69227-5

692275

NO. 69227-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES EDWARD HUDEN,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 05-1-00109-8

BRIEF OF RESPONDENT

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Attorney for Respondent

Island County Courthouse
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

FEDERAL COURT CASES

UNITED STATES SUPREME COURT CASES

WASHINGTON SUPREME COURT CASES

WASHINGTON COURT OF APPEALS CASES

REVISED CODE OF WASHINGTON

I. STATEMENT OF THE ISSUES

Issue 1. The victim of first degree murder was lured to a remote location using a ruse of delivering a gift for the victim's wife, and was then shot in the forehead by the defendant at very close range while the victim was still seat-belted in his parked car. The jury found, beyond a reasonable doubt, that the victim was particularly vulnerable or incapable of resistance, an aggravating circumstance under RCW 9.94A.535. Was the jury's finding supported by the record, when construing all evidence in a light most favorable to the State?

Answer: Yes. There was sufficient evidence to support the jury's finding.

Issue 2. Can a sentencing guideline statute that authorizes exceptional sentences be challenged as void for vagueness on Due Process grounds?

Answer: No. Sentencing guideline statutes are not susceptible to Due Process vagueness challenges because they do not (1) define conduct, (2) allow for arbitrary arrest and criminal prosecution, (3) inform the public of penalties attached to criminal conduct, or (4) vary the legislatively imposed maximum and minimum penalties for any crime.

Because the sentencing guideline statutes do not require a certain outcome, they do not create a constitutionally protectable liberty interest.

II. STATEMENT OF THE CASE

A. Procedural History

In May, 2005 the State charged James E. Huden with the December 26, 2003 murder or Russel Douglas. CP 66. At the time, Huden's whereabouts were unknown. Huden was eventually found living illegally in Mexico in 2011, and returned to Washington by the United States Marshal's Service. 8RP 912 – 915.[1]

The trial proceeded on a Second Amended Information, charging Huden with first degree premeditated murder, as a principal or accomplice. CP 38-40. The Second Amended Information alleged that Huden knew or should have known that Russel Douglas was particularly vulnerable or incapable or resistance. The Second Amended Information also alleged that Huden was armed with a firearm at the time of the commission of the offense. The trial began on July 10, 2012.

---

[1] For the Court's convenience, the State adopts the same designation of the VRP used by the appellant: 1 RP – May 18, 2012; 2RP – July 6, 2012; 3RP – July 10, 2012; 4RP – July 11, 2012; 5RP – July 12, 2012; 6RP – July 13, 2012; 7RP – July 16, 2012; 8RP – July 17, 2012; 9RP – July 19, 2012; 10RP – July 20, 2012; 11RP – July 23, 2012; 12RP August 21, 2012.

With regard to the aggravating circumstance of victim vulnerability, the jury was instructed as follows:

> A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of murder in the first degree. The victim's vulnerability must also be a substantial factor in the commission of the crime.

CP 35 (Instruction 15).

The jury was instructed that, in order to answer a special verdict question "yes," it must unanimously agree that the State had proved the existence of the aggravating circumstance beyond a reasonable doubt. CP 32 (Instruction 12).

On July 20, 2012, the jury returned a verdict of guilty and answered "yes" to both special verdict forms. CP 14, 15, 16.

On August 21, 2012, Judge Churchill sentenced Huden to an exceptional sentence of 960 months. CP 3-12. The trial judge entered written Findings of Fact and Conclusions of Law supporting the exceptional sentence. CP 13. This appeal timely followed.

B. Substantive Facts

On the morning of December 26, 2003, Russel Douglas left the home of his estranged wife, Brenna Douglas, telling her he was going to run some errands. 4RP 312. Russel never returned, and was found

murdered the following day, sitting in his yellow Geo Tracker parked in a driveway off of Wahl Road, a remote dead end road on Whidbey Island. 4RP 342; 5RP 419-420; 6RP 720.

Although separated from Brenna, Russel and she were contemplating reconciliation. 4RP 315. The Douglases owned a business together – the Just B hair salon in Langley. Brenna was a hair stylist, and Russel took care of the business end of things. 4RP 300, 330. Russel had spent the days from December 23, 2003 until his death on the 26th at Brenna's home, with their two young children. 4RP 310.

As the defendant points out in his brief, the police had no leads on who may have killed Russel Douglas for seven months. Then, on July 26, 2004 a close friend of the defendant, William "Bill" Hill, called Island County Sheriff's detectives from his home in Port Charlotte, Florida. 5RP 564-565. Hill, in a series of phone calls over the course of several days, anonymously told police how his closest friend, James Huden, had confessed to murdering a man on Whidbey Island over the previous Christmas. 5RP 564-584. Eventually, Hill was identified, and police contacted him in Florida.

Bill Hill testified that Huden was his closest friend, and the two men played in a rock band together. 6RP 635-639. Hill and his wife

socialized a great deal with Huden and his wife. Hill and Huden shared personal stories. 6RP 639. They were such close friends, that when Huden married, they asked Bill Hill to walk Huden's bride down the aisle. 6RP 639. Hill knew Huden was from Whidbey Island, but Hill had never been to Washington. 6RP 643.

Bill Hill testified that Huden, in early 2003, left his wife in Florida to have an affair with a woman named Peggy Thomas, in Las Vegas. Peggy Thomas, like Huden, was originally from Whidbey Island. Thomas was a hair stylist who had worked at Brenna Douglas' Just B hair salon prior to moving to Las Vegas in the summer of 2003. 4RP 301-302.

Hill testified that James Huden returned to Florida from Las Vegas in February, 2004, to reunite with his wife. 6RP 650. Shortly after his return, Huden confided in Hill that he had killed a man on Whidbey Island during Christmas time. Huden explained to Hill that he had always wanted to kill a man who was abusive toward his family, as Huden's stepfather had been when Huden was growing up. 6RP 653. Huden believed that Russel Douglas was abusive like Huden's stepfather. 6RP 653. Hill testified that Huden described the murder to him. Huden told Hill that Peggy Thomas had lured Douglas to the remote location with the promise of a birthday gift for Douglas' wife. 6RP 622-623; 6RP 655.

The location of the ambush was adjacent to a home Thomas lived in for a short period of time. 7RP 703-705. The area was described as a "remote, dark part of the island near the end of a dead end road." 6RP 620. Diane Bailey, a Wahl Road resident, indicated there is not much traffic there. 4RP 342. Once there, Huden ambushed Russel, and shot him in the head with a .380 caliber handgun. 6RP 353.

Huden told Hill that he did not know Russel Douglas, but had seen him once a couple days before the shooting so he could identify him once he was lured to the vulnerable location. 6RP 657.

Russel Douglas was killed by a single gunshot wound to his head. 5RP 530. The point of entry was centered between his eyebrows, at the bridge of his nose. 5RP 535. The distance of the muzzle to Russel's head was estimated by forensic pathologist Daniel Selove, MD, to be less than one foot. 5RP 536. The bullet path, relative to Russel's head, was from front to back, slightly upward, and from Russel's left to his right. 5RP 544. Russel died instantly, and would not have been capable of any conscious movement after being shot. 5RP 548.

The six-foot tall, 200-pound (7RP 801) Russel Douglas was found seated in his yellow Geo Tracker. The manual transmission was in reverse and the center parking brake was pulled up. 5RP 481-82. The only source

of blood in the car came from Russel Douglas. When Russel was found, it was apparent that blood had drained from the entry wound (there was no exit) onto the "over-the-shoulder" portion of his seatbelt. The seatbelt had been released from its latch, and partially retracted, so that the blood on the shoulder portion was at a higher elevation than the wound site. 5RP 479-480, 495. The defense's forensic expert conceded that the seatbelt was most likely attached during blood shedding event. 9RP 1067. There were "spared areas" where limited amounts of blood were deposited on Russel's waist and lower trunk, where his seatbelt would be had it been engaged while blood was actively draining from the entry wound. 5RP 491-493.

After the shooting, Huden and Thomas had returned to Las Vegas, where Huden gave the murder weapon to an acquaintance, Keith Ogden. 7RP 766-767. Ogden later moved to New Mexico, but kept the gun until he learned that Huden was a suspect in a murder on Whidbey Island. Ogden surrendered the gun to the local police in New Mexico. 7RP 769. Ogden testified that he taught Huden how to operate the gun. He said that they test fired it in the fall of 2003, using noise suppression gear, at Ogden's home in Las Vegas. 7RP 755-759. Kathy Geil, a toolmark

examiner from the Washington Crime Lab testified that the gun that was surrendered by Keith Ogden was the murder weapon. 7RP 830-831.

III. ARGUMENT

A. There Was Sufficient Evidence To Support A Jury's Unanimous Finding That Russel Douglas Was Particularly Vulnerable Or Incapable Of Resistance.

A challenged to the sufficiency of evidence supporting an aggravating circumstance is reviewed under the same "sufficiency of the evidence" standard that applies to challenges to guilty verdicts. *State v. Chanthabouly*, 164 Wn.App. 104, 142-43, 262 P.3d 144, 163-64 (2011) *review denied,* 173 Wn.2d 1018, 272 P.3d 247 (2012)(citing *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010)). Under that standard, a court is to review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of aggravating circumstances beyond a reasonable doubt. *Chanthabouly,* 164 Wn.App at 143. (citing *State v. Yates,* 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

Huden claims that (1) Russel Douglas was no more vulnerable than other victims of first degree murder, and (2) the "seatbelt was not a substantial factor in the offense." App. Br. at 7.

It is noteworthy that Huden challenges the sufficiency of the evidence supporting the jury's finding, and not the judge's decision to impose an exceptional sentence based upon that finding. Had he done the latter, the standard of review of the judge's decision would be whether her decision was "clearly erroneous." *State v. Mitchell*, 149 Wn.App. 716, 724, 205 P.3d 920, 924 (2009) *aff'd,* 169 Wn.2d 437, 237 P.3d 282 (2010)(citing *State v. Law,* 154 Wn.2d 85, 93, 110 P.3d 717 (2005)).

Defendant also does not challenge the sentence as being excessive, or the trial court's findings that there were substantial and compelling reasons to impose an exceptional sentence of 960 months. CP 3,13.

1. Russel Douglas' Vulnerability Was Created By Plans and Decisions Made By Mr. Huden In Carrying Out The Murder.

Here, Russel Douglas' vulnerability was achieved by design of Huden and Peggy Thomas to facilitate the murder. Russel was exceedingly vulnerable because of the combination of three factors:

1. The location of the murder;

2. His unsuspecting state of mind; and

3. His restraint in the Geo Tracker.

All three of these factors were the product of plans and decisions made by James Huden. All three of these factors combined to make

able to escape Jackmon's attack." *Jackmon*, 55 Wn.App. at 567. The court acknowledged that one test of vulnerability is one's ability to escape. Russel Douglas, due to the three factors identified above had no chance of escape.

Jackmon was narrowly focused, and is not consistent with later opinions concerning the aggravating circumstance of victim vulnerability. Vulnerability can be the result of characteristics other than the victim's physical condition or stature. *State v. Ross*, 71 Wn.App. 556, 565, 861 P.2d 473, 479 (1993) as *amended by,* 71 Wn.App. 556, 883 P.2d 329 (1994), *review denied*, 123 Wn.2d 1019, 875 P.2d 636 (1994). In *Ross*, the defendant's victims were women alone in offices that were otherwise open to the public. He gained access to them using a ruse that he needed to use a phone. This court held that it was proper for the trial court to rely on victim vulnerability as a basis for an exceptional sentence. *Ross*, 71 Wn.App at 565-66. Like the defendant in *Ross*, Huden engineered Russel Douglas' isolation, contributing to his vulnerability.

In *State v. Hicks*, 61 Wn.App. 923, 931, 812 P.2d 893, 897 (1991) the court rejected the defendant's contention that a rape victim could not be found particularly vulnerable because she was asleep when attacked. The court stated that, "because she was attacked as she slept, she was

quickly rendered incapable of attempting to resist as compared to other rape victims who are awake and could, in some way, resist." *Id.*

Huden would argue that the result in *Hicks* was wrong, because, asleep or awake, the victim would not have escaped. That argument would fail in *Hicks*, as it must fail here. While Russel Douglas may not have escaped if he were not seatbelted in his car, he certainly would have had a better opportunity to do so. Moreover, had he been free to move about, the mere greater possibility that he could have escaped may have discouraged Huden from committing the crime in the first place. A rational trier of fact could have also concluded that the bullet may not have been delivered with such fatal precision if Russel could have taken evasive action, or struck at Huden's hand.

In *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884, 888 (2011), the victim was outnumbered three to one when the beating that killed him commenced. The Supreme Court upheld the jury finding that he was particularly vulnerable. Leaving a woman stranded after a rape may justify a conclusion she was particularly vulnerable. *State v. Altum,* 47 Wn.App. 495, 502-03, 735 P.2d 1356, *review denied*, 108 Wn.2d 1024 (1987), *overruled on other grounds by State v. Parker,* 132 Wn.2d 182, 937 P.2d 575 (1997). The Supreme Court has also recognized that a

Russel vulnerable and to allow Huden to carry out the murder with no resistance, or risk of failure in his mission. Without the scenario Huden created for the murder, it is easy to conceive of many ways in which Russ Douglas or others may have foiled the murder. Absent the artificial advantage constructed by and for Huden, he may have determined the risk of failure was too great to continue, and aborted his plan.

Huden relies on *State v. Jackmon*, 55 Wn.App 562, 566-067, 778 P.2d 1079 (1989) for his argument that the evidence did not support a finding that Russel Douglas was particularly vulnerable. *Jackmon* is inapplicable.

Jackmon concerned itself exclusively with whether the victim's disability (a broken ankle) rendered him more vulnerable than a non-disabled victim. Since the victim was shot from behind without warning, his disability had no bearing in his vulnerability to being murdered. Moreover, the court pointed out that there was no evidence that Jackmon knew his victim was suffering from a broken ankle, so the aggravator failed on that score as well. *Jackmon*, 55 Wn.App at 567.

There is language in *Jackmon*, however, that supports the State's position that Russel Douglas was particularly vulnerable. The court stated: "It is highly unlikely that an able bodied person would have been

vehicular assault victim can be particularly vulnerable where the victim was relatively defenseless. *State v. Nordby,* 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

The common thread in these cases is whether the conditions provided additional advantage to the defendant in accomplishing his criminal act.

In this case, the nearly complete restraint of Russel Douglas allowed Mr. Huden to get within inches of Russel Douglas' forehead when he pulled the trigger. 5RP 535 – 536. Huden had successfully eliminated all obstacles to success, allowing him to walk up to Russel Douglas and put a bullet between his eyes. Russel Douglas was confined between his seat and the steering wheel and dashboard, preventing him from leaning back or ducking forward. He was blocked by the center console, preventing him from exiting out the passenger side of the car. He was restrained by a lap and shoulder belt that provided only limited mobility of his torso. And he was blocked on his left side by James Huden standing at the open front door of the car. The frame of the car, and his torso-forward seated position combined to make striking at Huden's shooting hand a virtual impossibility. Russel Douglas could not duck, run, or deflect

Huden's aim. Even fish in a barrel can swim and potentially avoid a fatal encounter with a bullet. Russel Douglas was more vulnerable than that.

Since the circumstances which accounted for Russel Douglas' vulnerability were not inherent in the crime of first degree murder, he was, by definition, more vulnerable than a typical victim of first degree murder. *See, e.g. State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481, 484 (1992)("[F]actors inherent in the crime... may not be relied upon to justify an exceptional sentence, whereas factors not inherent in the crime may justify a sentence enhancement even where the trial court relied on them in establishing the elements of the particular crime").

2. Russel Douglas' Vulnerability Was A Substantial Factor In Accomplishing The Crime

There is evidence in the record to support the proposition that, had Huden not been able to engineer the ideal stage upon which to murder Russel Douglas, he would not have followed through. Evidence showed that Huden encountered Russel once prior to the murder. Huden told Detective Plumberg that he had been to Russel's apartment in Renton. 8RP 937. Bill Hill also testified that Huden told him Russel Douglas was "pointed out" so he knew he was a couple days before the murder. 6RP 657. Huden chose not to murder Douglas then, but waited until Douglas

was more vulnerable to carry out the crime. Huden optimized the circumstances under which he was willing to kill Russel Douglas, to reduce the possibility of escape, resistance, or failure by other means, such as a misplaced shot or third-party intervention.

Mr. Huden characterizes this as a "surprise attack." App. Br. at 9. But, the surprise was only one of the factors engineered and exploited by Huden to ensure success. And, the "surprise" was accomplished by a ruse to eliminate suspicion and caution on Russel Douglas' part, making him more vulnerable.

Huden also relies on *State v. Serrano*, 95 Wn.App 700, 977 P.2d 47 (1999). That case dealt only with the "substantial factor" requirement of finding an aggravating circumstance. Mr. Serrano's victim was in an "orchard ape," described by the trial judge as a caged platform raised in the air, and used to pick apples in this instance. The published opinion is short on facts, making it difficult to compare *Serrano* with the instant case. Division III of the Court of Appeals acknowledged that, "although it may be true that [the victim] was vulnerable because he was above the ground in an 'orchard ape,' the record does not suggest this vulnerability was a substantial factor in the shooting." *Serrano*, 95 Wn.App. at 712. The

victim was shot five times, apparently in an attempt to resolve a romantic dispute. *Id.* at 702.

The usefulness of *Serrano* is further diminished by the Court's closing comments. The defendant had been charged with first degree murder, but the jury found him guilty of the lesser offense of second degree murder. The trial judge apparently did not agree with the jury's verdict. The Court of Appeals expressed its displeasure:

> A sentencing court's disagreement with the law or the jury's verdict cannot be a basis for an exceptional sentence. The court's oral decision here strongly suggests the court disagreed with the jury's verdict, the law, or both. The exceptional sentence should be reversed and the matter should be remanded for resentencing.

State v. Serrano, 95 Wn.App. 700, 715, 977 P.2d 47, 55 (1999).

Here, the question is: Could a rational trier of fact find that the vulnerability that Huden engineered was a substantial factor in accomplishing the crime? Under a "sufficiency of evidence" standard of review, the answer must be "yes."

B. The Aggravating Circumstance Cannot Be Challenged Based On The Due Process Vagueness Doctrine

Huden's assertion that a discretionary sentencing statute may be challenged as unconstitutionally vague has been rejected by the Washington Supreme Court. This Court must also reject the claim.

A criminal statute may be challenged as being "void for vagueness" under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. Huden acknowledges that the Washington Supreme Court, in *State v. Baldwin*, held that sentencing guidelines do not create a liberty interest protected by the Due Process Clause. Sentencing guidelines are "intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." *State v. Baldwin*, 150 Wn.2d 448, 461, 78 P.3d 1005, 1012 (2003).

Huden claims that, "since *Blakely*, the *Baldwin* rationale no longer stands." App. Br. at 11 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 403 (2004)). His argument is not supported by the

language in *Baldwin*, and the recent Supreme Court decision in *State v. Duncalf*, ___ Wn.2d ___, 300 P.3d 352, 355 (2013). None of the cases relied upon by Huden stand for the proposition that the Due Process Clause creates a liberty interest in sentencing enhancement factors in non-death cases. The cases he cites concerned only the question of whether a facts that authorized a sentence in excess of the statutory maximum must be determined by a judge or jury.

The rationale behind *Baldwin* continues to be sound, even when examined under the light of *Blakely, Apprendi*[2], and their progeny.

A vagueness analysis encompasses two due process concerns. First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005, 1011 (2003)(citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 168, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. *State v. Baldwin*,

---

[2] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

150 Wn.2d 448, 458, 78 P.3d 1005, 1011 (2003)(citing *United States v. Wivell,* 893 F.2d 156, 159 (8th Cir.1990)).

Division II of this Court recently articulated the *Baldwin* rule:

> The *Baldwin* court stated that "the due process considerations that underlie the void-for-vagueness doctrine" did not apply to these sentencing guideline statutes because these statutes did not (1) define conduct, (2) allow for arbitrary arrest and criminal prosecution, (3) inform the public of penalties attached to criminal conduct, or (4) vary the legislatively imposed maximum and minimum penalties for any crime. Because nothing in these guideline statutes "require[d] a certain outcome," they did not create a constitutionally protectable liberty interest.

State v. Chanthabouly, 164 Wn.App. 104, 141-42, 262 P.3d 144, 163 (2011) *review denied,* 173 Wn.2d 1018, 272 P.3d 247 (2012)(internal citations to *Baldwin* omitted).

Most recently, the Washington Supreme Court rejected a request to reconsider *Baldwin. State v. Duncalf*, ___ Wn.2d ___, 300 P.3d 352, 355 (May 2, 2013)("We find it unnecessary to address the broad question of whether *Baldwin* survives *Blakely.*"). The Court went on to note that, even if a Due Process vagueness challenge were permissible, the aggravating factor of injuries that substantially exceeded the level of harm necessary to commit the offense would not have been found to be vague. *Id.* at 355-56.

The *Baldwin* factors cited above still apply to the aggravating factor of victim vulnerability, and the Court should reject the challenge.

1. Even if this discretionary sentencing statute implicated due process concerns, subjecting it to a vagueness challenge, Huden has not met his burden to show it is vague beyond a reasonable doubt.

A statute is void for vagueness if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Eckblad,* 152 Wn.2d 515, 518, 98 P.3d 1184 (2004) (citing *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *State v. Branch,* 129 Wn.2d 635, 648, 919 P.2d 1228 (1996). A vagueness challenge, unless it implicates the First Amendment, is considered on an "as applied" basis. *Holder v. Humanitarian Law Project,* —— U.S. ——, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010).

A statute is presumed to be constitutional, and the person challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890, 894-95 (1992)(citing *Spokane v. Douglass,* 115

Wn.2d 171, 178, 795 P.2d 693 (1990)). The challenger must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass,* at 178.

A statute is unconstitutional if it " 'forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.' " *Douglass,* at 179, 795 P.2d 693 (quoting *Burien Bark Supply v. King Cy.,* 106 Wn.2d 868, 871, 725 P.2d 994 (1986)). This test does not demand "impossible standards of specificity or absolute agreement", and permits some amount of imprecision in the language of a statute. *Douglass,* 115 Wn.2d at 179, 795 P.2d 693.

Huden is expecting impossible standards of specificity when he concludes that a jury must know "what a typical murder victim looks like or how vulnerable that person might be." App. Br. at 14. Huden's sarcastic references to popular television shows aside,[3] (Br. App. 14 n.5) jurors are expected to be engaged citizens, who are familiar with the

[3] Given that such shows tend to exaggerate the vulnerability of victims for dramatic effect, Huden may have fared better in that fictional world.

general nature of crime and punishment through the mass media. Indeed, much of the broadcast, print, and internet media are devoted to reporting, often with grisly detail, the facts and circumstances surrounding criminal acts. A person of reasonable intelligence and awareness in modern society could answer that question without having to guess at its meaning.

Jurors are "expected to bring [their] opinions, insights, common sense, and everyday life experience into deliberations." *State v. Briggs*, 55 Wn.App. 44, 58, 776 P.2d 1347, 1355 (1989). It is "the very stuff of the jury system for the jury to exercise its collective wisdom and experience in dissecting the evidence properly before it; and in this process the cross-pollination of opinion, viewpoint, and insight into human affairs is one of the jury's strengths." *United States v. Howard*, 506 F.2d 865, 867 (5th Cir. 1975). To assert that jurors have no sense of what constitutes a "vulnerable victim" unless they are criminal justice professionals is to make the cynical presumption that jurors are disengaged from their community and ignorant of happenings outside of their living rooms and fictional television shows. If that were the case, we would have no business relying on juries to decide the fate of those accused of crimes.

Here, as discussed above, the jury has a concrete standard by which to begin its analysis of the aggravating circumstance: the trial court's

definition of murder in the first degree. Where the aggravating circumstance does not inhere in the definition of first degree murder, as in this case, a jury has a basis to then apply its collective wisdom and experience to the question of whether Russel Douglas was more vulnerable than a typical victim and whether it was a substantial factor in accomplishing the murder.

Russel Douglas was not gunned down in a drive by shooting. He was not murdered in a public place. He was not stabbed or beaten to death during the course of a fight. He was not murdered as a result of some act he committed that upset James Huden. Russel Douglas was murdered under circumstances that made him more likely to be killed, less likely to avoid being killed, and that created insurmountable advantages to James Huden to ensure his heinous plan would be successful.

A person of ordinary intelligence could understand that, murdering someone under those circumstances would expose him to an exceptional sentence. The jury has not been shown, beyond a reasonable doubt, to have had "unfettered latitude" in finding Russel Douglas was particularly vulnerable.

IV. CONCLUSION

For the reasons discussed herein, the State respectfully requests the Court to deny Mr. Huden's appeal.

Respectfully submitted this 11th day of June, 2013.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	
Plaintiff/Respondent,	NO. 69227-5-I
vs.	DECLARATION OF SERVICE
JAMES EDWARD HUDEN,	
Defendant/Appellant.	

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 11th day of June, 2013, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Jennifer J. Sweigert
Nielsen, Broman & Koch, PLLC
1908 E Madison Street
Seattle, WA 98122

Signed in Coupeville, Washington, this 11th day of June, 2013.

Jennifer Wallace