NO. 91987-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUGH EDWIN WILCOX,

Appellant.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the Petition for Review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Hugh Edwin Wilcox, No. 71620-4-I, 2015 WL 3855234 (June 22, 2015) (unpublished).

C. STATEMENT OF THE CASE

A detailed statement of the facts is set forth in the briefing before the Court of Appeals.

In summary, on November 6, 2012, Hugh Wilcox assaulted his roommate, Stephen Jennings, causing him permanent, life-threatening brain injury. RP 545-46, 548, 581. Wilcox struck Jennings twice on the head, and a third time somewhere else that Jennings is unable to remember. RP 454. Jennings fell to the floor, and was paralyzed on his right side. RP 454, 457.

Wilcox admitted to police that he held Jennings down by his head and that he heard it "crunch." Ex. 13 at 22:08, 22:25. He told

a friend that he held Jennings's head "down with force," and that "it sounded like a chicken bone crunching." Ex. 17, track 4 at 1:09.

By the time Jennings arrived at the hospital, he could no longer walk or speak. RP 612-13. Emergency healthcare providers determined that the midline of Jennings's brain had significantly shifted, and that Jennings had suffered a severe compressed skull fracture and potentially fatal brain bleed. RP 299, 330, 335. Jennings required emergency brain surgery, and a four-month stay at Harborview, before being released to a nursing facility. RP 545, 573-74, 581. At the time of trial, Jennings was still living in the nursing facility, paralyzed on his right side, and unable to communicate easily. RP 446, 451.

The State charged Wilcox with one count of Assault in the First Degree – Domestic Violence, and in the alternative, with one count of Assault in the Second Degree – Domestic Violence. CP 8-9. The second-degree assault charge included the aggravating circumstance that the victim's injuries substantially exceeded the level of bodily injury necessary to satisfy the elements of the offense. Id. Although the jury acquitted Wilcox of first-degree assault, it found him guilty of second-degree assault with the aggravating circumstance. CP 60-62. Due to the severity of

Jennings's injuries, the trial court imposed an exceptional sentence of 73 months. 2RP 14-15.

D. ARGUMENT

1. THE JURY INSTRUCTION IS NOT VAGUE AS APPLIED TO THIS CASE.

This Court determined only two years ago that addressing "the broad question of whether Baldwin survives Blakely" was "unnecessary" in a case where the "substantially exceeds" aggravating circumstance was not vague "as applied" to the facts of the case. See State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (holding that a reasonable person would not have to guess that causing substantial and likely permanent impairment to a person's jaw and lip might subject him to an increased sentence). If the victim's jaw and lip injuries in Duncalf were sufficient to vitiate a vagueness challenge, then Jennings's more severe and consequential brain injury certainly qualifies.[1]

To the extent that a significant question of constitutional law might exist, this is not the proper case to resolve it because the "substantially exceeds" aggravating circumstance is not

[1] The Court of Appeals did not reach the State's "as applied" argument, finding instead that Baldwin controlled.

unconstitutionally vague "as applied" to Jennings's permanent and life-threatening brain injury.

2. WILCOX WAIVED ANY CHALLENGE TO THE AGGRAVATING CIRCUMSTANCE INSTRUCTION.

Wilcox waived his vagueness challenge to the aggravating circumstance instruction by failing to propose any additional or clarifying instructions remedying the alleged vagueness at trial. This Court has repeatedly held that a defendant who believes a jury instruction is unconstitutionally vague has a ready remedy – proposal of a clarifying instruction – and that the failure to propose further definition precludes appellate review. State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991); State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946).

Additionally, Wilcox claims that the Court of Appeals decision in his case is in conflict with other Court of Appeals decisions. He is incorrect for the reasons set forth in the Brief of Respondent at pages 22-30.

E. CONCLUSION

For all the foregoing reasons, this Court should deny Wilcox's petition for review.

DATED this 11th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Donnan, the attorney for the appellant, at David@washapp.org, containing a copy of the Answer to Petition for Review, in State v. Hugh Edwin Wilcox, Cause No. 91987-9, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of August, 2015.

Name:
Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Cc: Relyea, Kristin; david@washapp.org; wapofficemail@washapp.org
Subject: RE: State v. Hugh Edwin Wilcox, Supreme Court No. 91987-9

Rec'd 8/21/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
Sent: Friday, August 21, 2015 1:08 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Relyea, Kristin; david@washapp.org; wapofficemail@washapp.org
Subject: State v. Hugh Edwin Wilcox, Supreme Court No. 91987-9

Please accept for filing the attached documents (Answer to Petition for Review) in State of Washington v. Hugh Edwin Wilcox, Supreme Court No. 91987-9.

Thank you.

Kristin A. Relyea
Deputy Prosecuting Attorney
WSBA #34286
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-477-1944
E-mail: **Kristin.Relyea@kingcounty.gov**
E-mail: **PAOAppellateUnitMail@kingcounty.gov**
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at Kristin Relyea's direction.