Supreme Court No. 98175-2
COA No. 78760-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON CALVIN KNOTH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Millie M. Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Brandon Knoth was the appellant in COA No. 78760-8-I, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Knoth seeks review of the Court of Appeals decision issued January 27, 2020, affirming his exceptional sentence imposed in Snohomish County No. 16-1-01705-31. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

1. The State charged Brandon Knoth with an assault offense and an aggravating factor based on a degree of injury allegedly sustained, but the charges relieved the prosecution from any burden to prove that Mr. Knoth actually intended great harm. In the case, the complainant John Schmidt fell to the ground after being punched by Mr. Knoth, during an altercation outside a pub where both individuals had been drinking significantly. Schmidt's treating neurologist for his head injury at Harborview Hospital testified that without the treatment given, there could be a possibility – not a probability - of death, and the evidence showed there was no permanent harm (to summarize "great bodily harm," which the jury was told categorically establishes the aggravating factor). There was a fracture – but this only equates merely to

substantial bodily harm. The injuries certainly did not amount to great bodily harm, as argued by the State, not did they exceed the injuries associated with second degree assault. Did the trial court err and violate Mr. Knoth's Fourteenth Amendment Due Process rights when it imposed an exceptional sentence without sufficient evidence that the injuries resulting from the defendant's commission of assault in the second degree substantially exceeded the level of injury necessary to constitute substantial bodily harm?[1]

2. Did the court err in entering the finding of fact at Appendix 2.4 that the injury sustained by the complainant substantially exceeded the injury necessary to prove second degree assault?

D. STATEMENT OF THE CASE

1. <u>Procedural history – the State's belated change to the charge eliminated the need for the prosecution to prove that Mr. Knoth had any intent to cause injury greater than second degree assault, much less any intention to cause the great bodily harm associated with first degree assault</u>.

Brandon Knoth was charged with second degree assault based on allegations arising out of a fight outside O'Houlies Pub in Mountlake

[1] The Fourteenth Amendment provides that no State shall deprive any person of Due Process of Law. U.S. Const. amend 14.

Terrace, on June 6, 2016. CP 78-79, CP 93-98. According to the affidavit of probable cause, complainant John Schmidt was seen on the ground in the parking lot near his Chevrolet Cavalier. He was bleeding from somewhere in his head area, and he was awake, but he "wouldn't speak" to responding officers. CP 93-94. The affidavit also states that bartender Kyle Halbert told police that Mr. Knoth and his wife and another couple were inside the bar that night drinking as a group. When they left, Mr. Schmidt, who had been playing pool, also left. CP 94. Officers reviewed security videotapes, including one of the parking lot area, which appeared to depict Schmidt and Mr. Knoth "talking to each other." According to the affidavit, the video showed Mr. Knoth punch Mr. Schmidt in the face, and Schmidt fell to the ground. CP 94. Subsequently, the complainant is seen walking to the driver's side of his vehicle, at which point Mr. Knoth approached Schmidt, and the video – again, according to the affidavit -- appeared to show him punch Schmidt, but the complainant is off camera. CP 94.

Mr. Knoth, through an attorney, contacted the police the next day and indicated that he would turn himself in that day. CP 95. However, police officers proceeded to the home where Mr. Knoth lived with his wife Alicia Knoth, and arrested him. CP 95.

Just prior to trial, the Snohomish County Prosecutor concluded it could not prove the original charge of first degree assault, but instead filed an amended information charging the crime in the second degree, along with the aggravating factor that the complainant's injuries "substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense." 6/25/18RP at 3-4; see CP 99 (information), CP 78 (amended information); RCW 9.94A.535(3)(y).[2]

The trial witnesses included two physicians on opposite sides of the case. See 6/27/18RP at 330 *et seq*. (Dr. Randall Chesnut), 2/27/18RP at 384 *et seq*. (Dr. Carl Wigren). The State's expert agreed that the video did not show that Mr. Knoth made contact with Mr. Schmidt in his second attempt to punch him. 6/27/18RP at 141; CP 101-03 (Exhibit list - Exhibit 1; Exhibit 24).

The jury found Mr. Knoth guilty and answered "yes" to the aggravator. 6/29/18RP at 549-50; CP 52, 51. At sentencing, the trial court determined that Mr. Knoth's standard range was 3-9 months with a

[2] The amendment of the information to charge a less serious crime of second degree assault, but to also add the aggravating factor, allowed the State to seek incarceration of Mr. Knoth for a period similar to that available for first degree assault, but without having to prove he had any intention to cause "great bodily harm." See RCW 9A.36.021(1)(a); RCW 9A.36.011(1)(c).

maximum term of 10 years. The court imposed an exceptional sentence of 48 months. CP 27-40; 7/10/18RP at 557, 564.

2. Trial summary – State's failure to prove the aggravating factor of "substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense."

At trial, Mr. Schmidt stated that the video depicted him walking toward Mr. Schmidt in the parking lot area and pointing, but Schmidt said that this merely showed the moment when he approached the group out of concern that the men were harassing the women. 6/26/18RP at 220, 245-50; CP 101-03 (Exhibit list - Exhibit 1, Exhibit 13 (parking lot video)). Mr. Schmidt admitted that he was making an accusation by pointing, but this was because he had seen one of the men pull one of the women's hair; he also admitted that he maybe yelled to scare them. 6/26/18RP at 236-37.

Alicia Knoth said that she, her husband Brandon, and the couple they were with, had been drinking a lot at O'Houlies bar as a group. 6/26/18RP at 298-99. She explained that she and Mr. Knoth, and the other couple, were later dancing around in the parking lot, acting in the same obnoxious but harmless way they were in the bar. 6/26/18RP at 298-99, 302-03. Mr. Knoth slapped his wife's butt a few times, because they have a playful relationship. 6/26/18RP at 300-01. They also lingered

in the parking lot after exiting O'Houlies because they were trying to convince her girlfriend's boyfriend to not drive. 6/26/18RP at 302, 309.

However, at some point, Mr. Schmidt approached the group several times, both times saying offensive things such as calling the women hookers. At some point after Schmidt was first punched by Mr. Knoth, he stated, "[y]ou're a dead man." 6/26/18RP at 305-11; 6/27/18RP at 427-28, 432. The group drove away after the incident, and went to a different establishment. 6/26/18RP at 312-13.

Mr. Schmidt conceded that he had been drinking, but despite his own actions, he said that Mr. Knoth's punches were without provocation, and knocked him to the pavement. 6/26/18RP at 214, 216, 220-21. He might have fallen onto a raised ramp the second time. 6/26/18RP at 242. Mr. Schmidt said that since the incident, which resulted in hospitalization for an injury primarily to the rear of his head after falling, his speech and memory were slower; he said he didn't have any balance or equilibrium, and "[t]hey said that can never come back." 6/26/18RP at 222-25. Schmidt said he no longer could participate in Search and Rescue, and asserted that he was on Social Security disability. 6/26/18RP at 225-26.

Based on this evidence, the Court of Appeals concluded that the evidence was sufficient to prove the aggravating factor. Decision, at pp. 4-7.

E. ARGUMENT

THE EXCEPTIONAL SENTENCE MUST BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE.

1. This Court should grant review of the Court of Appeals decision in Mr. Knoth's case under Rule of Appellate Procedure 13.4(b)(1).

Review is warranted under RAP 13.4(b)(1). The Court of Appeals decision is in direct conflict with this Court's decisions in State v. Pappas, 176 Wn.2d 188, 192, 289 P.3d 634 (2012), because a comparison of the complainant's injuries as against those required for second degree assault simply does not the standard, explained by this Court, that RCW 9.94A.535(3)(y) "requires comparison of the victim's injuries against the minimum injury necessary to satisfy the offense." Pappas, 176 Wn.2d at 192. Further, the evidence was not only insufficient to prove the "substantially exceeds" standard, the State's proof at trial did not equate to the "great bodily harm" standard, which the Court of Appeals chose to rest its decision on - even where all reasonable inferences from the evidence are drawn in favor of the State. See State v. Stubbs, 170 Wn.2d

117, 123 & n. 5, 240 P.3d 143 (2010); RCW 9A.04.110(4)(c). The Court of Appeals decision warrants review, looking to the case decisions by this Court. See Part E.3, infra.

2. An exceptional sentence must be reversed where a jury's answer of "yes" to a special verdict is not supported by sufficient evidence, in which case the entry of judgment and imposition of an exceptional sentence violates the defendant's Due Process rights.

The State must prove each essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend 14. Facts supporting an aggravating circumstance must also be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). In deciding whether sufficient evidence supports any criminal allegation in a jury trial, the reviewing court will view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the allegation beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); see State v. Yarborough, 151 Wn. App. 66, 96-97, 210 P.3d 1029 (2009) (imposing standard to proof of aggravating facts).

Generally, under Blakely,[3] the sentencing court's reason for imposing an exceptional sentence must be that the jury properly found a statutory aggravating factor by special verdict. See State v. Stubbs, 170 Wn.2d 117, 123 & n. 5, 240 P.3d 143 (2010); State v. Suleiman, 158 Wn.2d 280, 290– 91, 143 P.3d 795 (2006). The jury must find beyond a reasonable doubt that there is a factual basis for the aggravated sentence. Suleiman, 158 Wn.2d at 292. Therefore, the jury's special verdict is reviewed for sufficient evidence. Stubbs, 170 Wn.2d at 123; State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007); see In re Winship, supra, 397 U.S. at 364.

3. The trial court erred in entering judgment on the jury's answer of "yes" to the aggravating factor and imposing an exceptional sentence, where the evidence was constitutionally insufficient to prove the aggravating factor.

In convicting Mr. Knoth of assault in the second degree in violation of RCW 9A.36.021(1)(a), the jury found that he (1) intentionally assaulted Mr. Schmidt and (2) recklessly caused "substantial bodily harm." CP 67; see, e.g., State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). "Substantial bodily harm," the injury necessary to satisfy

[3] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amend. 6.

the offense, is injury "which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

However, the evidence was insufficient to support the aggravating factor that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y); CP 76. In State v. Pappas, 176 Wn.2d 188, 289 P.3d 634 (2012), the Court stated that RCW 9.94A.535(3)(y) "requires comparison of the victim's injuries against the minimum injury necessary to satisfy the offense." Pappas, 176 Wn.2d at 192.

(a). The evidence was insufficient. The jury was instructed that proof of "great bodily harm" would meet the standard for the aggravating factor. CP 77; see Stubbs, at 125-28. Here, the evidence was insufficient to prove the "substantially exceeds" standard, much less the "great bodily harm" standard, even where all reasonable inferences from the evidence are drawn in favor of the State. See State v. Salinas, 119 Wn.2d at 201; State v. Yarborough, 151 Wn. App. at 96-97.

Substantial bodily harm itself contemplates a high level of injury, including the fracture that Mr. Schmidt sustained, and also includes substantial loss of the function of any organ, including the brain, except

where such loss lasts a non-temporary amount of time. RCW 9A.04.110(4)(b). And, the standard of "great bodily harm" is the highest level of injury possible. Stubbs, at 125-28. "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); see CP 76, 77. For example, stabbing a person in the chest falls within the statutory standard of great bodily harm. State v. Langford, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007 (1993), cert. denied, 510 U.S. 838 (1993).

i. The Court of Appeals agreed with the appellant that Mr. Schmidt did not suffer significant serious disfigurement.

Importantly, the Court of Appeals agreed with the appellant that Mr. Schmidt did not suffer significant serious disfigurement. See Decision, at p. 6. This was correct. The medical experts agreed that the injury to Mr. Schmidt's head was likely caused by a fall resulting after he was struck or attempted to be struck by Mr. Knoth. 6/27/18RP at 338, 428. Further, the injury, which Dr. Chesnutt described as bruising and a lesion on the cerebellum area of the brain at the back of Mr. Schmidt's

head, did not involve a significant serious permanent disfigurement such as a knife entrance wound. 6/27/18RP at 335-36.

Dr. Chesnut detected swelling at the rear of Mr. Schmidt's head at the cerebellum area, but his testimony was primarily a discussion of his general expectation of locating swelling, and any swelling primarily presented simply as a result of the surgical procedure of entering the cerebellum area. The procedure he performed relieved the swelling. 6/27/18RP at 335-36, 340-41. Dr. Schmidt also described that the cerebellum "was not profoundly swollen." 6/27/18RP at 356-57.

Indeed, Dr. Chesnut did not describe, nor did he purport to describe, significant serious permanent disfigurement. See State v. Hill, 48 Wn. App. 344, 345-47, 739 P.2d 707 (1987) (injuries including lacerations to the victim's face that physician testified were permanent despite plastic surgery, as well as scarring to thigh, qualified as "serious permanent disfigurement" under former vehicular assault statute).

Given the definition of the word "permanent" as meaning fixed, lasting, and enduring without fundamental change, the State failed to prove its case under this definition. Webster's Third New International Dictionary 1683 (1993); see State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998), review denied, 137 Wn.2d 1039 (1999) (employing

dictionary definitions of statutorily-undefined terms). Here, when asked what conditions he would expect "later in time" in "someone" who sustained the swelling he observed, Dr. Chesnut stated that "the clinical findings are usually cerebellar speech which is difficulty in expressing yourself." 6/27/18RP at 341. He also listed imbalance, motor control issues, cranial nerve problems, and visual problems, 6/27/18RP at 341. At no juncture did Dr. Chesnut state that these were conditions that Mr. Schmidt had suffered, or would suffer, in any permanent degree. Further, Dr. Chesnut was asked, and testified:

> Q: How long is rehab for these types of injuries?
> A: Depends how you define rehab. It can be lifelong.
> Q: Would it be surprising to find lifelong injuries as a result of what you observed on Mr. Schmidt?
> A: No.

6/27/18RP at 346. Dr. Chesnut's testimony that "rehab" and "lifelong injuries" were things that "can" result was never claimed to be a description of Mr. Schmidt's current, or future medical circumstances . For his part, Mr. Schmidt explained that after he went through three weeks of physical therapy, his condition was that he now felt that his left side was physically slower, that his speech and memory was affected, and that he did not have the balance or equilibrium "to walk or run or jump."

6/26/18RP at 224-25. But there was plainly no claim that Mr. Schmidt could not walk.[4]

ii. Mr. Schmidt also did <u>not</u> sustain permanent loss or impairment of the function of any bodily part or organ.

As noted, the Court of Appeals dismissed as not pertinent the fact that Mr. Schmidt did not suffer disfigurement. <u>See</u> Decision, at p. 6. The Court held that permanent loss or impairment of the function of a bodily part or bodily organ was proved, and satisfied the injury element of the aggravating factor. <u>See</u> Decision, at pp. 6-7. But as Dr. Chesnut explained, there was no permanent loss or impairment of the function of any bodily part or organ. 6/28/18RP at 336-37. The Court of Appeals held that Schmidt's testimony as to problems with balance and speech satisfied this definition. Decision, at pp. 6-7. But Dr. Chesnut made clear in his testimony that under Mr. Schmidt's bone injury, "[t]he brain looked fine under there, as it very frequently does." 6/28/18RP at 336-37. Mr. Schmidt sustained a carotid injury, but this was something that the

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[4] Mr. Schmidt was asked, and testified, as follows:

Q: So what is different about your ability to walk or run or jump?

A: I don't have it – I don't have any balance, equilibrium. They said that <u>can</u> never come back.

(Emphasis added.) 6/27/18RP at 225.

doctor had no protocol for monitoring, except to recommend aspirin. 6/28/18RP at 337. In recent months before trial, Mr. Schmidt had made "drastic steps of improvement," but could not "physically hold a [pool] stick and manipulate his motions in the same way," according to Kyle Halbert, the O'Houlies bartender. 6/26/18RP at 208. Mr. Schmidt still played pool, but O'Houlies put him on a three-drink limit, because "when he'd drink more, you could tell his brain - his thought process would get more and more frustrated because alcohol inhibits you." 6/26/18RP at 208-09. Evidence of Mr. Schmidt having difficulties with certain activities, or evidence that his faculties were lessened by a greater sensitivity to alcohol, does not, without more, show the permanent impairment of a function.

iii. Mr. Schmidt also did <u>not</u> sustain injuries creating a probability of death.

The Court of Appeals in effect ruled that Mr. Schmidt's injuries satisfied this definition of harm because the doctor stated that there was a probability of death. Decision, at p. 6. But there were no injuries creating a probability of death – the Court of Appeals could only note that the doctor stated that the result of Mr. Schmidt's brain swelling was "quite possibly death." Decision, at p. 6. This was correct - Dr. Chesnut

stated that without surgery, the likely outcome of the injury was "quite possibly death." 6/28/18RP at 336. This does not establish a probability of death, particularly considering that criminal statutes must be given a strict and literal interpretation. State v. Van Woerden, 93 Wn. App. at 116. A "possibility" is not a probability. In determining the sufficiency of the evidence, the existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The evidence as to every possible definition of great bodily harm was constitutionally inadequate to warrant the jury verdict on the aggravating factor.

(b). The exceptional sentence must be reversed. Mr. Schmidt was wrongfully and seriously injured. But this was not the degree of injury the legislature intended when defining "great bodily harm." See Stubbs, 170 Wn.2d at 128 (great bodily harm "encompasses the most serious injuries short of death."); see, e.g., State v. Randoll, 111 Wn. App. 578, 45 P.3d 1137 (2002) (victim sustained an injury that resulted in an inability to drive, which was held to constitute more serious harm than "substantial bodily harm."). Nor was it injury that in any other manner substantially exceeded substantial bodily harm. For example, Dr. Chesnutt also stated that Mr. Schmidt had sustained a cheek bone

fracture. 6/27/18RP at 336-37. A fracture constitutes only substantial bodily harm. RCW 9A.04.110(4)(b). Dr. Chesnutt also made clear that there was no neck or spinal injury detected. 6/27/18RP at 361.

The exceptional sentence was erroneously imposed, and remand for resentencing to a standard range sentence, not to exceed 9 months for Mr. Knoth's offender score of zero, is required. This Court should grant review, and on review, reverse Mr. Knoth's sentence.

F. CONCLUSION

Based on the foregoing, the Supreme Court should accept review under RAP 13.4(b)(1), and reverse Mr. Knoth's judgment and sentence for insufficiency of the evidence rendering the trial court's entry of judgment a violation of Due Process under the Fourteenth Amendment.

Respectfully submitted this 14TH day of February, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON CALVIN KNOTH, Appellant.	No. 78760-8-I DIVISION ONE UNPUBLISHED OPINION FILED: January 27, 2020

MANN, A.C.J. — Brandon Knoth appeals the judgment and sentence imposed upon his conviction for assault in the second degree. He contends the evidence was insufficient to support the aggravating factor that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense and that the criminal filing fee should be stricken. We remand for the trial court to strike the criminal filing fee from the judgment and sentence. We otherwise affirm.

I.

On the evening of June 5, 2016, John Schmidt went to O'Houlies bar in Mountlake Terrace to play pool. Schmidt was a regular at the bar and he knew the bartenders. Throughout the evening, Schmidt consumed three or four rum and Coke cocktails. In the early morning hours of June 6, Schmidt decided to go home. While putting his pool stick in the trunk of his car, Schmidt "heard a commotion." A group of

four people were standing to the right of the entrance to O'Houlies. Schmidt saw a man in the group grabbing the hair of a woman in the group, and he thought she was in trouble. Schmidt asked the woman if she needed help. He remembered being "rushed" and knocked down by a man in the group, who was later identified as Knoth. Schmidt got up and tried to go back to his car. The next thing he remembered was waking up at Harborview Medical Center.

Knoth's wife Alicia testified that she, Knoth, and the other couple were hanging out in the parking lot "just kind of dancing and being loud and obnoxious, probably" when Schmidt walked up and said "derogatory things like we were hookers or prostitutes or something." She said Schmidt told Knoth "[y]ou're a dead man" right before Knoth chased him around the car. She said she did not see what happened after that.

The bartender, Kyle Halbert, recalled serving drinks to a group of two men and two women who came into O'Houlies at around 1:15 or 1:30 a.m. Because it was so late, Halbert assumed they had been drinking before they arrived. One of the women fell down, and Halbert took away her drink. The group left the bar at around 2:00 a.m. One of them left a cell phone in the bar, so Halbert took it out to them. The two women were sitting on the curb, and the two men were "horseplaying around." Another employee left the bar, then immediately returned to tell Halbert that Schmidt was laying on the ground outside. Halbert went outside and found Schmidt unconscious with blood on the ground near his head. Halbert immediately called 911.

Video surveillance showed Schmidt pointing and walking across the parking lot towards the group. Schmidt and Knoth appeared to exchange words. Then Knoth

adopted a fighting stance and bounced in a circle around Schmidt. A woman appeared to pull Knoth away, and Knoth and Schmidt walked away from each other. Knoth then approached Schmidt and punched him in the chest, knocking him to the ground. Schmidt slowly stood up, walked across the parking lot, then turned around and walked back to his car. Knoth suddenly came running around the rear of Schmidt's car towards him. Schmidt turned to run away, and Knoth appeared to catch up with him just off camera. Knoth then ran back to his car and the group quickly drove away.

Schmidt was taken to Swedish Hospital in Edmonds, then transferred to Harborview Medical Center. There, Dr. Randall Chesnut, a neurosurgeon, performed emergency surgery to relieve swelling on Schmidt's brain. Schmidt remained at Harborview for a month. When he got out of the hospital, he could not speak or swallow and had a tube in his stomach for three months.

The State charged Knoth by information with one count of assault in the first degree. Shortly before trial, the State filed an amended information charging Knoth with one count of assault in the second degree with an aggravating factor that Schmidt's injuries "substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense."

At trial, Dr. Chesnut described in detail the "catastrophic" nature of Schmidt's brain injury and testified that without surgical intervention, the "likely outcome" was "quite possibly death." Schmidt testified to the losses he suffered following the assault, including ongoing problems with equilibrium, balance, speech, and memory.

The jury found Knoth guilty of assault in the second degree. The jury returned a special verdict that "the victim's injuries substantially exceed[ed] the level of bodily harm

necessary to constitute substantial bodily harm." The court imposed an exceptional sentence of 48 months of confinement.[1] Knoth appeals.

II.

Knoth contends that there is insufficient evidence to support the aggravating factor. We disagree.

Facts supporting an aggravating circumstance must be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3); State v. Guzman Nuñez, 174 Wn.2d 707, 711, 285 P.3d 21 (2012). "A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard." State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). We defer to the trier of fact in matters of conflicting testimony, witness credibility, and its view of the persuasiveness of the evidence. State v. Trout, 125 Wn. App. 403, 409, 105 P.3d 69 (2005).

RCW 9.94A.535(3) lists aggravating factors that can support a departure from the sentencing guidelines if the "facts supporting aggravating circumstances" can be "proved to a jury beyond a reasonable doubt." One such factor is if "[t[he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." To impose an exceptional sentence on this basis, the court must be satisfied that the facts found by the jury are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); State v. Sage, 1 Wn. App. 2d 685, 709, 407 P.3d 359 (2017).

[1] Knoth's standard range sentence was 3 to 9 months.

In making this determination, the trier of fact must compare the actual injuries against the minimum injury that would satisfy the definition of the charged crime. State v. Pappas, 176 Wn.2d 188, 192, 289 P.3d 364 (2012). "Such a leap is best understood as the jump from 'bodily harm' to 'substantial bodily harm,' or from 'substantial bodily harm' to 'great bodily harm.'" Stubbs, 170 Wn.2d at 130. "Thus, the statute requires only that the injuries 'substantially exceed,' rather than a requirement to meet a higher category of harm." State v. Duncalf, 177 Wn.2d 289, 296, 300 P.3d 352 (2013) (quoting Pappas, 176 Wn.2d at 193).

As charged here, a person is guilty of assault in the second degree if they "intentionally assault[ed] another and thereby recklessly inflicted substantial bodily harm." RCW 9A.36.021(1)(a). RCW 9A.04.110(4)(b) defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part."

The court instructed the jury that proof of "great bodily harm" would satisfy the statutory aggravator. Under RCW 9A.04.110(4)(c), "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."

Although the State was not required to prove that Schmidt's injuries reached this higher category of harm, we conclude that the State presented sufficient evidence to satisfy this requirement, thereby necessarily exceeding the standard for substantial bodily harm. Dr. Chesnut testified that Schmidt presented with "a bad lesion" and

"bruises in the cerebellum" necessitating emergency surgery to relieve swelling by opening the skull. Dr. Chesnut recalled observing "a lot of swelling" on Schmidt's brain during surgery. He explained that any swelling in that area can be "catastrophic" because it "compresses the brain stem which is what runs breathing and helps control the cardiac rhythms." Dr. Chesnut specified that without surgical intervention, the likely outcome of that swelling would be "quite possibly death." Dr. Chesnut said that Schmidt also suffered an orbitozygomatic fracture to the cheek bone near his right eye.

Schmidt testified that since the assault, his "[l]eft side is slower" and he has problems with "speech and memory." He can no longer button his shirt and has ongoing problems with balance and equilibrium. He lost his job because he "couldn't think enough" and is now on Social Security Disability. And he had to quit hiking and volunteering for Search and Rescue. And Halbert testified that since the accident, Schmidt "just doesn't have the same full functionality that he had before," such as "limited physical mobility" and "slower speech."

Knoth argues that the State did not prove "great bodily harm" because there was no evidence Schmidt suffered "significant serious permanent disfigurement" such as facial lacerations or a knife entrance wound. But this is only one of three alternative means by which the State may establish "great bodily harm." Given that the State provided substantial evidence that Schmidt suffered a "probability of death" or "significant permanent loss or impairment of the function of any bodily part or organ," the lack of disfigurement is of no consequence.

Knoth also argues that the State failed to prove "great bodily harm" because it did not prove Schmidt suffered "permanent" loss or impairment of bodily functions. But

Schmidt's and Halbert's testimony at trial, which occurred more than two years after the assault, indicates that Schmidt continues to suffer significant problems with balance, equilibrium, speech, and memory and that these limitations prevent him from working or engaging in certain activities he once enjoyed. And Dr. Chesnut testified that it would not be surprising to find lifelong injuries as a result of Schmidt's injuries.

The evidence plainly exceeds the "temporary but substantial loss or impairment of the function of any bodily part or organ" standard necessary to prove substantial bodily harm. The evidence also meets the "probability of death" or "significant permanent loss or impairment of the function of any bodily part or organ" necessary to prove great bodily harm. The trial court was authorized to impose an exceptional sentence.

III.

Knoth next seeks to strike the $200 criminal filing fee from the judgment and sentence. The State concedes that, while this legal financial obligation was properly imposed at the time of sentencing, it should be stricken pursuant to recently amended RCW 36.18.020(2)(h)(criminal filing fee) and State v. Ramirez, 191 Wn.2d 732, 426, P.3d 714 (2018). We accept the State's concession and agree.

IV.

Knoth raises two additional issues in his pro se statement of additional grounds (SAG) pursuant to RAP 10.10. Neither issue has merit.

First, Knoth argues that the court failed to consider as a mitigating circumstance that the victim was the initiator and provoker of the incident. On this basis, he contends that the aggravating factor was not proven and that the jury was not properly instructed.

As discussed above, the evidence was sufficient to support the conviction. Regarding the alleged instructional error, "[j]ury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." State v. Knutz, 161 Wn. App. 395, 403, 253 P.3d 437 (2011) (quoting State v. Aguire, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010)). The instructions allowed defense counsel to present evidence that Schmidt instigated the incident by approaching the group and making offensive comments.

Second, Knoth claims his right to a fair trial was violated when the State amended the charge two days before trial from assault in the first degree to assault in the second degree with an aggravating factor, thereby forcing him to stand trial with an attorney who was unprepared. Under CrR 8.3(b), the court may "in the furtherance of justice . . . dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Prejudice includes the denial of the right to effective assistance of counsel who has had adequate opportunity to prepare a defense. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Here, the record shows that defense counsel affirmatively declined to object to the amended information. There is no showing of prejudice.

We remand to the trial court to strike the $200 criminal filing fee. We otherwise affirm Knoth's conviction and sentence.

Mann, ACJ

WE CONCUR:

Chun, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78760-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: February 14, 2020
Washington Appellate Project

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