

No. 74334-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HANS HANSEN,

Appellant.

FILED

August 8, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Hans Hansen's trial on assault and drive-by shooting charges resulting from his discharge of firearms, including an AK47 assault rifle, near the Granite Falls, Marysville, and Lake Stevens Police Departments, and his shooting in the direction of pursuing police officers' vehicles, the trial court abused its discretion in admitting video demonstration evidence of an AK47 being fired.

2. The court erred in determining that there was no legally cognizable basis for sentences below the standard range, where the Sentencing Reform Act makes it a mitigating factor that Mr. Hansen's capacity to appreciate the wrongfulness of his conduct was significantly impaired.

3. The court acted without statutory authority when it ordered forfeiture of firearms owned by another, Mrs. Hansen, who had no advance knowledge of the crimes, and where it ordered forfeiture of lone firearm parts and accessories, when RCW 9.41.098 only addresses "firearms."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Hans Hansen was a long-time gun aficionado who often fired assault rifles with his wife at a shooting range where those firearms were permitted. He admitted to police after his arrest that

he precisely understood the power of such guns. The State offered three videos created by the Crime Laboratory which showed an AK47 assault rifle being aimed and fired into a police ballistic vest, an AK47 bullet being fired through a metal car door, and the AK 47 being aimed, and fired rapidly, ejecting spent shells into the air. The videos were offered under the claim that the jury might think the defendant did not realize that an assault rifle could harm police officers if fired at them, and thus might conclude Mr. Hansen therefore lacked the intent to assault and cause great bodily harm.

Did the trial court abuse its discretion in allowing each of the scenes to be played for the jury, where the general requirements of relevance and substantial similarity to the actual events were not met, where any minimal probity was cumulative, and where the relevance, if any, of the videos was completely outbalanced by their unfairly prejudicial effect?

2. Is reversal required where the videos would have deeply affected the jury charged with deciding the closely contested issue of whether the defendant actually intended to cause great bodily harm to the officers, rather than scare and provoke them by apprehensive assault, and whether the defendant discharged his

firearm with a purpose of creating substantial risk to others (drive-by shooting)?

3. Where the trial court failed to consider that under the SRA a defendant's capacity to appreciate the wrongfulness of his conduct may, in certain circumstances, be a basis for a downward departure, is remand for re-sentencing required?

4. Did the sentencing court act without statutory authority when it ordered forfeiture of firearms that were community property of Mrs. Hansen, who indisputably met the criteria of RCW 9A.41.098(3) as an owner having had no knowledge until after the fact of the crimes in question?

5. Did the sentencing court act without statutory authority when it ordered forfeiture of not merely firearms, but of spare firearm parts such as barrels, and also magazines and bullets, under the putative authority of RCW 9A.41.098, which authorizes forfeiture only of firearms, i.e., devices capable of firing a projectile?

C. STATEMENT OF THE CASE

1. **Facts.** On October 15, 2014, Hans Hansen was despondent and suicidal because of the recent failure of his work prospects, and a severe illness that had destroyed his ability to work as a custom cabinet maker. The business he began had

founded since the 2008 economic crash. 11/4/15RP at 809-21.

On the night of October 15, Hans drove in his truck from the home he shared with his wife Angela Hansen to the nearby Granite Falls Police Department, where he fired one of multiple guns he had with him, putting bullet holes into the building and a patrol car.

11/15/15RP at 16.

This conduct unfortunately escalated into further shooting at other locations and police departments, and at pursuing police vehicles, until such point as Mr. Hansen was shot in the head so police could stop him, whereupon he was arrested. 11/15/15RP at 99.

However, Hans' conduct was driven by his diagnosed strong impetus to commit suicide in some fashion. At trial, the defense expert, Dr. Mark Koenen, testified that he diagnosed Mr. Hansen with several Axis 1 disorders including clinical depression. Dr. Koenen determined that Hans had clear suicidal ideation and intention. This was based in part on his additional, medical disorders of factor V Leiden thrombophilia, and related ischemia, which had resulted in a pending likelihood of amputation of one leg and possibly other limbs. 11/9/15RP at 866-70, 873. For Hans, this would be the nail in the coffin that would forever prevent him

from working as a craftsman, his life's vocation. 11/9/15RP at 808, 817.

On the night in question, Hans' disorders including his depression and his desire to be dead resulted in the shooting incidents. 11/9/15RP at 866-70. He fired in the direction of police vehicles that were pursuing him or had taken positions nearby. See, e.g., 10/28/15RP at 436-40. Hans defended at trial by arguing that he simply fired bullets in the direction of vehicles with the hope of provoking being shot himself by the police chasing him, and bleeding to death -- thanks to the exponentially high blood concentration of the Coumadin medication he had taken. 11/9/15RP at 940-51. Officer Maples of the Marysville Police Department was unfortunately struck in the leg and seriously injured. 11/9/15RP at 859-72.

2. Charges and trial. Mr. Hansen was charged with two counts of attempted first degree murder and additional charges of first degree assault and drive-by shooting, many of the charges with firearm enhancements. CP 382-84.

The State's theory was that Mr. Hansen was "looking for people to share in his misery and to take this out on" and therefore he was guilty of trying to actually kill or actually inflict great harm by

purposefully shooting people. 11/9/15RP at 918-20 (State's closing argument). The defense argued that Hans – despite the extremely wrongful nature of what he did do -- did not desire to hurt anyone and did not harbor the intent he was accused of. 11/9/15RP at 969-70.

The jury deadlocked on the State's original charges of attempted first degree murder as to Officers Maples and Tolbert, but found Mr. Hansen guilty of first degree assault as to those officers (Counts 3 and 4), and as to Officers Smith and Shove (Counts 6 and 7). The jury found Mr. Hansen guilty of the lesser included crime of second degree assault as to Officer Kieland (Count 5). The jury also found Mr. Hansen guilty of the lesser offenses of unlawful discharge of a firearm on all but one of the drive-by shooting counts (Counts 9, 10, and 11). However, the jury did convict Mr. Hansen of the greater crime in Count 8. CP 228-33.

3. Sentencing. The court denied the defense motion for an exceptional sentence below the standard range. 11/24/15RP at 1023. With consecutive firearm enhancements, and with the consecutive running of the serious violent offenses, the court sentenced Mr. Hansen to a total of 861 months incarceration. CP

228. The trial court also denied the defense objection to forfeiture of the firearms, following a hearing. 12/9/15RP at 1038.

Mr. Hansen appeals. CP 227.

D. ARGUMENT

(1). The trial court wrongly admitted the State's dramatized videotape scenes that failed the "substantially similar" test, which were unnecessary for the purposes advanced by the State, and which merely served to cause unfair prejudice.

By the time the three AK47 videos were shown to the jury, the jury already knew from multiple witnesses that there were bullets actually fired, that went through police cars and police car doors, and the jury knew that Mr. Hansen was well familiar with high-powered rifles and their assaultive danger, and the risk that firing them could cause substantial risk to others when done in "drive-by" style. Mr. Hansen remarked in the hospital that these were guns that would go through bullet proof vest or cars. CP 385-89 (affidavit); see Exhibit 28 (defendant's recorded statement); Exhibit 29 (transcript of recorded statement); see also State's pre-trial exhibit 1, State's trial exhibit 456.

None of the law enforcement officers in question was struck by any bullet that penetrated any bullet proof vest. Yet the court also admitted this third video, the most inflammatory of all. Bullets

kill people, or at least cause great bodily harm. This is commonly known. The prosecution is not entitled to introduce a newly-produced video that has the effect of shots fired at a bulletproof vest with a water body inside, in order to prove the disputed issue whether Mr. Hansen did aim to harm, under the guise of demonstration evidence offered for a 'technical' purpose of showing that bullets can hurt. Everybody knows that and in this case, it is beyond cavil that the defendant, a firearms and expert shooting aficionado, certainly knew that. This was simply not an issue.

a. Ruling on demonstration videos. Prior to trial, the court over defense objection (which was renewed during trial), ruled it would allow the prosecution to show the jury the three demonstration videos. 10/26/15RP at 66-68. The videos, State's pre-trial exhibit 1 and trial exhibit 456, depicted three scenes:

- a person aiming and firing an AK 47 firearm, with ejected shells exiting the gun and flying into the air as the trigger is pulled repeatedly;
- a bullet from an AK47 penetrating and piercing through a metal car door; and
- a bullet being fired from an AK47 at a gallon of water representing an officer, and penetrating and passing through the front of the surrounding ballistic vest protecting the body of water, causing water to exit from the bullet entry point, and showing the bullet then pass through the back of the vest.

10/26/15RP at 56-58, 60. These scenes were offered through Mr. Smelser of the Washington State Patrol Crime Laboratory.

11/5/15RP at 375-76; State's trial exhibit 456.

In seeking admission, the prosecution contended the videos were relevant to "intent," in particular to the attempted murder and the assault charges, because they would counter jury speculation that Mr. Hansen would not understand the bullet power of an AK47 assault rifle. 10/26/15RP at 59, 65-66. The prosecutor argued,

I don't want the jury to come away with the impression [that] the defendant knew he wouldn't really hurt them [the officers] if he shot them.

10/26/15RP at 66. The trial court accepted this, and admitted the video productions, rejecting the defense arguments that the video scenes added nothing helpful, were not similar to the facts, and would merely stimulate the emotions of the jury. 10/26/15RP at 64. The court reasoned that the video scenes would be useful to the jury to understand the power of the gun and what it can do.

10/26/15RP at 66; see 11/5/15RP at 375-76 (denial of renewed defense objection).¹

¹ The trial court did order redaction of a portion of the proffered videos that showed various scenes in slow motion. 10/26/15RP at 66-68. The exhibit as proffered pre-trial is State's pre-trial exhibit 1, and as admitted at trial is State's trial exhibit 456.

b. Demonstration evidence must be relevant, and substantially similar to the facts of the case, and the probity must outweigh waste of time and unfair prejudice, including the danger of decision-making by the jury based on passion rather than rationality.

(i). Abuse of discretion standard. Decisions involving evidentiary issues will not be reversed on appeal except upon a showing of abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). However, a trial court abuses its discretion if it improperly applies the strictures of the evidence rules at issue, State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007), or if the court's decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

In general, evidence must be relevant to be admissible, and the court must also assess the probative value of the evidence in comparison to the danger of unfair prejudice. ER 401; ER 402; ER 403.

(ii). Demonstration evidence. In the specific context of demonstration evidence, a trial court may only admit a specially created dramatic “demonstration” if it is relevant and helpful to a

rational decision by the jury, if the conditions are substantially similar to the facts of the case, and if the probative value of the evidence outweighs its prejudicial effect. State v. Hultenschmidt, 125 Wn. App. 259, 268, 102 P.3d 192 (2004).

The Court of Appeals in Hultenschmidt applied this analysis, relying in part on the Supreme Court's decision in State v. Finch:

A trial court may admit demonstrative evidence when the experimental conditions are substantially similar to the facts of the case. State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). If substantially similar, then demonstrative evidence such as photographs and videotapes may be admitted when it is shown that their probative value outweighs their prejudicial effect. State v. Rogers, 70 Wn. App. 626, 633, 855 P.2d 294 (1993), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994).

(Emphasis added.) Hultenschmidt, 125 Wn. App. at 268; compare, ER 403 (general prejudice standard, stating that evidence may be excluded where "probative value is substantially outweighed by the danger of unfair prejudice") (Emphasis added.).

Only if the general relevance test, and the substantial similarity and degree of outweighing probative value requirements are met, may the evidence be admitted, in which case insubstantial residual differences between the facts of the case and the

demonstrative evidence will go to weight. See Jones v. Halvorson–Berg, 69 Wn. App. 117, 126–27, 847 P.2d 945 (1993); see also Finch, 137 Wn.2d at 816; State v. Bechtel, 186 Wn. App. 1003, review denied, 183 Wn. 2d 1015, 353 P.3d 641 (2015).

c. The three video scenes failed the criteria for demonstration evidence. In this case the questions at trial were whether Hansen, following an irrational plan induced by his mental and physical disorders, was simply trying to cause his own “suicide by cop” by provoking law enforcement officers to the extreme circumstance of killing him. Or, whether he was specifically aiming at the officers intending to shoot them and kill them, or to cause great bodily harm for purposes of first degree assault. 10/27/15RP at 362, 379-81, 383-90 (parties’ opening statements); 11/9/15RP at 920, 940-44 (parties’ closing arguments).

(i). The evidence added nothing relevant or helpful to the jury’s ability to rationally answer the above disputed questions, because of the lack of substantial similarity, the great prejudice, and where any meager similarity was wholly cumulative. Throughout the 8-day trial, the jury learned volumes about the gravely dangerous power of an AK47 assault rifle from the police witnesses, who knew the matter professionally, and who

observed it personally that night. The three video scenes shed the scantest of light on that issue that had not already been explored.

On the question of the danger of assault rifles, the prosecutor offered the testimony of, among others, Officer Maples, who was involved in significant portions of the police pursuit of Mr. Hansen. Officer Maples stated that upon encountering Mr. Hansen in his truck, he exited his patrol car and crouched behind it to protect himself from shots being fired; he believed Mr. Hansen was trying to shoot him. However, “the [bullet] rounds were coming through the car and metal,” no matter where Maples tried to hide behind his vehicle, and Maples was wounded in the ankle by one of the bullets. 11/5/15RP at 469-73.

Officer Tolbert similarly testified that when he encountered the truck Mr. Hansen was firing from, he saw and heard an AK47 or other assault rifle being fired. As he tried to exit and take protection using his patrol car, multiple bullets shattered the windows, passing through the vehicle and destroying various equipment inside. Officer Tolbert felt the rounds hitting and penetrating his vehicle, so he dashed a short distance to take better cover behind “a big steel tow truck.” 10/27/15RP at 400-04.

As counsel rightly argued, the video of a bullet being shot through the side of a car door was cumulative, and added nothing to the authoritative testimony of the officers, except for unfair prejudice.

The jury was also presented with evidence of actual bullets that did penetrate through police cars, and about the holes they made, that were measured by forensics officers. 10/26/15RP at 56. A plethora of testimonial, physical, photographic, and video footage was admitted, documenting the SMART team's forensic evidence collection procedures at the shooting scenes. This included Officer Sletten and Officer Honnen, who testified regarding the bullet damage to various patrol cars, 11/4/15RP at 292-96, 308-11, and Officer Fontenot, who testified regarding how shell casings ejected from an AK47 fly out anywhere and can be hard to find, 11/4/15RP at 222-23. See also, e.g., Exhibits 163, 164, 165, 166, 167, 167 (photographs of police cars with bullet holes and bullet damage); Exhibit 450 and 452 (photographs of police cars with bullet holes and yellow rods showing bullet trajectories). Consequently, the State's argument that the demonstration video was necessary because a bullet piercing a car door could not adequately be communicated to the jury by showing them photographs of the

actual squad car door pierced, and the entrance and exit bullet holes, was completely without merit. 10/26/15RP at 59-60.

In addition, Brian Smelser of the Washington State Patrol Crime Laboratory, before the three movies were played for the jury, had already testified that Exhibit 76, the AK47 rifle, was easily capable of firing through a car door. 11/5/15RP at 377. He also testified that the bullets from such a rifle will pierce a ballistic vest like one of the various different kinds “like a police officer would use.” 11/5/15RP at 378. Smelser also testified that the AK47 is among the class of automatic or semiautomatic rifles that can be fired repeatedly and fast simply by pulling the trigger. 11/5/15RP at 333-35.

Importantly, the jury was also fully educated as to Mr. Hansen’s knowledge of the grave danger of an AK 47 assault rifle, giving lie to the prosecution’s implausible claim that the jury might think Mr. Hansen was unaware of the danger of guns. Mr. Hansen was a long-time gun collector, including of the AK47 and the AR15; as Mrs. Hansen recounted, he had built firearms as part of their survivalist philosophy, and they used firearms together at shooting clubs and gun ranges. This included a range where the more powerful assault rifles were permitted. 11/9/15RP at 827-28.

After the incident, Mr. Hansen admitted in his police statement, when thoroughly interrogated at the hospital, that he knew the power of the gun and bullets he used, and knew that they could pierce police car doors, and bullet proof vests. 10/26/15RP at 57 (argument on admission); see Exhibit 29 (Defendant's police statement).

As counsel argued below, there was simply no need to show the three video scenes to the jury on ground that the jurors might think Mr. Hansen did not know he was acting dangerously by firing an AK47. The paucity of colorable reasoning on this point reveals the probity argument to have been a mere crowbar, employed solely to interject the State's own creatively produced video scenes into the trial process, for their dramatic value to the jury alone.

(ii). There was no substantial similarity, and yet great unfair prejudice. Beyond the broad general truth that scenes of an assault rifle being aimed and fired, and bullets being fired at, into and through things, do illustrate the particular harm of firearms, the video demonstrations were not substantially similar to the facts, and were inadmissible for that reason alone. Finch, 137 Wn.2d at 816; Hultenschmidt, 125 Wn. App. at 268 (no abuse of discretion in excluding reenactment videotape purporting to demonstrate effects

of vehicle speed where demonstration not substantially similar to incident).

Here, as Mr. Hansen argued, the video of a bullet passing through an officer's ballistic vest was irrelevant because no bullet had penetrated or pierced any vest. This was not a fact in the case, and yet this particular mini-movie was particularly inflammatory because the water container leaking liquid obviously appeared to represent what could happen to a police officer being shot all the way through. 10/26/15RP at 56-57. The court simply did not address the fact that the scene's depiction of a bullet passing through the front, and then the back of the vest, after passing entirely through the water bottle, was completely different and significantly greater than anything that actually occurred. 10/26/15RP at 60-61.

Furthermore, as revealed at trial, Mr. Smelser admitted that the vest used for the video was simply one submitted by an unknown law enforcement agency; although it is a minor point within the far greater lack of similarity, the State certainly never attempted to show that the vest in the video had any relationship to a vest being worn by an officer in the case. 11/5/15RP at 378.

With regard to the video of a person firing an AK47, what that video did show, very unfairly, was a person specifically sighting with, and carefully aiming, an assault rifle. 10/26/15RP at 57-58. But the defense in the case was that Mr. Hansen did not aim at officers; rather, he recklessly shot in the general direction of police vehicles. The State should not be allowed to produce a movie, however sterile, showing the shooting of an assault rifle simply under the claim that this is what they want to convince the jury of what happened. Nothing technical or helpful is added to a case where the parties simply produce Hollywood versions of what each side says happened, and the fact that the videos were produced under the official authority of the Crime Laboratory adds no imprimatur that renders them admissible if they fail the substantial similarity test.

All of this makes this case akin to State v. Hunter, 152 Wn. App. 30, 41-42, 216 P.3d 421 (2009), though more stark and less complex. In that case, a trial court abused its discretion in allowing the jury to be shown a newly-manufactured device that purported to show the dimensions of a gun and the related pressure necessary to pull the trigger on the firearm. The Court of Appeals stated that there were substantial differences between the trigger pull device

and the firearm used, including a physical dimension difference between the trigger and the simulator of one inch and a lever mechanism on the actual trigger that was different from the straight-pulled trigger on the demonstrator. Hunter, 152 Wn. App. at 39-43. Furthermore, the erroneously admitted evidence was not harmless because the issue was whether Hunter accidentally shot the victim. Hunter, at 42-44.

Here, notably, the prosecutor admitted that in the making of the videos, there was no measure of how far away from the targeted car door, or the targeted ballistic vest, the bullets were fired from; rather, the distances were an “approximation” in comparison to what the distances might have been during the incident. 10/26/15RP at 63. Demonstration evidence must be substantially similar to the facts of the case. Even if the jury needed a video to show that bullets can pierce metal car doors, which it did not, these videos were not substantially similar.

Courtroom demonstrations like this, by their nature, must be relevant and helpful enough to the jury to overcome the inherent dramatic effect, and they must be very much like what occurred. Demonstration evidence is not an opportunity for the State to dramatize its disputed theory of the accused's conduct; rather, its

purpose is to “enlighten the jury and to enable them more intelligently to consider the issues presented.” Sewell v. MacRae, 52 Wn.2d 103, 107, 323 P.2d 236 (1958). Here, admitting the video scenes was error as the evidence was too different to be relevant, cumulative of the mountains of accurate, objective forensic evidence that came before it, and greatly prejudicial, in the unfair sense – highly likely to promote jury decision-making based on fear, the horror of gun violence against the police, and raw emotion of the times. This required the evidence to be carefully assessed, and here, it should have been excluded under ER 401, ER 402, and ER 403, and the trial court abused its discretion.

d. Reversal is required. As defense counsel argued in closing, Mr. Hansen’s intent was to shoot off his firearms so that he would be killed by law enforcement. His system was triple-loaded with the blood thinner Coumadin, which had been prescribed for his health condition; this was a drug that he knew, or at least hoped, would cause him to bleed to death quickly. Hans’ effort at this desperate plan of “suicide by cop” of course failed when he himself was shot in the head. His statement to officers at the hospital only confirmed his foolish plan to provoke being shot. But he never aimed or fired his guns at persons with any purpose killing Officer

Maples or Officer Tolbert or others, or any intent to inflict great bodily harm. RP 940, 943, 946-958, 968.

Within reasonable probabilities, the video evidence affected the outcome, given the closely contested issue of intent. The video of a person calmly and purposefully aiming and firing an AK47, and a video showing a vest being shot straight through, promoted decision in a very close case. Relatedly, the Supreme Court has recently recognized the prejudice of “created” visual images, because they may have undue influence with the jury, and they do not represent matters of fact. In the case of In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707-08, 286 P.3d 673 (2012), the Court deemed a closing argument image of the defendant that was altered by being overlaid with the word “guilty” to require reversal because of its unfairly persuasive nature and lack of relationship to actual evidentiary fact. Glasmann involved a claim of prosecutorial misconduct, there, in the form of a booking photo employed during closing argument that had never been made part of the evidence, thus the case is not precisely analogous to this one which is not about misconduct.

But Mr. Hansen submits that the Glasmann Court was recognizing the undue persuasiveness of visual images on twenty-

first century juries, and therefore the corresponding need to carefully ensure that such images not be produced for juries where unnecessary and where dramatized impact outweighs any of ER 403's concerns.

Trials must proceed by dry testimony, and proper demonstration evidence should be admitted only when truly accurate and needed. Instead, below, the prosecutor argued that despite Mr. Smelser and other witnesses being expected to testimonially answer each of the State's questions about the power of assault firearms, dry testimony was "not going to do justice to what you can see on that video." 10/26/15RP at 62-63.

This is correct and is precisely why a created video must be held to the existing, exacting standards before it can be placed before a lay jury. The produced demonstration video focused the jurors on their understandable fear of the inherent and dangerousness to persons and police of the weapons involved, rather than on the more difficult question of what Mr. Hansen's intent was. The counts of first degree assault and drive-by shooting must be reversed.

(2). The trial court erred in determining there was no legally cognizable basis for a downward departure sentence.

a. **Mr. Hansen may appeal his sentence.** Mr. Hansen sought an exceptional sentence below the standard range. CP 247-56 (Defense sentencing memorandum). The request recognized that Mr. Hansen was facing a standard range sentence of 717 to 861 months, based on the consecutive running of serious violent offenses and enhancements. Mr. Hansen requested that the court consider mitigating factors and a sentence of 60 months on each of the first degree assault convictions, and zero days on the other assault, drive-by shooting, and discharge of a firearm convictions. CP 247-48. This would result in a sentence of 516 months. CP 248.

In seeking this sentence, the defense acknowledged that given Mr. Hansen's illness, the sentence, despite being a downward departure, would still impose a sentence likely to result in lifetime imprisonment. CP 248. However, the reduced sentence would balance the need for a defendant to be punished severely for his offenses, and yet also recognize that

Mr. Hansen's actions on October 15, 2014, were motivated by a desire to end his own life, a desire born of acute depression spawned from a grave

illness and in inability to cope productively with the impact it had on his life.

CP 248; see 11/24/15RP at 1007, 1014-19.

The trial court denied the request and imposed the sentence requested by the State, noting that although the court did “accept that Mr. Hansen on that evening was a man with serious and debilitating physical and mental health issues which clearly evolved into a mental health crisis,” the court “did not accept that that stands as a reason to somehow hold Mr. Hansen less accountable when I look at his actions.” 11/24/15RP at 1023.

Mr. Hansen may appeal despite having been given a standard range sentence. As a general rule, under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range, there is no right to appeal it. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986). Thus, if a trial court has contemplated an exceptional sentence, concluded correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the legal requirements of that mitigating factor, the court has exercised its discretion, and the defendant may not appeal. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, RCW 9.94A.585's prohibition on appeal of standard range terms will not preclude appeal where the court has relied on an incorrect legal basis that the factors offered in support of the downward departure are not legally viable. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183. That is the case here.

b. A downward departure sentence was supported by a legally recognized mitigating factor. The trial court stated that the mental illness suffered by Mr. Hansen could not be accepted as a basis for a downward departure, and later remarked that although the mental health system is far from perfect in being able to offer help to those who need it, "Mr. Hansen did not seek that help[.]" 11/24/15RP at 1024.

The court appeared to simply reject the proposition that mental illness could be considered, as set forth in section 535(1)(e). But the Sentencing Reform Act allowed the trial court to take these matters into consideration. RCW 9.94A.535(1). RCW 9.94A.535(1)(e) provides for an exceptional sentence below the standard range based on the mitigating factor that

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the

requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

Notably, the sentence requested by Mr. Hansen would be both reasonable and supported by the standards of mitigation set forth by the SRA, and certainly would be affirmed because it would not be clearly erroneous. State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991) (legal error allows reversal of sentence); see also State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (where substantial evidence supports the court's findings, they will not be disturbed).

The facts established the mitigating factor -- Mr. Hansen, rather than a person who was set on the destruction of others, was someone who had suffered a severe psychological breakdown, and sought to end *his* life in a way he thought was certain. He did not have, during that acute period of illness, the acuity or the foresight to fully appreciate the impact his actions would have on others. CP 248. The trial court erred in determining that there was no legally cognizable basis to impose an exceptional sentence below the standard range.

c. This Court should remand for re-sentencing. In these circumstances, the trial court's refusal to impose an exceptional

sentence below the standard range requires reversal because the court relied on an untenable legal basis for refusing to consider and impose an exceptional sentence, believing it did not have authority. Herzog, 112 Wn.2d at 423; Ammons, 105 Wn.2d at 183; see also State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585. The sentencing court also could be said to have abused its discretion by rejecting an applicable legal standard, and as a result not exercising discretion it possessed. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse Mr. Hansen's sentence and remand the case for factual appraisal of the sentencing arguments offered in mitigation.

(3). The trial court erred in authorizing forfeiture where the guns were community property of Mrs. Hansen, and where the forfeiture statute authorizes forfeiture only of firearms, not lone parts of firearms, or magazines and ammunition.

The defense requested a hearing on the issue of forfeiture of the firearms that Mr. Hansen possessed during the incident, and the court granted a hearing over the State's opposition.

11/24/15RP at 1014, 1020-21; CP 63 (defense memorandum opposing forfeiture).

Washington law allows for the forfeiture of firearms in certain circumstances, including where a possessor commits a crime:

RCW 9.41.098. Forfeiture of firearms--Disposition-Confiscation

(1) The superior courts and the courts of limited jurisdiction of the state may order forfeiture of a firearm which is proven to be:

* * *

(d) In the possession or under the control of a person at the time the person committed or was arrested for committing a felony or committing a nonfelony crime in which a firearm was used or displayed;

* * *

[or]

(i) Used in the commission of a felony or of a nonfelony crime in which a firearm was used or displayed.

RCW 9.41.098(d), (i). See generally Morris v. Blaker, 118 Wn. 2d 133, 142-44, 821 P.2d 482, 487-88 (1992). Below, following its securement of convictions, the State listed multiple firearms for forfeiture, along with various firearm parts or accessories. CP 228-33; CP 63-67. The court granted the order of forfeiture. 12/9/15RP at 1038-40; CP 68.

a. However, first, RCW 9.41.098 excludes from forfeiture an owner of the firearms who was unaware of the offenses.

Although a possessor of a firearm used or displayed in an offense may cause the device to be subject to forfeiture, Mrs. Angela

Hansen was not covered by the statute; indeed, she was specifically excluded. Section 3 of RCW 9.41.098 provides:

(3) The court shall order the firearm returned to the owner upon a showing that there is no probable cause to believe a violation of subsection (1) of this section existed or the firearm was stolen from the owner or the owner neither had knowledge of nor consented to the act or omission involving the firearm which resulted in its forfeiture.

(Emphasis added.) RCW 9.41.098(3). Here, the firearms, being community property obtained during the Hansen marriage, were also owned by Mrs. Hansen, as she testified at trial. 12/9/15RP at 1033-34; see 11/9/14RP at 826-830; CP 65 (citing community property definition of RCW 26.16.030). As Mrs. Hansen also testified, she had no awareness of how her husband was going to behave on the night in question; she began worrying that something might be wrong, such as Hans being in an accident, after she heard patrol cars in the area. 11/9/15RP at 828-30, 842-43, 850-51. As a consequence, return to the community property owner was required and the trial court's order of forfeiture must be reversed or vacated. RCW 9.41.098(3).

b. Second, the forfeiture of mere lone firearm parts or accessories is not authorized by the statute. The trial court's

order of forfeiture included firearms, but also various firearm parts including two spare rifle barrels (“upper receivers,” which can be attached to lower receivers to form a firearm) and six magazines with ammunition. CP 228-33; CP 63-67; CP 68 (order of forfeiture).

The court granted the order of forfeiture as to all these items, including items that the defense contended were not “firearms” in themselves. 12/9/15RP at 1038-40. The court appeared to credit the State’s contention that any firearm parts that were attached or attachable to a firearm used, were subject to forfeiture, and rejected the defense argument that the various receivers were not even a physical *part* of any existing firearm. 12/9/15RP at 1033, 1037-38.

This was error. Courts determine meaning by examining the plain language of a statute. In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838–39, 215 P.3d 166 (2009). The firearms forfeiture statute permits forfeiture of firearms. RCW 9.41.098 (referring to forfeiture of “firearms” and “a firearm.”). A firearm is not a magazine, or ammunition, or a lone barrel; rather, a firearm is a device from which a projectile may be fired, and of course, this case does not involve forfeiture of multiple component parts of a complete single firearm that need only be assembled to

work. RCW 9.41.010(1); see State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999).

For comparison purposes, the federal forfeiture statute, 18 U.S.C. § 924(d)(1), provides for the forfeiture of “[a]ny firearm or ammunition involved in [listed offense statutes].” As to the barrels and the magazines and bullets, these are items that are simply not firearms. The forfeiture order as to those items must be reversed.

Because it is a plain language issue, construction is not necessary, but in general, the statute should be read narrowly. The Washington Courts and the United States Supreme Court have stated forfeiture of property is disfavored, and that forfeiture statutes should be construed strictly: “Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.” Bruett v. Real Prop. Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 295, 968 P.2d 913 (1998) (quoting United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249 (1939)). In that context of a strict reading, the state firearms forfeiture statute provides no hint of authority to seize and order forfeiture of accessories, appurtenances, and the like. The order of forfeiture must be reversed as to all items that are not firearms (Exhibits 64, 69, 72, 73, 77, 305, 358, and 363).

E. CONCLUSION AND APPELLATE COSTS PRAYER

Based on the foregoing, the appellant, Mr. Hansen, requests that this Court of Appeals reverse his convictions, his sentence, and the order of forfeiture, as argued herein.

Further, in the event that Mr. Hansen does not substantially prevail on appeal, he asks this Court, under its discretionary authority, to deny any award of appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), review denied, No. 92796-1 (Wash. June 29, 2016). The trial court, likely based on Mr. Hansen's sentence and age, as was the case in Sinclair, waived all non-mandatory fees and fines, noting it was unrealistic that various amounts could be paid. 11/24/15RP at 1026; CP 239. This Court should deny appellate costs.

DATED this 8TH day of August, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74334-1-I
)	
HANS HANSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 8TH DAY OF AUGUST, 2016.



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