

COA No. 44726-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SANDRA WELLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Barbara Johnson

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant Sandra Weller

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

 1. Investigation, charging and trial. 4

 (a) Warrantless entry. 5

 (b) Trial. 7

 2. Verdicts and sentencing. 8

D. ARGUMENT 10

 1. THE 20-YEAR EXCEPTIONAL SENTENCE WAS ENTERED WITHOUT STATUTORY AUTHORITY BECAUSE THE LEGISLATURE DID NOT MAKE THE AGGRAVATING FACTORS IN QUESTION APPLICABLE TO UNDERLYING CONVICTIONS THAT THE JURY DID NOT EXPRESSLY PREDICATE ON PRINCIPAL LIABILITY. 10

 (a). Pertinent sentencing facts. 10

 (i). Standard range calculations – incarceration increased by multiple current violent felonies in the one-year charging time, requiring double-scoring, for a standard 57 months total prison. ... 10

 (ii). Exceptional imposition of consecutive terms, totaling 240 months prison, based on (a) the pattern of multiplicity of assaults during a prolonged one-year period; and on (b) cruelty of the violent counts and the imprisoning. 11

 (b). Sentencing error. 12

(c). <u>This Court should reverse the exceptional prison sentence, and re-sentencing within the standard ranges is mandated.</u>	15
2. THE VANCOUVER POLICE ENTERED THE WELLER HOME WITHOUT A WARRANT AND THE STATE FAILED TO MEET ITS BURDEN TO SHOW THAT SOME EXCEPTION APPLIED.	18
(a). <u>CrR 3.6 suppression hearing.</u>	19
(b). <u>Oral ruling.</u>	20
(c). <u>The warrantless home entry and search violates the state and federal constitutions unless an exception to the warrant requirement applies.</u>	21
(d). <u>The “plain view” doctrine does not apply.</u>	30
(e). <u>The State failed to file written CrR 3.6 findings of fact and conclusions of law.</u>	31
(f). <u>Especially where the defendants testified with detailed refutation of the allegations, the State cannot satisfy its burden to show harmlessness.</u>	33
3. THE UNLAWFUL IMPRISONMENT COUNT MUST BE REVERSED FOR ABSENCE OF CHARGING NOTICE.	35
(a). <u>Mrs. Weller was charged and convicted of unlawful imprisonment.</u>	35
(b). <u>The charging document must allege every element of the crime.</u>	35
(c). <u>The information did not include the essential elements of unlawful imprisonment.</u>	37
E. CONCLUSION	38

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	
<u>State v. Bradley</u> , 105 Wn.2d 898, 719 P.2d 546 (1986).	22
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	32
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).	33
<u>State v. Byrd</u> , 83 Wn. App. 509, 922 P.2d 168 (1996)	32
<u>State v. Campbell</u> , 125 Wn.2d 797, 888 P.2d 1185 (1995)	36
<u>State v. Cannon</u> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	32
<u>State v. Collicott</u> , 118 Wn.2d 649, 827 P.2d 263 (1992).	12
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998)	18,29
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987)	12
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005).	29,33
<u>State v. Grande</u> , 164 Wn.2d 135, 187 P.3d 248 (2008).	22
<u>State v. Harris</u> , 66 Wn. App. 636, 833 P.2d 402 (1992).	33
<u>State v. Hayes</u> , ___ P.3d ___, 2013 WL 6008686, Wash.App. Div. 2, November 13, 2013 (NO. 43207-2-II)	13,16
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	32
<u>State v. Hendrickson</u> , 129 Wn. 2d 61, 917 P.2d 563 (1996)	21
<u>State v. Hos</u> , 154 Wn. App. 238, 225 P.3d 389 (2010), <u>review</u> <u>denied</u> , 169 Wn.2d 1008, 234 P.3d 1173 (2010)	22
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).	19

<u>State v. Johnson</u> , 172 Wn. App. 112, 297 P.3d 710 (2012), <u>review granted</u> , 178 Wn.2d 1001, 308 P.3d 642 (Wash. Sep 04, 2013).	37
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000)	25,26
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	35
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).	36
<u>State v. Lopez</u> , 105 Wn. App. 688, 693, 20 P.3d 978 (2001), <u>review denied</u> , 144 Wn.2d 1016 (2001)	33
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).	38
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003).	33
<u>State v. Miller</u> , 92 Wn. App. 693, 964 P.2d 1196 (1998).	31
<u>State v. McKim</u> , 98 Wn.2d 111, 653 P.2d 1040 (1982).	16
<u>State v. Moavenzadeh</u> , 135 Wn.2d 359, 956 P.2d 1097 (1998)	36
<u>State v. Myers</u> , 117 Wn.2d 332, 815 P.2d 761 (1991)	30
<u>State v. Nordby</u> , 106 Wn.2d 514, 723 P.2d 1117 (1986)	12
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997)	12
<u>State v. Parker</u> , 139 Wash.2d 486, 987 P.2d 73 (1999)	21
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007)	14
<u>State v. Pineda-Pineda</u> , 154 Wn. App. 653, 226 P.3d 164 (2010)	16
<u>State v. Read</u> , 147 Wn.2d 238, 53 P.3d 26 (2002)	27
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000)	16
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008)	16
<u>State v. Schultz</u> , 170 Wn.2d 746, 248 P.3d 484 (2011).	18,24,26

<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004)	23
<u>State v. Warfield</u> , 63 Wn. App. 630, 821 P.2d 492 (1991).	38
<u>State v. Winterstein</u> , 167 Wn.2d 620, 220 P.3d 1226 (2009).	19
<u>State v. Williams</u> , 148 Wn. App. 678, 201 P.3d 371 (2009)	25
<u>State v. Williamson</u> , 84 Wn. App. 37, 924 P.2d 960 (1996).	35
<u>York v. Wahkiakum Sch. Dist. No. 200</u> , 163 Wn.2d 297, 178 P.3d 995 (2008).	19

UNITED STATES SUPREME COURT CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.435 (2000)	13
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).	13
<u>Brigham City v. Stuart</u> , 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)	22
<u>Hamling v. United States</u> , 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)	36
<u>McDaniel v. Brown</u> , 558 U.S. 120, 130 S.Ct. 665, ___ L.Ed.2d ___ (2010)	34
<u>U.S. v. O'Brien</u> , 560 U.S. 218, 130 S.Ct. 2169, ___ L.Ed.2d ___ (2010)	36
<u>Payton v. New York</u> , 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)	18
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)	29

UNITED STATES COURT OF APPEALS CASES

<u>United States v. Erickson</u> , 991 F.2d 529 (9th Cir.1993).	26
---	----

<u>Ray v. Township of Warren</u> , 626 F.3d 170 (3rd Cir.2010)	25
<u>United States v. Wright</u> , 667 F.2d 793 (9th Cir.1982)	30
<u>STATUTES AND COURT RULES</u>	
RCW 9.94A.525(8)	10
RCW 9.94A.589(1)(a).	10
RCW 9.94A.585(4)	12
RCW 9.94A.535	12
RCW 9A.08.020	13
RCW 9.94A.535(3)(a)	13,14
RCW 9.94A.535(3)(h)(i).	13,14
RCW 9A.40.040.	37
RCW 9A.40.010	37
RCW 9A.40.010(6)	37
RAP 10.4(c)	14
CrR 2.1(a)(1)	35
RAP 2.5(a)	36
<u>TREATISES AND REFERENCE MATERIALS</u>	
D. Boerner, <u>Sentencing in Washington</u> (1985)	12
The American Heritage Dictionary 1538 (5th ed 2011), http://www.ahdictionary.com/word/search.html?q= restrain).	38
Charles W. Johnson, <u>Survey of Washington Search and Seizure Law: 2005 Update</u> , 28 Seattle U. L. Rev. 467, 638 (2005).	30

CONSTITUTIONAL PROVISIONS

Wash. Const. art. 1, sec. 7. 18

U.S. Const. amend. 4. 18 U.S. Const. amend. 6 12,13

U.S. Const. amend. 14 12,13

Wash. Const. Art. 1, sec. 21 12,13

Wash. Const. Art. 1, sec. 22 12,13

U.S. Const., amend. 6. 35

Wash. Const. art. I, section 22 35,36

A. ASSIGNMENTS OF ERROR

1. In Sandra and Jeffrey Weller's Clark County trial on multiple charges of second degree assault and other abuse crimes, allegedly committed against their two adopted teenagers, the trial court erroneously denied the defendants' CrR 3.6 motion to suppress a wooden board or "stick" that was located by Vancouver police as a result of questioning of complainant Christa Weller, which was conducted following a warrantless entry and search of the Weller home.

2. The trial court erred in imposing an exceptional sentence in which it "ran" all of Ms. Weller's convictions consecutively, absent constitutional and statutory authority.

3. The information failed to charge the essential elements of unlawful imprisonment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Vancouver police officers accompanied Child Protective Services (CPS) workers to the Weller home to assist with a welfare check on Christopher and Christa, the Wellers' two adopted teenagers. The two complainants had written and sent a note to a therapist, claiming physical abuse. When the officers knocked at the home, they asked Sandra Weller if they could enter and talk to

the teenagers; when she stood aside, the two teenagers were standing right behind, or right next to her, at the door. However, the police officers entered, and then took the children farther inside to other locations in the house to question them. After questioning Christa and hearing her claims of abuse, the primary police officer learned of a wooden stick allegedly used to beat her and Christopher about their posteriors. After joint searching with Christa, the officer located the stick, or board, sticking out from behind a fixture or piece of furniture in the garage area in the back of the home.

The State argued that the general, non-emergency “community-caretaking” function of police, and these officers’ desire to assess the teenagers’ welfare, justified the warrantless entry, and the trial court agreed, also finding that the stick was then seen by the officers in plain view. The Washington Supreme Court, in a decision issued shortly before the CrR 3.6 hearing, clarified that the police have a community-caretaking function, but must establish an actual “emergency-aid” exception, in order to justify a warrantless law enforcement entry into a home. The State did not attempt to prove this degree of emergency, and did not otherwise show that the unreasonable invasion of privacy was justified under the law.

Further, the police did not locate the stick in “plain view,” even if the officers had been lawfully in the home; rather, it was located following a non-consensual entry, and during a search effort. Is reversal of the CrR 3.6 order required?

2. The trial court failed to file written CrR 3.6 findings of fact, and entry of written findings at this late juncture could only, without risk of tailoring to meet the issues on appeal, repeat the court’s limited oral ruling. That ruling does not address, much less find, the requisite level of emergency, or any other exception to the warrant requirement. Is reversal of the CrR 3.6 order also required for the absence of written findings, prohibiting late entry, and requiring exclusion of the stick?

3. The evidence of the stick, which forensic testing showed had blood on it containing DNA that matched the male complainant, was pivotal to the State’s persuading of the jury. The case involved multiple allegations of assault in which Jeffrey Weller allegedly beat the teenagers’ buttocks with the stick, but both he and Mrs. Weller testified and denied the claims with detailed explanations for the false allegations. The evidence was not overwhelming in favor of the State – although the prosecution witnesses testified ‘consistently’ with each other, Sandra and Jeffrey testified with

similar detail and equal consistency. Is reversal required where the State cannot prove that the CrR 3.6 error of admitting the stick was harmless beyond a reasonable doubt?

4. Did the trial court err in imposing the 240-month exceptional sentence on Mrs. Weller for her four assault convictions and her conviction for unlawful imprisonment, by running the prison terms consecutively, where neither RCW 9A.08.020 nor the aggravating factors of deliberate cruelty and pattern of abuse statutorily authorize an exceptional sentence of the defendant, absent a special jury verdict indicating the jury relied for Sandra's convictions on principal liability?

5. Did the information fail to charge the elements of unlawful imprisonment where it did not include the elements of the crime by any fair construction?

C. STATEMENT OF THE CASE

1. Investigation, charging and trial. The defendants, Sandra Weller (appellant herein) and Jeffrey Weller (co-appellant) were the long-time adoptive parents of teenaged twins Christa Weller and Christopher Weller, the complainants. CP 1-3 (affidavit of probable cause). Following a period of years of ongoing custody battles and parental custody evaluations around and after initial

adoption, the children sent a note to a therapist claiming physical abuse in the home, in the form of them being beaten with a stick, causing them to bleed; the therapist mandatorily reported the note to state authorities. 2/6/13RP at 996-97; 2/5/13RP at 799-800; 2/7/13RP at 1191, 1229-30; CP 1-3.

(a) Warrantless entry. On October 7, 2013, Child Protective Services visited the Weller home briefly in response to the note, then left and requested that Vancouver police accompany them back to the home to do a further "welfare check" on the children. When the police and CPS workers arrived and told Ms. Weller at the door that they were there to check on the children's safety, and needed to speak with them, Ms. Weller stood aside, made an arm motion, and the police officers entered. 2/1/13RP at 233-38. The two teenagers, who later were described as underweight by Dr. Kim Copeland who works at a private child abuse investigating company, had been standing right next to or behind Ms. Weller at the threshold. 1/31/13RP at 99; 2/6/13 at 875-76.

The officers took the children inside the home and away from the parents, and commenced talking to Christa at some length, in the garage area near the back of the property. The

primary officer then seized a stick that the children claimed had been used to beat their behinds when they complained about being fed inadequately, and/or fed with gruel and moldy bread, or when they took junk food from the kitchen. 2/1/13RP at 233-37. No warrant had been obtained for the home entry.

The defendants moved to exclude the stick from evidence under the Fourth Amendment and Article 1, section 7 of the state constitution, arguing that the State could not meet its burden to prove that some delineated exception to the warrant requirement applied. CP 20 (motion joining co-defendant's suppression motion); CP 21 (State's response); Supp. CP ____, ____ (Sub #'s 37 and 39 in Superior Court file of co-defendant Jeffrey Weller). Following a CrR 3.6 suppression hearing, the trial court orally ruled that the police, with the CPS workers, had entered the Weller home to talk to and check on the children under their "community-caretaking" duties, and that the stick or board had thereafter been seen by the officers in plain view. 2/1/13RP at 237-38.

No written CrR 3.6 findings were prepared by the prosecutor despite the court's specific request that the State do so. The stick was admitted at trial, along with forensic testimony that there was blood on the stick containing DNA that was a presumptive match to

Christopher Weller, with Christa Weller and Jeffrey Weller also being possible contributors to the DNA's presence. 2/6/13RP at 1054-59, 1081, 1089-91, State's exhibit 1-A.

(b) Trial. At trial, both Christa and Christopher Weller testified that during the year-long charging period (October 7, 2010 to October 7, 2011), their adoptive father Jeffrey Weller, with the encouragement of Sandra Weller, would strike them with a wooden stick or board on their bottoms, causing bleeding and later swelling, and this was something that happened many times during that year. 2/6/13RP at 983-86 (testimony of Christa Weller); 2/5/13RP at 784-90 (testimony of Christopher Weller) ("he [Jeffrey Weller] would swing and hit us on our rear ends"); CP 52.

Mr. and Mrs. Weller testified extensively at trial about the children's pre-existing conditions, including failure to thrive and bulimia for which they had been seeing an endocrinologist and received treatment. They testified about the teenagers' discipline problems and the difficulty of parenting them, and vigorously denied the teenagers' claims of assault and or any other offenses. 2/7/13RP at 1224-35, 1322-23. The children's health and eating problems had required the frazzled parents to forbid them from

hoarding food, including disallowing them from taking junk food upstairs to their bedroom. 2/7/13RP at 1256, 1290-92, 1306.

Sandra Weller explained that the blood on the stick, which had been brought home from the junk bin of a home supply store as a possible shim for the disrepaired garage structure, was the result of Christopher running around with the stick like it was a light sabre, after cutting his hand by trying to jack open a food can with a screwdriver or some other implement. 2/7/13RP at 1286-89, 1309-10.

2. Verdicts and sentencing. The State had alleged a charging period of October 7, 2010 to October 7, 2011. CP 52. Each assault count was predicated on the statutory alternative means of assault with a deadly weapon, and harm that by design caused pain equivalent to torture, (CP 69 – Instruction no. 8), and pursuant to jury instructions that set forth and defined accomplice liability (CP 68 - Instruction no. 7).

Following the evidence phase, Sandra Weller was convicted by complicity of four counts of Assault in the Second Degree (counts 1, 2, 5 and 6), in addition to a count of Unlawful Imprisonment (count 4) based on the allegation that Christa Weller was kept in the children's room with a motion alarm on the door and

no inside door handle, requiring a jury-rigged coat hanger be used to get out. CP 1-3, 52 (final amended information), CP 105, 107, 109, 111, 113 (verdict forms) (alternative lesser counts of third degree assault were found by the jury but not punished in Sandra Weller's judgment and sentence).

The jury additionally found the two statutory aggravating factors of RCW 9.94A.535(3)(a) and (3)(h)(i) -- deliberate cruelty, and a pattern of abuse shown by multiple incidents over a long time, attached to each of the four convictions for second degree assault, and attached also to her one count of conviction for unlawful imprisonment (counts 1, 2, 4, 5 and 6).

Following sentencing, Mrs. Weller timely appealed. CP 167.

D. ARGUMENT

1. **THE 20-YEAR EXCEPTIONAL SENTENCE WAS ENTERED WITHOUT STATUTORY AUTHORITY BECAUSE THE LEGISLATURE DID NOT MAKE THE AGGRAVATING FACTORS IN QUESTION APPLICABLE TO UNDERLYING CONVICTIONS THAT THE JURY DID NOT EXPRESSLY PREDICATE ON PRINCIPAL LIABILITY.**

- (a). **Pertinent sentencing facts.**

- (i). ***Standard range calculations – incarceration increased by multiple current violent felonies in the one-year charging time, requiring double-scoring, for a standard 57 months total prison.***

At sentencing, the trial court calculated Sandra Weller's offender score points for each conviction, including by applying three sets of double-point multipliers to each of the four individual second degree assault counts (as violent felonies), on the statutory ground that each count was accompanied by the other three. CP 146; RCW 9.94A.525(8), RCW 9.94A.589(1)(a).

Application of the foregoing scoring rules, with multipliers (and the addition of a further one point for the unlawful imprisonment count) produced scores of 7 and thus standard ranges of 43-57 months for each assault, along with the score of 4 and the accordant range of 12-16 months for the unlawful

imprisonment itself, reached by single-counting of the other felony counts under 9.94A.589.

Based on the Legislature's determination that a person committing this many current crimes of the listed categories, including violent counts, should have their possible prison term multiplied, Ms. Weller's total available standard punishment therefore increased to possible high ends of 16 and 57 months (for a presumptive 57 months concurrent total). CP 163 (Exceptional sentence Findings of Fact nos. 7, 18, 19); CP 146 (judgment and sentence); CP 125 (State's sentencing memorandum).

(ii). *Exceptional imposition of consecutive terms, totaling 240 months prison, based on (a) the pattern of multiplicity of assaults during a prolonged one-year period; and on (b) cruelty of the violent counts and the imprisoning.*

Next, the trial court departed upward and imposed an exceptional sentence in the form of a 240-month term (20 years), calculated by consecutively running each of the court's range selections (56-month terms, and a 16-month term) for the five respective counts, on the ground that the imprisonment, and the beating and torturing assaults, were cruel, and on ground that each of the four assaults, individually, were among a multiplicity of assaults committed from October 7 to October 7, which was the

charging period and which the court coincidentally stated was a prolonged time (2010 to 2011) under 9.94A. CP 163; CP 146; CP 125.¹

(b). Sentencing error. At sentencing, the right to be sentenced only by a trial court having the predicate findings in hand, akin and a part of the due process guarantee and the jury trial right, U.S. Const. amends. 6, 14, Wash. Const. Art. 1, secs. 21, 22, must not be violated, and under the SRA, the trial court only possesses that felony sentencing authority which is granted to it by the Legislature. RCW 9.94A.010 *et seq.* Additionally, the sentencing factors used in this case do not contain any individual extension to Mrs. Weller as convicted.

¹ In general, the defendant's standard prison ranges must be correctly calculated before they can be exceeded. State v. Parker, 132 Wn.2d 182, 188, 937 P.2d 575 (1997); State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). Here, the ranges were correctly calculated because, *inter alia*, the Legislature has stated that the presence of *multiple* violent assaults requires double-scoring of the others, as to each of them individually. See supra. Further, under State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987), State v. Nordby, 106 Wn.2d 514, 520, 723 P.2d 1117 (1986), RCW 9.94A.585(4), and RCW 9.94A.535, the reasons for the upward departure (here, because of the crimes' multiplicity, and the cruel nature of their commission) must reflect only matters not already considered by the Legislature in the basic offender scoring of the particular crimes (those being, here, *inter alia*, the total number of multiple torture and deadly weapon assaults required initially to be scored against each other with a two-point factor, because of their violent nature). Cf. D. Boerner, Sentencing in Washington § 9.6, at 9–13 (1985) (contending that duplicative matters are by definition *neither* substantial nor compelling justification for yet further upward multiplication of sentence length).

In this case, sentencing error occurred, because RCW 9A.08.020's general law of accomplice liability for crimes does not apply to expand the actors subject to sentencing factors. Where Sandra Weller and Mr. Weller were charged with committing the same crime or crimes and the jury was permitted in the jury instructions to rely on accomplice liability, the defendants may each be *convicted* by general verdicts of guilty. However, absent specific complicity language in a particular aggravating factor, the SRA's aggravating factors do not provide authority for the court to impose exceptional punishment on a given defendant, unless the State obtained special verdicts indicating that the jury found that defendant guilty by principal liability. See, e.g., State v. Hayes, ___ P.3d ___, 2013 WL 6008686, Wash.App. Div. 2, November 13, 2013 (NO. 43207-2-II); RCW 9.94A.535(3)(a); RCW 9.94A.535(3)(h)(i).

A court exceeds its constitutional authority if it imposes a sentence based on factual determinations not proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22; Blakely v.

Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Similarly, the trial court cannot impose an exceptional sentence unless the above-range punishment is statutorily authorized, in this case by specific jury findings (which were not sought or found) that Sandra Weller was deemed guilty as a principal. See generally State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (SRA sentencing authority is statutory). Unlike punishment under, for example, a Washington firearm enhancement statute that adds additional punishment if the defendant “*or an accomplice*” is armed, the aggravating factors chosen by the State in this case do not by their language apply to crimes accountable by complicity. RCW 9.94A.535(3)(a) and (3)(h)(i).²

² The court instructed the jury using language that adequately tracked the two statutory aggravating factors of deliberate cruelty, and the crime being one of domestic violence that was part of a pattern of abuse shown by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(a), (3)(h)(i). The relevant language appears in the designated documents each in slightly different form, and citing each of them in their entirety would be unwieldy, considering that the precise language does not require study. See, e.g., CP 103 to 104; see special verdicts forms 106, 108, 110, 112, 114; see RAP 10.4(c). Mrs. Weller has designated the entirety of the trial court’s jury instructions, the special verdict forms, and all the informations; the Court of Appeals assigned the instructions and other documents with page numbers identifying the first page of documents, and those numbers are used where helpful to the record. See CP 59 (jury instructions); see July 15, 2013 index to Clerk’s Papers.

Imposition of exceptional sentences in these circumstances exceeded the SRA's grant of authority, and was also necessarily based on facts that the jury did not find and that the court therefore necessarily must be deemed to have implicitly so done. But there was no waiver of the right to jury trial.

These principles apply here. Ms. Weller's criminal convictions were obtained pursuant to jury instructions that set forth and defined accomplice liability. CP 68 (Instruction no. 7). The verdicts procured by the prosecution's selected manner of persuading the jury of guilt were general only; there was no effort made by the State to obtain findings indicating that the jury had premised Mrs. Weller's particular criminal liability for the crimes under a theory of principal liability. CP 105, 107, 109, 111, 113 (verdict forms).

(c). This Court should reverse the exceptional prison sentence, and re-sentencing within the standard ranges is mandated. Reversal is therefore required under the Legislature's rules and established sentencing doctrines. In Washington, general theories of accomplice criminal liability do not automatically apply routinely to aggravating factors, as they generally do to elements of the substantive crime – in part because such factors

are not elements. See State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); see State v. Pineda-Pineda, 154 Wn. App. 653, 661, 226 P.3d 164 (2010); compare State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000) (discussing aggravated murder liability for solicitation to commit crime). The foregoing rules of statutory and constitutional authority, although developed in the recent years of Apprendi application, and, in the statutory context most recently applied in Hayes, are not new and create no windfall for either defendant. Hayes, supra; Pineda-Pineda, supra; State v. McKim, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982).

Under the recent Hayes decision of this Court of Appeals and the authorities in that case, the Sentencing Reform Act allows aggravating factors to compel an exceptional sentence if the defendant has been found guilty for the substantive crimes by express jury findings of principal liability, or where the SRA specifically provides for accomplice-like liability for an aggravating factor or sentencing enhancement. Hayes, supra. But where, as here, the jury has been instructed upon accomplice liability for the crimes, and no special findings indicate the jury relied on principal liability for the defendant in question, the exceptional sentences were not authorized. State v. Hayes, supra.

In this limited context of the jury and sentencing authority required to be in hand, Hayes and the decisions it relies on make clear that under the SRA, accomplice liability is a distinct type of liability. The prosecution in a criminal case always improves its odds of persuading each of the 12 jurors to vote guilty, on some basis, when it can spread its persuasive efforts across multiple theories of guilt. The Hayes doctrine recognizes the statutory limits in RCW 9.94A on the ultimate penalties that can be imposed on the basis of the combined verdicts and special verdicts here.

Although the facts for both Wellers' cases are immaterial under the 'Hayes doctrine,' Christa and Christopher Weller testified that Jeffrey Weller was the person who struck them with the wooden stick. 2/6/13RP at 983-86; 2/5/13RP at 784-90. Allegedly Sandra Weller was present, and it was claimed that she would encourage the beatings, or state to the father that he had not struck the teenagers enough time; under the accomplice liability basis for a jury conviction with regard to the facts adduced, she was similarly not the assailant for subsequent purposes of sentencing authority under these provisions of RCW 9.94A.535. 2/6/13RP at 987-88; 2/5/13RP at 788-89. The court, in sentencing Sandra Weller, was without authority to impose punishment for conduct falling outside

that targeted by the factors the Legislature enacted at RCW 9.94A.535(3)(a) and (3)(h)(i). 2/5/13RP at 789, 797-98, 813, 857. Further, the wrongfulness of her alleged conduct corresponds to the penalty authorized by law. (At sentencing, Mrs. Weller tearfully maintained her innocence, and she continues to do so. 3/20/13RP at 1552-55.). Mrs. Weller asks that her exceptional sentence be reversed.

2. THE VANCOUVER POLICE ENTERED THE WELLER HOME WITHOUT A WARRANT AND THE STATE FAILED TO MEET ITS BURDEN TO SHOW THAT SOME EXCEPTION APPLIED.

Article 1, section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1, sec. 7. The Fourth Amendment to the federal constitution protects against unreasonable searches and seizures, and imposes a presumption that warrantless home entry is unreasonable under its dictates. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); U.S. Const. amend. 4. The same presumption applies under the Washington Constitution, and under its requirements, the home in fact enjoys special protection. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Under Article 1, section 7,

“authority of law” means a warrant. See, e.g., York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

(a). CrR 3.6 suppression hearing. Mr. and Mrs. Weller properly challenged the legality of the warrantless entry of the their home, in written suppression motion briefing, and in argument to the trial court at the hearing held July 30, 2012,³ January 31, 2013 and February 2, 2013, based on the testimony of the CPS workers and the Vancouver police officers involved.⁴

Officer Sandra Aldridge testified that she and her partner Officer David Jensen received a dispatch on October 7, 2010 that CPS workers needed assistance going to an address in Vancouver. 1/31/13RP at 87-89. Down the street from the location, the officers

³ The July 30, 2012 hearing was a perpetuation deposition of Vancouver police officer David Jensen, which the trial court considered in making its later oral ruling. 7/30/12RP at 10.

⁴ The pertinent ‘new’ case of State v. Schultz, supra, was decided before the CrR 3.6 motion. Although the Wellers relied on Schultz, the court and the State only addressed the suppression issue under a non-emergency based “community-caretaking” argument. CP 20, CP 21-26, 2/1/13RP at 233. The trial court at best can be said to have made implicit conclusions of law on the suppression issue by its act of denying the suppression motion; those conclusions are reviewed *de novo*. See State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). There are no written factual findings for the appellant to assign error to, and thus none are verities on appeal. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). For purposes of review, Mrs. Weller believes that the essential facts were established by the officers’ testimony that this was a routine safety check of the sort that they would assist CPS with frequently, they are undisputed and they support her argument of law, that this was no emergency, as required under Schultz. See 7/30/12RP at 118; 1/31/13RP at 153-54.

conferred with CPS workers Margie Dunn and Kim Karu, who explained that a note had been left at a therapist's office claiming physical abuse of two 16-year-old twins and that the CPS workers needed assistance doing a "welfare check" for a "potential determination if -- if protective custody was needed." 1/31/13RP at 89, 93-97.

Mrs. Weller answered the police knock on the door, and when the officers explained why they were there, it turned out that Christopher and Christa Weller were standing next to Mrs. Weller. 1/31/13RP at 99. There was no warning given of Mrs. Weller's right to decline the request to enter, and although Officer Aldridge testified that Mrs. Weller "opened the door, [and] motioned for us to come in," the trial court later remarked in a way that indicated it would decline to find anything more than a mere absence of protest to the entry. 1/31/13RP at 100; see 7/30/12RP at 163 (testimony of Officer David Jensen).

(b). Oral ruling [2/1/13RP at 233]. The trial court, describing the facts as undisputed, orally stated that CPS was made aware of the written note claiming abuse and after an initial CPS visit to the home that day, CPS social workers Karu and Dunn, and the police, proceeded to the Weller residence understanding

that the officers held the authority under RCW 26.44.050 to determine whether the children should or should not be taken into custody because of abuse or neglect or the like. 2/1/13RP at 233. Then, as to plain view, the trial court stated that because the police had a right to be inside the home for the welfare check, the stick evidence was in "plain view" from where the officers had a "right to be within their community caretaking function and the interviews that they were conducting." 2/1/13RP at 237-38. The court stated, "We then come into the plain view doctrine, where if officers had a right to be where they were and observe evidence in plain view, they have a right to seize that evidence. I've concluded that the evidence was in plain view and was identified by the children as being relevant to their complaint." 2/1/13RP at 238.

(c). The warrantless home entry and search violates the state and federal constitutions unless an exception to the warrant requirement applies. The State bears the burden of establishing an exception to the warrant requirement. Under Article 1, section 7, "authority of law" means a warrant, and exceptions to that requirement have been described as few, jealously guarded, carefully drawn, and narrowly construed. State v. Parker, 139 Wash.2d 486, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.

2d 61, 70, 917 P.2d 563 (1996); State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986).

The Vancouver police entered and searched the Weller home without a warrant, thus the prosecution commenced the CrR 3.6 litigation facing a presumption that the entry and search were illegal under the constitution. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

At the hearing, the State pursued the theory that a broad, concern-based “community care-taking” *function* categorically created an exception to the warrant requirement, and did not attempt to show the imminent danger required by the constitution. In Schultz, *supra*, 170 Wn.2d 746, 750, 248 P.3d 484 (2011), the Supreme Court held that for the emergency aid *exception* to apply, a true emergency must exist. Schultz, 170 Wn.2d at 754. Routine community-caretaking functions of the police, such as checking on the welfare of a child, are societally valued – but they do not outweigh citizens’ privacy interests against entry into the home where that is not necessary to perform the function, i.e., without a true emergency need to do so. Schultz, 170 Wn.2d at 754; Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (under ‘emergency aid’-type exigency

exception, law enforcement officers may enter a home without a warrant if it is necessary in order to render emergency assistance to an injured occupant, or to render such assistance to protect an occupant from imminent injury).

Here, it was apparent that the police did not need to intrude into the Weller home by the degree (if even beyond the threshold at all) that the officers did to perform the wellness check, or the safety interview of the teenagers that the officers and CPS workers stated they wanted to conduct. The State did not prove any emergency aid exception that permitted the entry into the home, which the officers and CPS workers nonetheless conducted. The Washington courts have never applied any community-caretaking function to permit non-emergency intrusion into a private home absent a genuine emergency. See, e.g., State v. Thompson, 151 Wn.2d 793, 802–03, 92 P.3d 228 (2004) (declining to excuse warrantless entry where “there was no immediate need for assistance for health or safety concerns”). The function can lead to the exception, but the exception requires more – actual, reasonable police officer belief that someone needs health or safety assistance in the form of an imminent threat of substantial injury, and lack of pretext. See Supp. CP ____ (Sub # 37 in Superior Court file of defendant Jeffrey

Weller) (arguing, *inter alia*, that the officer's stated welfare concerns were also pretext for an investigatory entry and search); 1/31/13RP at 103 (Aldridge testimony that, as an investigatory technique, she usually does not tell the person 100 percent of the reason the police are there). In this regard, Officer Aldridge did indicate that although she initially thought (when first receiving the dispatch call) there was an actual, already-signed court order authorizing a "pick-up" of a child or children, the social workers informed the officers that this was going to be merely a CPS visit to determine what the situation was with the abuse allegations. 1/31/13RP at 88-89, 97.

Whether a court order to pick up one of the teenagers, if established or admitted and its basis shown, would be adequate to amount to the required emergency is not presented in Mrs. Weller's case. Here, the entire thrust of the State's argument and the court's similar theme in upholding the police conduct was that the officers knocked and gained entry pursuant to their general bailiwick of checking on the welfare of people, and the State therefore emphatically painted a picture showing that these were *not* pressing, emergency circumstances that would show this was a law enforcement-purposed police activity. CP 21; 2/1/13RP at 233-38. At the same time, the prosecutor sought to avoid labeling the

police action as investigatory, or having a determined, specific law enforcement purpose. Urging twin contentions on the trial court, the prosecutor argued that the officers' entry was a

good faith effort to engage and to conduct a wellness check, and to investigate for those purposes, and under the rubric of plain view, [the] seizure of the board was appropriate and not violative of the rights of either defendant.

1/31/13RP at 178. The State elicited from one of the CPS workers, that in determining with the agency whether they should be enlisting police assistance, that her characterization of the visit was a routine “wellness check.” 1/31/13RP at 153-54. This creates neither a situation of a mere safety inquiry, nor probable cause, nor emergency. See also State v. Hos, 154 Wn. App. 238, 247–48, 225 P.3d 389 (2010) (warrantless entry justified under community caretaking function exception when officer had a reasonable belief that unresponsive resident was not breathing and in need of immediate medical attention), review denied, 169 Wn.2d 1008, 234 P.3d 1173 (2010); State v. Williams, 148 Wn. App. 678, 687, 201 P.3d 371 (2009) (entry and search of hotel room was illegal because no one in the room “was in immediate danger”). Thus in turn, the entry was also not justified under any emergency exception. See also Ray v. Township of Warren, 626 F.3d 170,

175–177 (3rd Cir.2010); United States v. Erickson, 991 F.2d 529, 533 (9th Cir.1993).

The constitutional protection of the home and the case of State v. Schultz strongly indicates that there is no “welfare check” or “community custody” exception to the warrant requirement, and no emergency-aid exception – the factors of immediacy and harm required to render community caretaking *concerns* into exigency -- was proved here. As the defense argued at the CrR 3.6 hearing, the police entry was made with a pre-existing concern to assess the children’s wellness, which was based on the CPS workers’ concerns, raised through the allegations made by Christopher and Christa alleging beating with a stick. The Vancouver officers, acting under the premise of an absence of probable cause, then did enter, investigate, and determine the importance of the alleged stick, which was located and seized. 7/30/12RP at 25, 70-71, 1/31/13RP at 146-48, 182-83.

Importantly, the *scope* of the police and CPS workers investigation and search in the house, upwards of almost 4 hours in time, is further indication of both unreasonableness and an impermissible intrusion into private affairs. 1/31/13RP at 169; see State v. Kinzy, 141 Wn.2d 373, 386-88, 5 P.3d 668 (2000) (a

proper community caretaking function is divorced from a criminal investigation).

Given all these circumstances, no other theory could be applied, particularly belatedly, to render the entry into, and the scope of police activity in, the home. The State, which bore the burden to come forward with and prove some reason why the court should find this warrantless home entry to be lawful, failed to litigate any actual effort to do so, much less successfully convince the trial court of such a notion. In its oral ruling, the court mentioned “consent” only obliquely, and the trial court’s only remark on that issue was dismissive of it, noting only that there had been no objection to the police entry by Ms. Weller, before it proceeded to approve the entry instead under community-caretaking reasoning. 2/1/13RP at 236-37. The court was not finding ‘consent,’ for the additional reason that if it did, the court would not have then addressed ‘community-caretaking.’ Instead, the court turned its ruling on the State’s argument, which was immaterial if the court had believed the officer’s entry was legal because of some grant of permission. 1/31/13RP at 171-72 (trial court expressly noting that the State bore the burden of proving the legality of the warrantless entry into the home); see also State v. Read, 147 Wn.2d 238, 245,

53 P.3d 26 (2002) (trial court in bench proceeding knows the applicable law).

Importantly, even if there was an “arm motion” by Mrs. Weller or conduct that the officers took to be an act of acquiescence to their entry, this is inadequate. The knock, talk with Mrs. Weller, and subsequent entry into the home to pursue concerns regarding alleged beating with a stick and the collection of the stick was *not* categorizable as emergency aid, and where questioning did not require intrusion into the house, much less its recesses, the intrusion was for the very investigative concerns the CPS workers and the officers (and the State at the CrR 3.6 hearing) freely admitted to. If there was no imminent harm, and yet the police secured entry to pursue claims of abusive assault, the rationale of requiring informed consent for entry squarely applies under Article 1, section 7. State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) (“knock and talk” entry for investigative reasons but without probable cause requires homeowner be notified of right to refuse entry). The defense argued that Schultz was applicable to preclude any finding of an emergency exception. The court, before reasoning that community care-taking rendered the entry legal, effectively rejected the State’s suggestion that there

was affirmative permission given to enter; and even if it had found such permission, Ferrier required a warning of rights.

The teenagers were at the threshold of the Weller home when police knocked on the door and Sandra Weller answered. 1/31/13RP at 99. There was no need to intrude into the home as the officers did, to pursue the child welfare issue, further indicating of violation of the Weller's constitutional right of privacy. The Supreme Court examines both need and intrusiveness, because the emergency-aid exception allows only a limited invasion of protected privacy rights, to the degree only "when it is necessary to for police officers to render aid or assistance." State v. Schultz, 170 Wn.2d at 754, 761.

Suppression is required. Evidence derived from an unlawful search, including evidence subsequently uncovered after some attenuation of time, but nonetheless obtained only but for the illegality, must be suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 485–86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Gaines, 154 Wn.2d 711, 716–20, 116 P.3d 993 (2005). This reasoning applies even in instances where the evidence is produced from an independent actor; see, e.g., Wong Sun; the present case involves an actor

being questioned by police and helping the officer search for the evidence, or leading the officer to the evidence following the questioning that the police came to the residence to engage in.

Relatedly, there could be no "plain view" discovery of the stick.

(d). The "plain view" doctrine does not apply. As noted, the trial court orally stated that because the police had a right to enter and be in the Weller home without a warrant, the stick evidence was in "plain view." 2/1/13RP at 237.

But a plain view search and seizure is legal only when the police (1) have a valid justification to be in an otherwise protected position and (2) are immediately able to realize that certain evidence they see is contraband associated with criminal activity. State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991); see generally Charles W. Johnson, Survey of Washington Search and Seizure Law: 2005 Update, 28 Seattle U. L. Rev. 467, 638 (2005).

Plain view, then, is by definition incompatible with questioning and subsequent revelation by the questioner, and of course with searching. Myers, 117 Wn.2d at 346; see, e.g., United States v. Wright, 667 F.2d 793, 797 (9th Cir.1982) (lawful presence does not create an ability in law enforcement to engage in

exploratory rummaging). The “plain view” doctrine under which the trial court found the stick to be ultimately admissible does not apply where the children either searched for the stick during, or as part of, or as a result of the questioning by, the Vancouver police officers. Whether one credits the testimony that the children were looking for something they described as a stick as the police were talking to them, or the testimony that the police encouraged the children in their efforts to search for the stick they had mentioned, the stick was not in plain view simply because it was ultimately successfully located via searching and found in a location where it was partially visible. Further, the stick was not recognizable under the plain view doctrine where additional testimony and evidence would be required to classify it as akin to contraband. The evidence must be suppressed.

(e). The State failed to file written CrR 3.6 findings of fact and conclusions of law. CrR 3.6 in pertinent part states: “If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.” Although it can be harmless, the failure to enter written CrR 3.6 findings of fact and conclusions of law is trial court error. State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). Remand at most can

authorize entry of memorialization of the court's oral ruling. See State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996). Here, the ruling was limited to the affirmative finding on the community-caretaking argument made by the State, which understated the emergency doctrine of Schultz; thus remand would be pointless at best. Reversal of the suppression ruling is required. The error of absence of findings cannot be overlooked because the trial court's oral ruling, to the extent necessary under Schultz, was not focused on the applicable doctrine, and did not address the arguments made by defense counsel, under Schultz. See generally State v. Head, 136 Wn.2d 619, 623-24, 964 P.2d 1187 (1998) (adequacy of oral ruling to meet pertinent legal test can obviate error). Appellant argues that the trial court's written CrR 3.6 findings, if subsequently entered, could reflect only those precise statements in its oral CrR 3.6 ruling. See State v. Byrd, 83 Wn. App. at 512. Thus in this case, the trial court cannot now properly enter written findings or conclusions other than a pointless recitation of its oral ruling, because anything else would, by definition, go beyond its prior statements after the issues have been framed on appeal. See State v. Brockob, 159 Wn.2d 311, 343-44, 150 P.3d 59 (2006); State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996);

State v. Lopez, 105 Wn. App. 688, 693, 20 P.3d 978 (2001), review denied, 144 Wn.2d 1016 (2001); State v. Harris, 66 Wn. App. 636, 640–41, 833 P.2d 402 (1992). Error, in this case independently requiring reversal, has been created by the failure of the party prosecutor to propose and obtain from the trial court written findings of fact and conclusions of law.

(f). Especially where the defendants testified with detailed refutation of the allegations, the State cannot satisfy its burden to show harmlessness. Admission of evidence seized in violation of a defendant's Fourth Amendment or state constitutional privacy rights is constitutional error that is presumed prejudicial. State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). Constitutional error is harmless only if the State proves beyond a reasonable doubt that the verdict would have been the same without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, absent the evidence seized, the jury would not have found Mrs. Weller guilty, and reversal of her convictions is required. State v. Gaines, 154 Wn.2d at 716 (suppression error must be harmless beyond a reasonable doubt). Although the children and their adoptive siblings testified with relative consistency, the defendant parents also testified, and with the very

same consistency vigorously denied the allegations. The State's evidence was not overwhelming; Mrs. Weller respectfully argues that the State's case does meet this high standard on review simply because the complainants were teenage children who deserve all possible protection, and whom a jury would give all possible credence and reliability because of their minor age. Nor is the evidence overwhelming because the allegations were horrific if true.

Where the defendant (and co-defendant) testified in their defense and disputed the two victims' allegations that they struck the children, the erroneous admission of the seized board requires reversal because it was not only significantly persuasive in its dramatic nature, but it also was interjected into a case with affirmative, and opposing, prosecution and defense claims. The certain-seeming, scientific nature of the DNA evidence on the stick further aggravated the prejudice. McDaniel v. Brown, 558 U.S. 120, 136, 130 S.Ct. 665, ___ L.Ed.2d ___ (2010) (noting the powerful nature of scientific evidence in general and the persuasiveness of DNA evidence for a lay jury in particular). It cannot be said beyond a reasonable doubt that the jury would have convicted Mrs. Weller absent the constitutional error.

**3. THE UNLAWFUL IMPRISONMENT
COUNT MUST BE REVERSED FOR
ABSENCE OF CHARGING NOTICE.**

(a). Mrs. Weller was charged and convicted of unlawful

imprisonment. Sandra Weller was convicted of unlawful imprisonment based on the final amended information and the jury verdict. CP 52. The information, which alleged merely that the defendant "knowingly restrained" the complainant, was defective for failure of notice.

(b). The charging document must allege every element

of the crime. The Sixth Amendment to the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation[.]" U.S. Const., amend. 6. In addition, the State Constitution further states that "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against [her]." Wash. Const. art. I, section 22 (amend. 10).

Pursuant to these guarantees, every material element of the crime charged, along with all essential supporting facts, must be put forth with clarity in the document charging the accused with a crime. CrR 2.1(a)(1); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960

(1996); United States v. O'Brien, 560 U.S. 218, 224, 130 S.Ct. 2169, ___ L.Ed. 2d ___ (2010); Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (indictment must contain all elements of offense charged so it informs defendant of charge, and enables defendant to use indictment to prevent future prosecutions for same offense)..⁵

If a charging document is challenged for the first time on appellate review, it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. However, "[i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)). Due process is violated where the defendant proceeds to trial and conviction in this absence of notice. Wash. Const. art. 1, sec. 21, art. 1 sec. 22.

⁵ Mrs. Weller may challenge the sufficiency of the charging document in her case for the first time on appeal because the issue involves a question of constitutional error which is manifest. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989); RAP 2.5(a).

(c). The information did not include the essential elements of unlawful imprisonment. A charging document which merely states the language that the defendant knowingly restrained a person is constitutionally defective to charge unlawful imprisonment, and requires reversal without any showing of prejudice. State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), review granted, 178 Wn.2d 1001, 308 P.3d 642 (Wash. Sep 04, 2013). The statute for unlawful imprisonment provides that “[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person.” RCW 9A.40.040. However, determining the entirety of the elements in the crime requires looking to another statute whose language was not charged in Mrs. Weller’s information. CP 52. Under RCW 9A.40.010, to “restrain” means to “restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.” To restrain a person “without consent” is accomplished by “physical force, intimidation, or deception.” RCW 9A.40.010(6) (also stating that the statute does not otherwise define the remainder of the last clause of the definition of restrain).

The Johnson Court looked to the common definition of restrain and determined that the elements of the crime could not

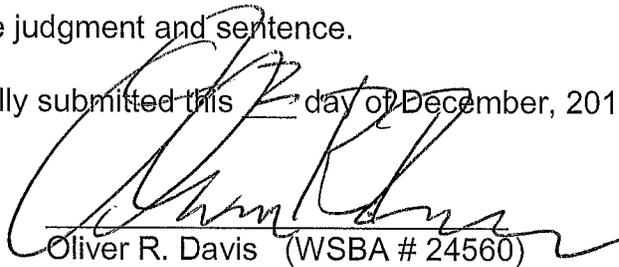
reasonably be inferred from the charging language. Johnson, 172 Wn. App. at 138-39 (citing The American Heritage Dictionary 1538 (5th Ed. 2011) at <http://www.ahdictionary.com/word/search.html?q=restrain>). Further, the charging language fails to correctly indicate all the knowledge elements of the crime. Johnson, at 139 (citing State v. Warfield, 63 Wn. App. 630, 821 P.2d 492 (1991)).

Mrs. Weller's unlawful imprisonment conviction must be vacated. State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000).

E. CONCLUSION

Based on the foregoing, Sandra Weller requests that this Court reverse the judgment and sentence.

Respectfully submitted this 27 day of December, 2013.



Oliver R. Davis (WSBA # 24560)
Washington Appellate Project – 91052
Attorneys for Appellant Sandra Weller

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 44726-6-II
v.)	
)	
SANDRA WELLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANNE MOWRY CRUSER	()	U.S. MAIL
CLARK COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
PO BOX 5000	(X)	E-SERVICE VIA COA
VANCOUVER, WA 98666-5000		PORTAL
E-MAIL: prosecutor@clark.wa.gov		
[X] JODI BACKLUND	(X)	U.S. MAIL
BACKLUND & MISTRY	()	HAND DELIVERY
PO BOX 6490	()	E-SERVICE VIA COA
OLYMPIA WA 98507-6490		PORTAL
[X] SANDRA WELLER	(X)	U.S. MAIL
365337	()	HAND DELIVERY
WCC FOR WOMEN	()	
PO BOX 2049		
AIRWAY HEIGHTS, WA 99001		

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF DECEMBER, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

December 02, 2013 - 3:48 PM

Transmittal Letter

Document Uploaded: 447266-Appellant's Brief.pdf

Case Name: STATE V. SANDRA WELLER

Court of Appeals Case Number: 44726-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:
prosecutor@clark.wa.gov