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NO. 89742-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LARRY A. HAYES,

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
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 ORIGINAL

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A. INTRODUCTION

Larry Hayes was charged with participating in a scheme to buy things with other people's credit card account information. Although the State initially claimed he was the scheme's leader, at trial many witnesses testified that one of the prosecution's witnesses actually stole and used the credit card account information for himself, not for Hayes. The State asked the jury to convict Hayes as an accomplice. By special verdict, the jury found that the underlying crimes were part of a series of offenses constituting a major economic offense. Hayes appealed and several of his convictions were reversed, but on remand he received an exceptional sentence based on the same aggravating factor. The Court of Appeals reversed this exceptional sentence because the exceptional sentence statute does not direct increased punishment for a person convicted based on accomplice liability.

B. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED

1. Accomplice liability for an underlying crime stems from statutory authority distinct from eligibility for enhanced punishment. The text of the sentencing statute dictates whether a person convicted as an accomplice is eligible for an aggravated sentence. The exceptional sentence statute does not mention imposing an enhanced punishment

upon a person found guilty based on accomplice liability. Did the Court of Appeals correctly hold that the judge lacked statutory authority to impose an exceptional sentence for a series of offenses constituting a major economic offense when Hayes was convicted as an accomplice?

2. The Court of Appeals reversed several convictions underlying the scheme that the jury used to find a major economic offense and no new jury was empaneled after remand. Did the reversal of several convictions undermine the jury's special verdict finding that the "series of offenses" constituted a major economic offense?

C. STATEMENT OF THE CASE

In 2009, Larry Hayes was accused of stealing credit card receipts and directing others to buy property with false identities. CP 21-22. The State's case hinged on the testimony of Benny Epstein, who received immunity and was cooperating with the prosecution in hopes of reducing his sentence for a pending federal case. 7RP 27-28; 8RP 8, 75-76.¹ Multiple witnesses testified that Epstein, not Hayes, was the person who stole and used the credit card receipts at issue. *See State v.*

Hayes, 164 Wn.App. 459, 465-66, 262 P.3d 538 (2011). The prosecution altered its theory to accuse Hayes of being an accomplice to Epstein. 12RP 10; 6/23/09a.m.RP 37-39, 52-53; 6/23/09p.m.RP 54-55.

Without the jury specifying whether they found Hayes guilty as an accomplice, Hayes was convicted of leading organized crime, one count of identity theft in the first degree for using Scott Mutter's credit card number, five counts of identity theft in the second degree and five related counts of possession of stolen property in the second degree – each based on the same five receipts listing credit card account numbers, a sixth count of possession of stolen property in the second degree for receipts of unnamed individuals' credit card accounts, and two counts of possession of a stolen vehicle. CP 13-22.

The jury entered special verdict findings for each count stating that “the crime” was “a major economic offense or series of offenses.” See CP 25 (special verdict form, count I, attached as Appendix A). As punishment, the court imposed an exceptional sentence above the

¹ The transcript (RP) from the resentencing hearing is cited based on the date of the proceeding. The trial transcripts are cited by the volume designated on the cover page, or by the date of the proceeding if no volume number is listed on the cover page. The trial transcripts from COA 66646-1-I were transferred to the instant appeal.

standard range for leading organized crime and treated the remaining offenses as part of the same criminal conduct. 164 Wn.App. at 483-84.

The Court of Appeals reversed Hayes's conviction for leading organized crime, holding that this offense punishes the leader of a criminal enterprise and not someone with a limited role in aiding the leader. 164 Wn.App. at 470. The jury's verdict reflected only a finding that Hayes assisted another person in a limited role, which is insufficient to convict him of leading organized crime. *Id.* at 471. The Court of Appeals also reversed two convictions for possession of a stolen vehicle. *Id.* at 481. The State did not seek review.

On remand, the State dismissed the three reversed charges as well as one conviction for possession of stolen property in the second degree. 3/16/12RP 6-7; CP 70, 96-97. Even though the court vacated these convictions, the prosecution asked the judge to impose the same 180-month exceptional sentence he had previously ordered. 3/16/12RP 8-10. The judge agreed in part, imposing an exceptional sentence of 96 months for Count One, first degree identity theft, which involved the unauthorized use of Scott Mutter's credit card account in a value exceeding \$1500. CP 13. Mutter's account had four unauthorized

charges, totaling \$2047. 10RP 9. The judge imposed standard range sentences for all other remaining convictions. 3/15/12RP 16.

The Court of Appeals reversed this exceptional sentence because the State used accomplice liability to win its convictions and the sentencing statutes do not authorize an exceptional sentence for a person convicted as an accomplice. *State v. Hayes*, 177 Wn.App. 801, 808-09, 312 P.3d 784 (2013), *rev. granted*, 180 Wn.2d 1008 (2014).

D. ARGUMENT

The Court of Appeals correctly held there is no statutory authority for imposing an exceptional sentence when a person is convicted as an accomplice without a jury finding of the accused's individual culpability

1. *A sentencing enhancement must expressly extend liability for additional punishment to an accomplice.*

The imposition of an enhanced penalty must depend on the accused's own conduct. *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). This principle is well-established. "Absent explicit evidence of a contrary legislative intent, an accomplice's liability extends only to the substantive crime, not sentence enhancements." 13A Wash. Prac., Criminal Law § 104 (2013-2014 ed.).

RCW 9A.08.020 sets forth the requirements for finding a person “is guilty of a crime” based on another person’s acts. *McKim*, 98 Wn.2d at 115. This accomplice liability statute does not direct the imposition of punishment on participants whose guilt stems from being legally accountable for the behavior of others. *Id.*

In *McKim*, the court addressed a prior version of the deadly weapon enhancement statute that did not mention imposing the enhanced penalty upon an accomplice. *Id.* at 116. It held that a sentencing enhancement may be imposed on a person convicted as an accomplice only if there is a “triggering device” within the “operative language” of the sentencing statute. *Id.* at 116. Without explicit legislative authority directing the sentencing judge to increase of an accomplice’s punishment, “any sentence enhancement must depend on the accused’s own misconduct” as found by the jury. *Id.*

The Legislature demonstrated its understanding of the need to include express triggering language to increase an accomplice’s punishment when it revised the deadly weapon enhancement statute after *McKim*. The revised statute permits the penalty enhancement when “the offender or an accomplice was armed with a deadly weapon.” *See State v. Silva-Baltazar*, 125 Wn.2d 472, 481, 886 P.2d

138 (1994) (quoting former RCW 9.94A.125 and discussing statutory change following *McKim*).

The Legislature has not changed the complicity statute since *McKim*. RCW 9A.08.020 continues to define when a person may be found “guilty of a crime” based on another person’s conduct. It does not authorize increased punishment under the Sentencing Reform Act. *See In re Pers. Restraint of Howerton*, 109 Wn.App. 494, 501, 36 P.3d 565 (2001) (*McKim*’s analysis “is sound” regarding the complicity statute’s inapplicability to sentence enhancements). Imposing an enhanced sentence flows from the express and deliberate authorization in the governing sentencing statute, regardless of how the underlying crime is defined. *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010).

In *Silva-Baltazar*, this Court considered an accomplice’s eligibility for a sentencing enhancement based on a drug sale that occurs within 1000 feet of a school bus zone. 125 Wn.2d at 480. The statute increases punishment for “[a]ny person” who commits a specified drug offense “within one thousand feet of a school bus stop route.” *Id.* at 476 (citing RCW 69.50.435). By including “any person” within the terms of the statutory enhancement, a judge may add punishment for people who “are themselves participating in this

criminal activity within a drug free zone.” *Id.* at 483. The statute does not clearly extend the school bus zone enhancement to accomplices “who are not within the zone themselves” at the time of the drug activity. *Id.* at 480.

In *State v. Pineda-Pineda*, 154 Wn.App. 653, 661, 226 P.3d 164 (2010), the defendant was not personally present within the drug zone at the time of the offense but the court imposed a school bus zone enhancement based on accomplice liability. The *Pineda-Pineda* Court reiterated the established principle that “the accomplice liability statute does not contain a triggering device for penalty enhancement.” *Id.* at 661. Consequently, “the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute.” *Id.* Because the school zone enhancement at issue had “no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendant’s own acts must form the basis for the enhancement.” *Id.* at 664; *see also State v. Roberts*, 142 Wn.2d 471, 501-02, 505, 14 P.3d 713 (2000) (individualized determination of “major participation by a defendant” necessary to convict person of aggravated first degree murder, not

“[m]erely satisfying the minimal requirements of the accomplice liability statute”).

The Court of Appeals relied on *McKim*, *Silva-Baltazar*, and *Pineda-Pineda*, to construe the exceptional sentence statutes. *Hayes*, 177 Wn.App. at 807-09. It correctly rejected the State’s strained efforts to parse the statutes as implicitly permitting exceptional sentences for a person convicted as an accomplice to the crime. *Id.* at 809.

2. *This Court has long required express triggering language to give the trial court its sentencing authority.*

The legislative branch sets the terms of a sentence. “This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function.” *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). The constitutional separation of powers doctrine precludes the judiciary from asserting sentencing powers not expressly granted by statute, because “the trial court’s discretion in sentencing is that which is given by the Legislature.” *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986).

Even when this Court believes the Legislature has inadvertently omitted a sentencing provision, courts “do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.” *State v. Martin*, 94 Wn.2d 1, 8, 614

P.2d 164 (1980). The “Legislature has the power to fix the term of imprisonment,” and the court’s role is merely “to carry out the legislative mandate.” *Id.* at 629; *see In re Pers. Restraint of Acron*, 122 Wn.App. 886, 891, 95 P.3d 1272 (2004) (refusing to speculate about seriousness level for unranked offense because “[a]ppellate courts do not supply omitted language even when the legislature’s omission is clearly inadvertent”).

Furthermore, as a basic rule of statutory construction, courts must rely upon the plain language of the statute. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Penal statutes are given “a strict and literal interpretation.” *Id.* at 727. The court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.*

By its terms, RCW 9.94A.535(3) sets forth an “exclusive list of factors” that may be used to support a sentence above the standard range. The court cannot amend an exclusive statutory list with other similar or like conduct. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 186, 163 P.3d 782 (2007). Neither RCW 9.94A.535 nor the procedural rules for imposing an exceptional sentence contained in RCW 9.94A.537 direct the court to impose an exceptional sentence for a person convicted as an accomplice.

In its Petition for Review, the State urged the Court to adopt a piecemeal analysis, construing some words referring to a crime generally as sufficient to trigger increased punishment for an accomplice. This approach would lead to arbitrary application and cause disproportionate punishment. In addition, it is contrary to settled law to impute triggering language authorizing additional punishment when the Legislature chose not to include such language in the statute, having demonstrated it knows how to extend punishment to accomplices in other sentencing statutes and based on case law plainly informing the Legislature that explicit triggering language is required.

3. *The plain and clear terms of the aggravating factor used in the case at bar do not apply to a person convicted as an accomplice.*

Hayes received an exceptional sentence above the standard range for one count of identity theft in the first degree premised on the jury's finding that the crime is "a major economic offense or series of offenses." 3/15/12RP 16.

After analyzing *McKim* and related precedent, the Court of Appeals concluded that "[n]othing in RCW 9.94A.535(3)(d) explicitly extends responsibility to an accomplice." 177 Wn.App. at 808. "[T]he major economic offense enhancement does not contain a triggering

device that would extend its application to a conviction based on accomplice liability.” *Id.*

The major economic offense enhancement is defined in RCW

9.94A.535(3)(d):

[T]he following circumstances are an exclusive list of factors that can support a sentence above the standard range[:]

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Unlike the exceptional sentence statute, other provisions of the SRA direct the imposition of enhanced penalties for accomplices. *See* RCW 9.94A.533(5) (“additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility”); RCW 9.94A.533(3) (“additional times shall be added to the standard sentence range ... if the offender or an accomplice was armed with a firearm”);

RCW 9.94A.533(4) (adding punishment “if the offender or an accomplice was armed with a deadly weapon”).

Expressly authorizing additional punishment for an accomplice in some statutes shows that the Legislature knows how to enact a statute that imposes additional punishment for an accomplice. *Delgado*, 148 Wn.2d at 728-29. The omission of such language in the exceptional sentence statutes indicates that the Legislature did not intend to punish accomplices the same as the principal for exceptional sentences. *Id.* Even if the Legislature’s omission is deemed “inadvertent,” courts lack the authority to read into the statute an additional basis for substantially increasing a person’s punishment. *See Martin*, 94 Wn.2d at 8. The statute contains an “exclusive list” of aggravating factors without directing additional punishment for a person found guilty as an accomplice. *See Leach*, 161 Wn.2d at 187; RCW 9.94A.535(3).

The operative language of RCW 9.94A.535(3)(d) contains no triggering device for accomplice liability. The Legislature is aware that it must explicitly direct punishment for an accomplice in the governing statute and did not include such language for an exceptional sentence above the standard range. *See McKim*, 98 Wn.2d at 116.

4. *Hayes's conviction rests on accomplice liability.*

There is no dispute that the State asked the jury to convict Hayes as an accomplice. 6/23/09p.m.RP 38. The jury was instructed that it may convict Hayes as an accomplice for each offense. CP 142, 146 (Instructions 11, 15). The Court of Appeals reversed Hayes's conviction for leading organized crime because it was likely that he was convicted as an accomplice for assisting someone else in a broader scheme, and this offense was intended to punish only the leader. *Hayes*, 164 Wn.App. at 465-66, 471.

The major economic offense aggravator was presented the jury under two of the statutory alternative means:

- (1) The crime involved multiple victims or multiple incidents per victim; or
- (2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

CP 177 (Instruction 45); RCW 9.94A.535(3)(d). The jury was instructed it did not need to unanimously agree which alternative means was proved. *Id.*

The jury was not asked to find that the aggravating factor rested on Hayes's own conduct. Instead, the special verdict form asked the jury whether,

having found the defendant guilty of Identity Theft in the First Degree in Count I as defined in these instructions .

..
Was the crime a major economic offense or series of offenses?

CP 25. As explained in *McKim*, a person's liability for "a crime" does not extend liability for additional factual considerations necessary for an enhanced punishment. 98 Wn.2d at 116. The jury could have relied solely on acts of another to conclude that "the crime" was part of a "series of offenses" involving multiple victims or a high degree of sophistication but the statute does not authorize enhanced punishment for a person who merely aids a principal offender in some aspect of the offense.

5. *The jury's special verdict finding was nullified when several of "the series of offenses" underlying the aggravating factor were reversed on appeal.*

The judge's authority to impose an exceptional sentence stemmed solely from the jury's finding that the current offense "or series of offenses" constitute a major economic offense. CP 25. The sentencing judge must take the jury's finding at face value and cannot surmise that the finding reflects additional facts. *State v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010).

The Court of Appeals reversed several of the offenses within the “series of offenses” contained in the special verdict finding, including the leading organized crime allegation that was the focal point of the trial, and the State dismissed four convictions following the initial appeal. *See Hayes*, 164 Wn.App. at 481. These intervening acts nullified the jury’s special verdict.

The jury never specified which acts it relied upon to find a “series of offenses” was a major economic offense. The prosecution asked the court to impose an exceptional sentence based on the sheer number of credit card receipts contained in a briefcase that several witnesses said belonged to Epstein, not Hayes. 3/16/12RP 9. A person may not be sentenced for allegations that were not proven to a jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). “[T]he jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime.” *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012).

After reversing multiple offenses contained within the “series of offenses” found by the jury, the appellate decision undermined the continued validity of the jury’s finding on the aggravating factor. The jury’s verdict no longer reflects unanimous agreement that a certain

series of valid convictions constitutes a major economic offense, which is a mandatory requirement of the exceptional sentence. RCW 9.94A.537(3) (“The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory”).

Furthermore, the jury’s special verdict finding cannot be logically construed as relying on Count One alone as a major economic offense. This conviction was for first degree identity theft, involving the use of Scott Mutter’s stolen credit card to amass \$2047 in unauthorized charges. 10RP 9. Since first degree identity theft requires the perpetrator obtain property over \$1500, the \$2047 theft is hardly an extraordinary departure from acts contemplated by the statute and the standard range. RCW 9.35.020(1), (2)(a). To be a major economic offense, the State needed to prove either multiple victims or a high degree of sophistication. RCW 9.94A.535(3)(d). The use of Scott Mutter’s credit card on four occasions to only marginally exceed the value threshold necessary to elevate the offense to first degree theft, did not involve multiple victims or a high degree of sophistication, and could not provide a substantial and compelling reason to depart from the standard range by itself.

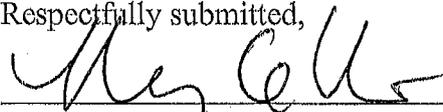
Having reversed the overarching allegation of leading organized crime and several other related offenses, the appellate decision undermined the factual predicate critical to the jury's finding that the "series of offenses" constituted a major economic offense. The exceptional sentence must be reversed because the jury's verdict did not authorize the court to impose an enhanced penalty after Hayes's successful appeal, and the court lacked authority to impose an exceptional sentence upon a person convicted for aiding someone else under a theory of accomplice liability.

E. CONCLUSION

For the foregoing reasons, Larry A. Hayes respectfully requests this Court affirm the decision of the Court of Appeals and reverse the exceptional sentence imposed by the trial court.

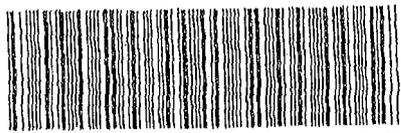
DATED this 30th day of June 2014.

Respectfully submitted,



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APPENDIX A



07-1-05967-1 32399140 SVRD 07-08-09

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
LARRY ALAN HAYES
Defendant.

CAUSE NO. 07-1-05967-1
SPECIAL VERDICT FORM COUNT I

We the jury, having found the defendant guilty of Identity Theft in the First Degree in
Count ^I ₁ as defined in these instructions return a special verdict by answering as follows:

Was the crime a major economic offense or series of offenses?

ANSWER: Yes (Yes or No).

Michael D Peters
PRESIDING JUROR

Dated: 6/26/09

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Petitioner,)
)
 v.) NO. 89742-5
)
 LARRY HAYES,)
)
 Respondent.)

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Supplemental Brief of Respondent

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