCLUSION.

For the forgoing reasons the State asks this court to affirm the result reached by the court below.

DATED: APRIL 7, 2014

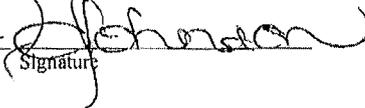
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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/7/14 
Date Signature

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Attached is the State's Supplemental Brief of Respondent