69227-5

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NO. 69227-5-I

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

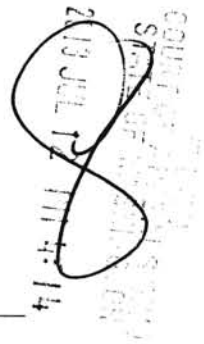
STATE OF WASHINGTON,

Respondent,

v.

JAMES HUDEN,

Appellant.



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

The Honorable Vickie I. Churchill, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. NO INDIVIDUAL IS "PARTICULARLY VULNERABLE" WHEN AN ATTACK IS SUDDEN AND DECISIVE SUCH THAT NO ONE WOULD BE ABLE TO RESIST.

A victim is not particularly vulnerable unless the victim is less able to resist the attack than other victims would be. State v. Jackmon, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989). Under Jackmon, the type of attack is an essential inquiry in determining whether the victim is particularly vulnerable. This principle has stood the test of time and is entirely consistent with subsequent precedent. For example, in State v. Hicks, 61 Wn. App. 923, 931, 812 P.2d 893, 897 (1991), victims of a physical assault and rape were found to be particularly vulnerable because they were asleep and, therefore, less able to resist. Similarly, in State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986), the victim was particularly vulnerable and less able to evade a vehicular assault because she was a pedestrian, rather than in a car. The victim in State v. Gordon, 172 Wn.2d 671, 680, 260 P.3d 884 (2011), was more vulnerable to a physical assault or beating because he was one against three, and then later five other persons.

Like Jackmon, each of these cases looked at the type of crime - a vehicle collision, a rape, a physical beating – and then compared the victim's ability to escape or resist with that of more typical victims. Determining

particular vulnerability "requires this type of comparison." Hicks, 61 Wn. App. at 931.

Other subsequent cases not mentioned by the State also follow this principle from Jackmon. For example, this Court has since applied Jackmon to hold, "A person using a cane is plainly more vulnerable to a physical attack than someone who can walk without assistance and with both hands free." State v. Hooper, 100 Wn. App. 179, 184, 997 P.2d 936 (2000) (emphasis added). The court also applied Jackmon in State v. Mitchell, 149 Wn. App. 716, 724-25, 205 P.3d 920 (2009), to find that a four-year-old with an eating disorder was particularly vulnerable to criminal mistreatment via food deprivation. In each case, the type of attack played a crucial role in determining whether the victim was particularly vulnerable. Had the attack been of a different type, such as a sudden gunshot, the victims in Hooper and Mitchell, like the employer with the broken ankle in Jackmon, would have been no more vulnerable than anyone else. Jackmon, 55 Wn. App. at 567.

The State has failed to cite a single case where a court has found a victim to be particularly vulnerable even though the attack left no room for significant resistance or escape regardless of the victim's abilities. Every case cited by the State, and other subsequent cases as well, are consistent with Jackmon. This Court should reject the State's suggestion that Jackmon is somehow not in line with more recent precedent.

2. UNDER JACKMON, DOUGLAS WAS NOT PARTICULARLY VULNERABLE.

Perhaps recognizing that it is directly on point, the State suggests this Court should reject its own precedent from Jackmon or narrow its holding. Brief of Respondent at 11. Jackmon may be narrow, but this case falls directly under its aegis. Like Jackmon, this case involved a surprise attack in which the victim was taken unawares. 55 Wn. App. at 567; 6RP 655-56. In both cases, the type of attack was such that no one would have been able to flee or resist. Id. Therefore, this Court should reach the same conclusion as the Jackmon court: "[T]here is no indication that the victim's disability rendered him more vulnerable to Jackmon's assault then an able bodied person would have been." Id. In this case, there is no indication Douglas was more vulnerable to Huden's assault than a person not in a car or seatbelt would have been.

The State dismisses the direct parallel between the surprise gunshot in Jackmon and the surprise gunshot in this case, and argues Douglas was particularly vulnerable because Huden arranged for his "restraint" in the car. Brief of Respondent at 13. But there is no evidence Huden engineered the fact that Douglas was in a car. Huden had no way of guaranteeing Douglas would wear his seat belt or even remain in the car for their encounter. Douglas might have pulled up and immediately gotten out of the car to meet

Huden face to face. There is no evidence Huden told him to stay in his car or prevented him from getting out before their encounter.

The State also argues Douglas was vulnerable because he was lured to a remote location. This perhaps makes it less likely that Huden would be caught afterwards, but it has no impact on Douglas' vulnerability. In a large crowd of people, Douglas would have been no more likely to be able to escape this type of sudden, decisive attack.

The third circumstance the State points to is Douglas' unsuspecting state of mind. First, to use this fact as evidence of particular vulnerability is directly counter to the precedent in Jackmon, which also involved a surprise attack. 55 Wn. App. at 567. Moreover, it extends the particularly vulnerable victim aggravator to virtually every premeditated murder case. It would apply to all cases except the presumably rare few where a killer announces his intent before striking or otherwise gives "fair warning."

This is not a case like State v. Ross, 71 Wn. App. 556, 861 P.2d 473 (1993), in which victims were chosen because of obvious vulnerabilities which were used to facilitate the crime. Douglas was an able bodied man in a car. He was shot in the head suddenly and at point blank range. Because all persons are equally vulnerable to this type of attack, Douglas was not particularly vulnerable, and the exceptional sentence was not warranted.

Huden argued in the opening brief that the record does not support the court's finding of substantial and compelling reasons to impose the exceptional sentence. Brief of Appellant at 1 ("The trial court erred in imposing an exceptional sentence.") and 9 ("[T]here was no substantial or compelling reason to support the exceptional sentence."). In this case, the sufficiency of the evidence is inextricably linked with whether that evidence suffices, as a matter of law, for imposition of an exceptional sentence. Huden's challenge is to both aspects of the analysis. To the extent the Court may view this as a technical defect in the assignment of error, Huden respectfully requests this Court review both aspects of the issue because the Brief of Appellant was sufficient for response, the State did indeed respond, and does not appear to have been prejudiced in doing so. See State v. Olson, 74 Wn. App. 126, 129, 872 P.2d 64 (1994), aff'd, 126 Wn.2d 315, 893 P.2d 629 (1995).

3. THE "PARTICULARLY VULNERABLE VICTIM" AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE.

a. In Light of *Blakely*, Aggravating Factors Are the Equivalent of Elements of the Offense and Are Subject to Challenge as Unconstitutionally Vague.

The Washington Supreme Court's recent decision in State v. Duncalf, 177 Wn.2d 289, 355, 300 P.3d 352 (2013), did not decide whether aggravating factors are subject to a vagueness challenge. The court found it unnecessary to decide whether its decision in State v. Baldwin, 150 Wn.2d

448, 78 P.3d 1005 (2003), survived Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because, assuming a vagueness challenge could be brought, the aggravator in that case was not vague. Duncalf, 177 Wn.2d at 355. The aggravator in this case, however, is vague and the Baldwin rationale is untenable in light of the Supreme Court's subsequent holding in Blakely that Washington's aggravating factors are the equivalent of elements of a more serious crime. Blakely, 542 U.S. at 303-05 (applying Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Aggravating factors are no different from elements of the crime for the purposes of the jury trial right at issue in Blakely and Apprendi and also for purposes of the notice required by due process. The correspondence is illustrated by the Apprendi decision:

> In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. . . ." New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Apprendi, 530 U.S. at 476. The State argues that, under Baldwin, sentencing factors do not implicate vagueness concerns because they do not prohibit conduct. Brief of Respondent at 18-19. This is patently no longer true, now that the language from Apprendi discussed above applies to Washington's aggravating factors under Blakely. 542 U.S. at 303-05. Under Apprendi, when "The law threatens certain pains if you do certain things," labeling some of those things aggravating factors does not justify treating them differently from elements in terms of the right to a jury trial. Id.

Nor does it provide a principled basis for excluding them from the due process right to have fair notice and ascertainable standards regarding what conduct is prohibited. To put it in Oliver Wendell Holmes' terms, when "The law threatens certain pains if you do certain things," you have a due process right to fair notice and ascertainable standards on what those things are. There is no "principled basis" for treating them differently whether they are labeled elements or aggravating factors.

The State also argues that, under Baldwin, there is no liberty interest in sentencing outcomes. 150 Wn.2d at 458. Again, Blakely expressly rejects that argument:

> In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 309 (emphasis added). The rationales from Baldwin do not survive Blakely. Sentencing factors must meet the due process requirements of fair notice and ascertainable standards. When they do not, they are void as unconstitutionally vague.

b. The Aggravator Is Unconstitutional Because It Fails to Provide Ascertainable Standards for Deciding Who Is Particularly Vulnerable.

A statute is unconstitutionally vague when "persons of common intelligence must guess at its meaning and differ as to its application." Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). According to the State's brief, even Washington's appellate courts apply the aggravating factor in RCW 9.94A.535(3)(b) inconsistently. See Brief of Respondent at 11 (arguing Jackmon is inconsistent with subsequent cases). If the law does not provide sufficient guidance for appellate courts to formulate a coherent interpretation, how, then are lay juries to be able to do so? Under the State's own argument, the aggravator is vague because "persons of common intelligence. . . differ as to its application." Douglass, 115 Wn.2d at 179.

Due process also requires ascertainable standards of guilt to protect against arbitrary enforcement. Douglass, 115 Wn.2d at 178. Such ascertainable standards are lacking with the particularly vulnerable victim aggravator. If every victim of a surprise attack is particularly vulnerable, the

aggravator could be applied in the vast majority of cases. To accept the State's interpretation would lead to the possibility of exceptional sentences in virtually every case. This state of affairs opens the door to arbitrary, discriminatory, or ad hoc decisions about which cases actually result in enhanced sentences. The opportunity for this type of selective or random enforcement violates both the vagueness doctrine of constitutional due process and the Sentencing Reform Act's goal of bringing coherence and consistency to Washington criminal sentences. See, e.g., State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (purpose of vagueness doctrine is to protect against arbitrary, ad hoc, or discriminatory law enforcement); RCW 9.94A.010 (purpose of Sentencing Reform Act includes ensuring sentences are "commensurate with the punishment imposed on others committing similar offenses").

Duncalf also supports Huden's argument. In that case, the court held the jury could properly determine whether the victim's injuries substantially exceeded the level of harm necessary to satisfy the elements of the offense. Duncalf, 177 Wn.2d at 355-56. The jury was instructed on the definition of substantial bodily harm, and the court held the jury was capable of determining whether the harm substantially exceeded that definition. Id. Therefore, the aggravator was not unconstitutionally vague. Id.

By contrast, with the particularly vulnerable aggravator, the jury has no benchmark upon which to base its determination. There is no definition or instruction describing the typical victim so the jury may decide if the individual in this case was more, less, or equally vulnerable. Due process requires ascertainable standards to prevent arbitrary enforcement. Douglass, 115 Wn.2d at 178. The jury has none here. The result is a special verdict like the one in this case, where the victim was found to be particularly vulnerable even though, as discussed above, he was no more vulnerable than anyone else would have been. The aggravator in RCW 9.94A.535(3)(b) is unconstitutionally vague as applied to Huden.

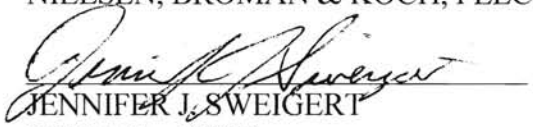
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Huden requests this Court vacate his exceptional sentence and remand for resentencing within the standard range.

DATED this 12th day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

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	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69227-5-I
	)	
JAMES HUDEN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JULY, 2013.

X Patrick Mayovsky