Supreme Court No. 100878-3
(COA No. 37871-3-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM H. FLETCHER,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS
DIVISION THREE OF THE STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Fletcher, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Fletcher seeks review of the Court of Appeals decision dated March 31, 2022, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Assault in the first degree necessarily contemplates violent and traumatic conduct that creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. Does the first degree assault statute necessarily contemplate all pain from no pain to the most pain up to death?

2. Application of the deliberate cruelty aggravator requires the State to demonstrate the defendant's criminal conduct exceeds what is normally associated with or inherent within the charged crime. Does the Court of Appeals incorrectly hold Mr. Fletcher's criminal conduct was deliberately cruel when he had a demonic look and used a blunt object, striking the victim repeatedly, with enough force to constitute first degree assault?

3. Application of the deliberate cruelty aggravator requires the State to demonstrate the victim's pain exceeded what is normally associated with or inherent within the charged crime. Does the Court of Appeals incorrectly hold there is sufficient evidence the victim's pain exceeded what is contemplated by or inherent within the first degree statute, without articulating what the victim's pain was; and when the victim in this case testified her pain was an 8-9 on a scale of ten; and her injuries were severe but non-life threatening?

D. STATEMENT OF THE CASE

Mr. William Fletcher was a neighbor to Ms. Laura Romig. RP 81. The two had known each other for five or six years and they had a friendly relationship. RP 80-1, 178. Ms. Romig began to distrust Mr. Fletcher due to his changed demeanor around November or December 2018. RP 81, 84.

Mr. Fletcher would occasionally visit with Ms. Romig and on several occasions talked with Ms. Romig about drugs and alcohol. RP 85. On one occasion Mr. Fletcher asked Ms. Romig for her Gabapentin. RP 87. On some occasions Mr. Fletcher would do housework for Ms. Romig due to her physical disability in which she utilized a wheelchair. RP 79. Mr. Fletcher began asking Ms. Romig for money to buy drugs which prompted Ms. Romig to stop paying Mr. Fletcher and instead pay his landlady. RP 87. This angered Mr. Fletcher. *Id*.

On the day of the incident, Mr. Fletcher went over to Ms. Romig's residence to do housework which included doing the laundry and mopping the floor. Mr. Fletcher told Ms. Romig "well I know you've been sick with the flu and I just wanted to do something nice for you. So, I was going to mop your floor." RP 89.

Ms. Romig was cautious and watched Mr. Fletcher enter the kitchen where he fell to the floor, yelled, and flopped like a fish. RP 91. Ms. Romig, experienced in seizure disorders, believed Mr. Fletcher did not need medical assistance. RP 102. After a brief moment, Mr. Fletcher stood up and looked directly at Ms. Romig. RP 103. "I watched him more and he kind of crouched down then he gave me this look I've never seen on William's face, it was frightening. It was demonic. It was very scary." RP 103.

As Ms. Romig reached for her phone, Mr. Fletcher quickly ran from the kitchen to where Ms. Romig was

sitting, slapped the phone out of her hand, grabbed a candlestick, and started striking Ms. Romig repeatedly on the head. RP 103. Ms. Romig did not call for help but "calmly started talking to him in a low voice as he was behind me hitting and hitting and I said William you don't want to hurt me, now stop. You know know—you know you don't want to hurt me. But that seemed to agitate him more." RP 106. Ms. Romig counted 14 strikes over the course of the assault before she lost count. RP 107. The pain was "about an 8 or 9." RP 108. Mr. Fletcher did not say anything during the assault. RP 109. The candlestick eventually broke at which time Mr. Fletcher left the residence. RP 108.

Either Ms. Romig, or her neighbor, called emergency services. RP 109-10. When officers arrived they observed a large amount of blood coming from her head, she was calm but shaking. RP 41-2. Ms. Romig was transferred to Dayton General Hospital. RP 113.

Ms. Romig suffered several injuries including a broken nose, several fractured teeth, and lacerations. RP 141. Ms. Romig's injuries could have been life threatening but she recovered at another hospital within a few days. RP 113. In addition to the observable injuries, Ms. Romig suffered from accelerated hearing loss, a lack of balance, decreased vision, headaches, and is diagnosed with Post Traumatic Stress Disorder (PTSD). RP 117. Ms. Romig declined nose surgery and as a result has no sense of smell as well as breathing issues. RP 119-20.

The State charged Mr. Fletcher with first degree assault with two aggravating factors: deliberate cruelty and particularly vulnerable. CP 143-45. The jury found Mr. Fletcher guilty and by special interrogatory that his conduct constituted deliberate cruelty and Ms. Romig was particularly vulnerable. The trial court sentenced Mr. Fletcher to an exceptional sentence of 396 months.

On appeal, Mr. Fletcher raised several issues including a challenge to the sufficiency of the State's evidence on the two aggravating factors. Division Three, in a split decision, affirmed Mr. Fletcher's conviction. In analyzing the deliberate cruelty aggravating factor, the majority stated that "[t]he focus of the deliberate cruelty aggravator is not the extent of the victim's injuries; it is instead the infliction of psychological and emotional pain. OP at 9 (citing *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)). The majority went on to say that "[p]hysical injuries, no matter how severe, are not always accompanied by intense pain and emotion suffering. The latter are separate harms that can justify additional punishment under RCW 9A.36.011(1). *Id*.

Without citing any cases, the majority held there was sufficient evidence of deliberate cruelty when Mr. Fletcher (1) had a demonic look, (2) knocked Ms. Romig's phone

out of her hand, and (3) hit her with a candlestick until it broke. OP at 9-10.

In his dissent, Judge Lawrence-Berrey disagreed with the majority's interpretation and application of *Tili* stating that the proper application under *Tili* "requires us to determine what factors are inherent or typical in the particular class of crimes and whether exceptional circumstances are present that truly distinguish the crime from others in the same category." Dissent at 1. Judge Lawrence-Berrey went on to say that "intense pain and emotional suffering" is not a valid distinction between assault in the first degree and Mr. Fletcher's conduct because "assault in the first degree typically is accompanied by intense pain and emotional suffering." Dissent at 2. In a footnote, Judge Lawrence-Berrey disagreed with the majority's opinion that Mr. Fletcher's demonic look and repeated strikes are valid distinctions

elevating Mr. Fletcher's conduct to satisfy deliberate cruelty. *Id*. at n. 1.

This timely petition follows.

E. ARGUMENT

1. THE COURT OF APPEALS MISINTERPRETED AND MISAPPLIED THIS COURT'S CASE LAW.

Under RCW 9A.36.011(1) a person is guilty of Assault in the First Degree when that person "with intent to inflict great bodily harm assaults another...by any force or means likely to produce great bodily harm or death." Great bodily harm "means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

The aggravating factor in dispute, deliberate cruelty, "means gratuitous violence or other conduct which inflict physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the

elements of the crime or is normally associated with the commission of the crime." CP 144 (Jury Instruction 11). This is a high threshold. *State v. Serrano*, 95 Wn. App. 700, 712-13, 977 P.2d 47 (1999).

The Court of Appeals in Mr. Fletcher's case held, (1) the focus of deliberate cruelty aggravating factor is on the infliction of psychological and emotional pain, and (2) intense pain and emotional suffering can justify additional punishment. OP at 9 (citing *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)). This interpretation is incorrect because it does not recognize the criminal conduct and pain normally associated or inherent within the first degree assault statute.

This Court in *Stubbs* addressed a similar relationship between first degree assault and the aggravating factor: that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. *State v. Stubbs*, 170 Wn.2d 117, 131, 240 P.3d

143 (2010); RCW 9.94A.535(3)(y). First, this Court stated the first-degree assault statute encompasses all injuries short of death: "we cannot imagine an injury that exceeds 'great bodily harm' but leave the victim alive." *Stubbs*, 170 Wn.2d at 128. Thus, no "injury can exceed this level of harm, let alone substantially exceed it." *Id*. In analyzing prior opinions with this aggravating factor, this Court stated the question was whether the victim's injuries fall within the definition of "great bodily harm." *Stubbs*, 170 Wn.2d at 128.

In contrast to the older application, the Court recognized the aggravating factor in dispute presented a somewhat different question, instead, the aggravating factors asks the jury to consider whether the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. *Stubbs*, 170 Wn.2d at 128-29. Therefore, the jury had to measure "the victim's actual injuries against the minimum injury that would satisfy the definition of, in this case, 'great bodily

harm' to see if they 'substantially exceed' that benchmark." *Stubbs*, 170 Wn.2d at 129.

The prior test discussed in *Stubbs* is the type of test articulated by this Court in *Tili*, the case the majority in Mr. Fletcher's case relied on in articulating the application of deliberate cruelty aggravator. In *Tili*, this Court stated "the cruelty [in deliberate cruelty] must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense—elements of the crime that were already contemplated by the legislature in establishing the standard range." *Tili*, 148 Wn.2d at 369.

Harmonizing *Stubbs* and *Tili* demonstrates three questions need to be asked: (1) what lens does the aggravating factor ask the jury to consider the facts of the case?; (2) was the defendant's conduct normally associated or inherent within the crime charged?; and (3) was the victim's pain normally associated with or inherent within pain suffered by victim's of first degree assault?

Here the Court of Appeals did not apply this three-part test. Instead, the majority held there was sufficient evidence of deliberate cruelty because: (1) Mr. Fletcher had a demonic look; (2) Mr. Fletcher slapped Ms. Romig's phone out of her hand; and (3) Mr. Fletcher struck Ms. Romig on the head with a candlestick until it broke.

None of these facts are unique or unusual. More specifically, none of these facts demonstrate Mr. Fletcher's conduct of using a candlestick to cause great bodily harm goes beyond what is normally associated with first degree assault. *Serrano*, 95 Wn. App. at 713 (five gunshots did not constitute deliberate cruelty). Implicitly recognized in *Stubbs*, the criminal conduct requirement within the first degree assault statute can be satisfied in a variety of ways, from cutting off a limb to paralyzing an individual with a stab wound. Here, Mr. Fletcher used a heavy blunt object with enough force to rise to the level of first degree assault. There were no unique facts in Mr. Fletcher's case.

Turning to the pain experienced by Ms. Romig, based on the injuries inflicted. The majority fails to discuss any facts that demonstrate how Ms. Romig's injuries, and associated pain, exceeded what is normally associated with or inherent within first degree assault. The Court focused on Mr. Fletcher's demonic look yet Ms. Romig did not, let alone discuss how this look made her pain exceed what is normally associated with first degree assault. Additionally, Ms. Romig testified that her physical pain was an 8-9 on a scale of 10. The victim's own testimony is consistent with what could potentially occur in an assault that constitutes first degree assault. Again, Ms. Romig's injuries were severe and rose to level sufficient to constitute first degree assault, but these injuries were not unique and they do not shock the conscious. *See State v. Baird*, 83 Wn. App. 477, 488, 922 P.2d 157 (1996) (defendant surgically mutilated the victim's face).

Here, the majority's opinion in Mr. Fletcher's case, substantially lowers the bar of what constitutes deliberate cruelty in the context of first degree assault. The majority misapplied *Tili* and failed to consider the facts in Mr. Fletcher's case against other first degree assault cases, such as in *Stubbs* or *Baird*. As the dissent articulates, a demonic look and repeated strikes are not valid distinctions from conduct necessarily contemplated or inherent within the first degree assault statute, under the circumstances of this case.

F. CONCLUSION

Based on the foregoing, petitioner, Mr. Fletcher, respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 27th day of April 2022.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 2260 words.

Respectfully submitted,

_____

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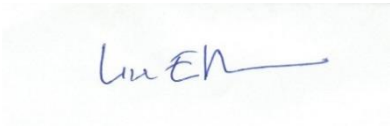

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I, Kyle Berti, a person over the age of 18 years of age, served the Columbia County Prosecutor (cindy_horowitz@co.columbia.wa.us), and William Fletcher/DOC #348535 Coyote Ridge Corrections Center PO Box 769, Connell, WA 99326, a true copy of the document to which this certificate is affixed on (4/27/2022). Service was made by electronically to the prosecutor, and Mr. Fletcher by depositing in the mails of the United States of America, properly stamped and addressed.

_____

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APPENDIX

FILED
MARCH 31, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. WILLIAM HENRY FLETCHER, Appellant.	)))))))))	No. 37871-3-III UNPUBLISHED OPINION

PENNELL, J. — William Henry Fletcher appeals his conviction for first degree assault. We affirm.

BACKGROUND

Mr. Fletcher and Laura Romig were neighbors living in Dayton, Washington. Ms. Romig is a senior who, because of a disability, requires the use of an electric wheelchair for mobility. Ms. Romig often paid Mr. Fletcher to help her with various household tasks.

For several years, the relationship between Ms. Romig and Mr. Fletcher was warm and friendly. But things started to change in 2018. Mr. Fletcher struggled with substance abuse. At times, Mr. Fletcher asked Ms. Romig for money to buy drugs, prompting Ms. Romig to send any money for Mr. Fletcher directly to his landlady. This angered Mr. Fletcher, resulting in an argument on January 5, 2019.

On the morning of January 7, 2019, Mr. Fletcher went to Ms. Romig's home to help with housework. Mr. Fletcher put on gloves and picked up Ms. Romig's laundry. When he returned he put on another pair of gloves and offered to mop the floor. This caused Ms. Romig to feel cautious since she felt gloves were unnecessary to mop the floor. Mr. Fletcher then went into the kitchen, fell to the floor, yelled, and moved like a "floppy fish." 1 Report of Proceedings (RP) (Sept. 3, 2020) at 91. Ms. Romig, a former nurse who specialized in epilepsy, believed Mr. Fletcher was not actually in need of medical assistance.

Mr. Fletcher then arose from the floor and stared directly at Ms. Romig. He crouched down and gave Ms. Romig a look she described as "demonic" and "very scary." *Id*. at 103. Mr. Fletcher ran toward Ms. Romig, then looked around and picked up a lead crystal candle holder with sharp corners. Ms. Romig picked up her phone and attempted to call 911. Mr. Fletcher reached Ms. Romig before she could place the call, knocked the phone out of her hand, and began striking her over the head with the candle holder. Mr. Fletcher hit Ms. Romig on her head, face, mouth, and from behind at least 14 times. She did not yell for help because she thought no one would hear her and feared it could worsen the situation. She fought to maintain consciousness though she reported her pain level as "about an 8 or 9." *Id*. at 108.

Eventually, the lead crystal candle holder shattered over Ms. Romig's head and Mr. Fletcher fled the home. Ms. Romig attempted to call 911 but could not hear the dispatcher and had to wait until a neighbor arrived to assist her. Officers soon arrived to find Ms. Romig in the hallway with a large amount of blood on and around her. She had lacerations on her face, head, and mouth. When the officers went across the street to make contact with Mr. Fletcher, they found him unconscious. He had bitten his tongue and had urinated himself. Mr. Fletcher appeared confused about the events and said he did not recall the assault.

Emergency personnel transported Ms. Romig to Dayton General Hospital where she was evaluated for head trauma. Doctors diagnosed her with a nasal bone and dental fracture, concussion with loss of consciousness, and multiple contusions and scalp lacerations. After initial treatment, Ms. Romig was transported by helicopter to Sacred Heart Medical Center in Spokane where she spent just over a week.

Ms. Romig's vision never completely returned after the attack. She also suffered a broken nose, causing breathing issues and loss of smell, and her teeth were either broken or completely knocked out. Ms. Romig also endured hearing loss and now requires hearing aids. Because Ms. Romig no longer feels safe living in Dayton, she moved away and makes her home in Walla Walla.

The State charged Mr. Fletcher with first degree assault. In an amended information, the State also alleged two aggravating circumstances in that Mr. Fletcher exhibited "deliberate cruelty" toward Ms. Romig, and that she was "particularly vulnerable or incapable of resistance." Clerk's Papers (CP) at 157.

Defense counsel successfully moved for a psychiatric evaluation. The evaluation was directed at Mr. Fletcher's sanity, drug use, and capacity to form intent. After receiving the psychiatric evaluation report, defense counsel decided not to present expert testimony at trial.

The case proceeded to trial. During opening statements, defense counsel stated that on the day of the assault "William took a pill because he was not feeling well." 2 RP (Sept, 3, 2020) at 34. Later that day, Ms. Romig testified. The State elicited some testimony regarding Mr. Fletcher's drug and alcohol use. Ms. Romig stated she and Mr. Fletcher talked about drugs and alcohol and that Mr. Fletcher asked her for her prescription drugs. There was no discussion of whether Mr. Fletcher consumed drugs on the day of the assault. Mr. Fletcher objected to the testimony regarding prior drug and alcohol use, arguing it was overly prejudicial. The court sustained two of defense's objections but allowed other testimony about Mr. Fletcher's drug and alcohol abuse.

After the State rested, it made a half-time motion to exclude defense references to anything related to a potential involuntary or voluntary intoxication defense. The State asserted the defense had not provided proper notice of the voluntary intoxication defense, and instead had misled the State by pursuing a diminished capacity defense based on Mr. Fletcher's alleged seizures. Defense counsel replied:

> Your Honor, I guess I just didn't realize when I had made that statement and talked about him having taken a pill that that would be considered involuntary intoxication. It seems obvious that that was not where I was going or where Defense was going in this case. Our entire time my entire defense has been . . . that he doesn't remember. And so when I mentioned in opening that Mr. Fletcher had taken a pill it was not my intent to bring up any involuntary intoxication defense. My—it was just to go towards perhaps reasons why he doesn't remember.

1 RP (Sept. 4, 2020) at 166. The court noted that mention of the pill nevertheless "goes towards intent." *Id.* at 167. Defense counsel agreed, replying "yes." *Id.* The court then stated it would treat the State's concerns as a motion in limine to exclude evidence pertaining to a voluntary intoxication defense, and granted the motion.

An "unknown"[1] attendee at the hearing then spoke up and asserted that the State had "opened the door" regarding Mr. Fletcher potentially being intoxicated on the day of the attack. 1 RP (Sept. 4, 2020) at 170. The unknown attendee argued Ms. Romig's

[1] When the unknown attendee spoke, defense counsel mentioned that the unknown person was her senior attorney.

statement that Mr. Fletcher looked "demonic" suggested an altered state of mind and the defense should be allowed to address it with evidence of Mr. Fletcher's drug use. *Id*. at 171. The court disagreed, stating:

> No, the Court will not do that. The Defense has not put forward that defense. They have not called an expert in regards to voluntary/involuntary intoxication. So, at this time, I do not find the Defense one is timely, nor is it prepared to be put forward in any fashion at this time. If I had a choice of continuing or the trial—continuing this trial and doing it again, I decline to do neither. At this time, I'm going to direct the Defense to limit that questioning.

Id. at 172.

Later that day, Mr. Fletcher testified at trial about his memory of the day of the assault. Mr. Fletcher stated he woke up feeling "[a] little different, not myself." *Id*. at 179. He recalled going to Ms. Romig's home, talking with her briefly, and beginning his chores. Mr. Fletcher testified the last thing he remembered was going to grab the mop. He then felt "auras" and the next thing he recalled was being woken up by a police officer across the street from Ms. Romig's residence. *Id*. at 180.

The trial court declined to include a jury instruction proposed by Mr. Fletcher on diminished capacity, stating "it would not be based on the evidence before the court." 1 RP (Sept. 4, 2020) at 200. Mr. Fletcher did not propose a voluntary intoxication

instruction. The court provided jury instructions regarding the aggravating factors of deliberate cruelty and a victim particularly vulnerable or incapable of resistance.

The jury convicted Mr. Fletcher of assault in the first degree and found, via special verdict, that Mr. Fletcher's conduct during the crime was deliberately cruel and that Ms. Romig was particularly vulnerable or incapable of resistance.

At sentencing, Mr. Fletcher's standard range was calculated at 178 to 236 months. The court imposed an above-range sentence of 396 months based on the aggravating factors of deliberate cruelty and a victim particularly vulnerable or incapable of resistance. Mr. Fletcher timely appeals.

ANALYSIS

Aggravating factors

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a court generally must impose a standard range sentence. RCW 9.94A.505. However, a court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An aggravating factor may support an exceptional sentence so long as it is proved to a jury beyond a reasonable doubt. RCW 9.94A.535, .537(3). The State presents sufficient evidence to justify an aggravating factor so long as the evidence, viewed in the light most

favorable to the State, could justify a reasonable fact finder to have found the presence of the aggravating factor. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 221, 427 P.3d 621 (2018).

Here, the jury found two aggravating factors: deliberate cruelty and a victim that was particularly vulnerable or incapable of resistance. Mr. Fletcher claims the evidence was insufficient to justify either factor. We discuss each factor in turn.

Deliberate cruelty

An exceptional sentence may be justified if the defendant's conduct "manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). "Deliberate cruelty" requires a showing "of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. . . . [T]he cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense." *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003).

As charged in this case, a person is guilty of assault in the first degree when that person "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). Great bodily harm means "bodily injury which creates a probability of death, or which causes significant

serious permanent disfigurement, or which causes significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Mr. Fletcher points out that the concept of great bodily harm "encompasses the most serious injuries short of death." *State v. Stubbs*, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). Because "[n]o injury can exceed [the] level of harm" contemplated by first degree assault under RCW 9A.36.011(1), Mr. Fletcher argues the injuries inflicted on Ms. Romig cannot be characterized as deliberately cruel. Instead, he claims that Ms. Romig's injuries are necessarily contemplated by the crime of conviction.

Mr. Fletcher's argument fails to appreciate the subtle specifics of the deliberate cruelty standard. The focus of the deliberate cruelty aggravator is not the extent of the victim's injuries; it is instead the infliction of psychological and emotional pain. *See Tili*, 148 Wn.2d at 369. Physical injuries, no matter how severe, are not always accompanied by intense pain and emotional suffering. The latter are separate harms that can justify additional punishment under RCW 9A.36.011(1).

Here, Mr. Fletcher did not simply attack Ms. Romig in a way sufficiently serious to cause great bodily harm. He brutalized Ms. Romig so that she experienced severe pain and psychological trauma. Mr. Fletcher terrorized Ms. Romig by beginning his attack with a demonic look. He then knocked the phone out of Ms. Romig's hands when she

tried to call 911 for help. Mr. Fletcher did not end his attack until the candlestick shattered. Mr. Fletcher's actions were indicative of someone intent on inflicting not just physical injuries, but gratuitous pain and suffering. Mr. Fletcher's actions went beyond what is contemplated by RCW 9A.36.011(1). He was deliberately cruel. The jury's verdict on this measure was justified.

Victim particularly vulnerable or incapable of resistance

An exceptional sentence may also be justified if the victim is "particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). To justify an exceptional sentence based on the aggravating factor of particular vulnerability, the State must show (1) the defendant knew or should have known of the victim's particular vulnerability and (2) that vulnerability must have been a substantial factor in the commission of the crime. *See State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). Victims who are advanced in age, disabled, or are alone at the time of the crime may be deemed particularly vulnerable. *See, e.g.*, *State v. Jones*, 130 Wn.2d 302, 311, 922 P.2d 806 (1996) (advanced age made victim vulnerable); *State v. Phillips*, 160 Wn. App. 36, 38-39, 246 P.3d 589 (2011) (victim who was unable to walk was particularly vulnerable); *State v. Hicks*, 61 Wn. App. 923, 926, 812 P.2d 893 (1991) (victims who were home alone were particularly vulnerable). Vulnerability is a substantial factor in the commission of the

crime if the victim's disability rendered them "'more vulnerable to the particular offense than a nondisabled victim would have been.'" *State v. Mitchell*, 149 Wn. App. 716, 724, 205 P.3d 920 (2009) (quoting *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989)), *aff'd*, 169 Wn.2d 437, 237 P.3d 282 (2010).

Mr. Fletcher does not dispute he knew Ms. Romig was disabled and therefore vulnerable; his argument is that Ms. Romig's vulnerability was not a substantial factor in his crime. According to Mr. Fletcher, his assaultive conduct was so sudden and violent that an able-bodied person would have been no better able to defend themselves than Ms. Romig.

We disagree with Mr. Fletcher's assessment. According to Ms. Romig's testimony, she first suspected something was wrong with Mr. Fletcher when he gave her a demonic look. Mr. Fletcher then looked around and grabbed a lead crystal candle holder. Had she been able bodied, Ms. Romig might have been able to move away or flee before Mr. Fletcher began his attack with the candle holder. But because she was confined to a wheelchair, all Ms. Romig was able to do was try to call 911. The jury was justified in finding Ms. Romig was particularly vulnerable or incapable of resistance for purposes of the sentencing aggravator.

Voluntary intoxication defense

A criminal defendant has a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *State v. Blair*, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018). However, this right is not absolute. It does not extend to irrelevant or inadmissible evidence. *Blair*, 3 Wn. App. 2d at 349. The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). We review a trial court's decision regarding whether to exclude evidence for abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Mr. Fletcher contends the trial court violated his constitutional right to present a defense when it barred him from presenting or eliciting testimony regarding voluntary intoxication. We disagree.

The only evidence excluded by the court was testimony about Mr. Fletcher ingesting an unidentified pill on the morning of the assault. The defense made no proffer of evidence about the nature of the pill that was mentioned during opening statement or whether the pill caused Mr. Fletcher any immediate reaction. Without more information,

nothing but speculation suggested the pill caused Mr. Fletcher to become intoxicated. The trial court acted within its discretion in excluding evidence of the pill.

Apart from the excluded evidence regarding the pill, nothing in the trial record suggested Mr. Fletcher was voluntarily intoxicated at the time of the assault. While there was evidence of Mr. Fletcher's prior drug use, it was not contemporaneous to his offense. At trial, Mr. Fletcher did not request a jury instruction on voluntary intoxication[2] and he objected to the State's references to his past drug use.[3]

Given the speculative nature of the lone fact proffered by Mr. Fletcher of taking an unidentified pill, the record fails to show Mr. Fletcher was denied the opportunity to present a defense. Regardless of whether the trial court erroneously believed pretrial notice or expert witness testimony was required for voluntary intoxication evidence, it was not an abuse of discretion for the trial court to exclude evidence at trial regarding Mr. Fletcher's ingestion of the unidentified pill.

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[2] Mr. Fletcher's request for a diminished capacity jury instruction was denied, but that ruling has not been appealed.

[3] When the State mentioned that Mr. Fletcher had been trying to get drugs from Ms. Romig, the defense objected that "[a]ny references to alcohol or drugs was stricken from the record and Mr. Fletcher did not admit on—on the record to having used drugs." 1 RP (Sept. 4, 2020) at 224.

CONCLUSION

The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, J.

LAWRENCE-BERREY, A.C.J. (dissenting in part) — I agree with the majority except its analysis of the "deliberate cruelty" aggravator issue.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, gave judges limited discretion to sentence a felony offender above the standard sentencing range by including a list of aggravating circumstances, any one of which permitted an exceptional sentence. *State v. Tili*, 148 Wn.2d, 350, 368, 60 P.3d 1192 (2003). The *Tili* court emphasized this limited discretion when noting:

> Exceptional circumstances must *truly distinguish* the crime from others of the same category. [T]hose factors that are inherent in the particular class of crimes at issue may not serve to distinguish defendant's conduct from what is "typical" for that crime and may not, therefore, serve as justification for an exceptional circumstance.

Id. at 369 (emphasis added) (citations omitted). *Tili* thus requires us to determine what factors are inherent or typical in the particular class of crimes and whether exceptional circumstances are present that truly distinguish the crime from others in the same category.

A person is guilty of assault in the first degree when that person, "with intent to inflict great bodily harm . . . [a]ssaults another and inflicts great bodily harm." Former RCW 9A.36.011(1)(c) (1997). "Great bodily harm" includes "bodily injury . . . which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). "Great bodily harm" is typically accompanied by intense pain and emotional suffering.

The majority attempts to distinguish this case from a typical assault in the first degree by noting that Mr. Fletcher's assault inflicted "intense pain and emotional suffering." Majority opinion at 9. This is not a valid distinction because assault in the first degree typically is accompanied by intense pain and emotional suffering. I would conclude that "intense pain and emotional suffering" do not "truly distinguish [assault in the first degree] from others of the same category." *Tili*, 148 Wn.2d at 369.[1]

Here, the State did not present any evidence of deliberate cruelty other than injuries consistent with the charged degree of assault. For this reason, I would affirm but remand for resentencing without the deliberate cruelty aggravator.[2]

The majority reaches a different conclusion by misapplying *Tili*. Instead of asking whether assault in the first degree is typically accompanied by intense pain and emotional suffering, the majority asks whether "[p]hysical injuries, no matter how severe, are [ ] always accompanied by intense pain and emotional suffering." Majority opinion at 9. Because the majority misapplies *Tili*, I dissent.

Lawrence-Berrey, A.C.J.

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[1] The majority also attempts to distinguish this case from a typical assault in the first degree by noting that Mr. Fletcher began his attack with a demonic look and struck his victim repeatedly. These are not valid distinctions either.

[2] The State argues that resentencing is not required because the trial court would have entered a similar sentence even without the deliberate cruelty finding. The record does not support this argument.

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