Supreme Court No. 99770-5

No. 80849-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BURRUS,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

United States Constitution

Statutes

Rules

A. IDENTITY OF PETITIONER

Christopher Burrus was convicted of attempted murder. He asks this Court to grant review of the Court of Appeals published decision affirming the imposition of an exceptional sentence based on deliberate cruelty.

B. ISSUES PRESENTED FOR REVIEW

1. The State must prove the existence of an aggravating circumstance beyond a reasonable doubt. The deliberate cruelty aggravator requires proof the crime was atypically cruel, in that it was more cruel than typical. Did the State present insufficient evidence to support this aggravator? Does the Court of Appeals decision merit review? RAP 13.4(b)(3), (4).

2. Elements of an offense violate due process if they are so vague that they fail to provide notice or invite arbitrary application. Statutes that fix or increase sentences are also subject to the void for vagueness doctrine. When aggravating factors do not provide notice of the prohibited conduct or they invite jurors to arbitrarily apply them, are they impermissibly vague in violation of the Fourteenth Amendment? Does the Court of Appeals decision merit review, as it involves a significant question of law under the United States Constitution, and as a matter of substantial public interest? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Christopher Burrus grew up near Greenlake, graduating from Bishop Blanchet High School. RP 741; CP 97-104. He graduated from Washington State University in 2010. RP 741; CP 97-104.

When Mr. Burrus discovered illicit drugs, his life changed rapidly. RP 742. He lost his housing and began living out of a storage unit, staying with various girlfriends in their vehicles. RP 742.

During the same period of time, Mr. Burrus met Joe Colella and Ryan Moore. RP 743. Over the years, the men worked and used drugs together at a location in Ballard known as "the shop." RP 743-44. The shop is an industrial warehouse owned by Mr. Colella's family. RP 319, 745. Mr. Colella resided in a loft there, along with several other individuals, some of them transient. RP 320-21, 357-58, 361-62. Mr. Colella, Mr. Moore, and others used the warehouse as a base for salvaging materials before taking them to a recycling yard. RP 320-21, 328.

Another member of this community was Kasey Busch, who sometimes looked for work at the shop. RP 321. Mr. Busch, a commercial diver, had been living on a small boat docked in Westlake, so he did not regularly sleep at the shop like some of the other men. RP 328, 449-51. In early November 2017, however, Mr. Busch found himself

without a steady place to stay, after losing his boat following a period of incarceration. RP 453. Mr. Busch, too, began staying at the shop. Id.

Mr. Burrus spent a fair amount of time at the shop, although by November 2017, he was residing in a van with his then-girlfriend, Chantal "Petals" Latorto. RP 322, 361, 446-47, 749-50. According to Mr. Busch, Ms. Latorto was known to be "devious," a "liar and a thief." RP 447. Ms. Latorto would "show up sporadically, yeah, kind of stir things up and bring a little bit of chaos to [the] place, then she'd leave." RP 446.

On November 7, 2017, Ms. Latorto visited the shop to clear out some of her belongings that she had been storing there. RP 363, 457-58, 756. Mr. Burrus remained just outside the fence of the property in their van for most of the day, as Ms. Latorto passed him items to load from the shop into the van. RP 366, 459. At some point, there was a dispute between Ms. Latorto and Kasey Busch over a wrench. RP 367-68, 450-52, 457-459. Mr. Busch had previously accused Ms. Latorto of stealing some of his tools – particularly a special wrench he had modified for use in his commercial diving work. RP 450-52. Mr. Busch and Ms. Latorto struggled over a wrench she was holding, causing her to lose her balance, and she stormed out of the shop. RP 458.

Mr. Busch went to discuss this incident with Mr. Burrus, who was

still outside in the van. RP 460. The conversation was friendly. Id. Mr. Busch offered $50 if Mr. Burrus could get the wrench back from his girlfriend. RP 463. Mr. Burrus did not seem upset or angry about the situation. Id. Mr. Busch recalled, "There was nothing, I mean, there was no indication at all that there was any kind of ill will towards me at all even … I never had a cross word between me and Chris." Id. at 463-64.

Mr. Busch and Ryan Moore then departed to take the day's salvaged materials to the recycling yard before the 7:00 p.m. closing time. RP 331-32, 369, 464. When they returned to the shop a few hours later, Mr. Burrus was standing in front of the shop holding a Big Gulp cup. RP 332, 466. After Mr. Moore parked the car, Mr. Burrus and Mr. Busch greeted each other briefly, saying, "What's up." RP 466. Suddenly, Mr. Burrus turned toward Mr. Busch and threw the contents of the cup on him. RP 466.[1] Mr. Busch began to run away from Mr. Burrus, which surprised everyone, since it seemed unlike Mr. Busch, a renowned tough guy, to run away from a fight. RP 337 (Mr. Busch was known as a bit of a "thug" before incident); RP 372 (Mr. Colella: "I was thinking, Uh oh, Chris

[1] Mr. Burrus testified he had been "huffing" gasoline from the cup to get high. RP 760-62. The gas was from a small tank mounted to the roof of his van; it was used to fill his and Ms. Latorto's generator, to power their appliances and electronics. Id.

[Burrus] is about to get whupped here.").

Mr. Busch ran when he realized the liquid in the cup was not soda, but gasoline. RP 466-70. Mr. Burrus testified that he hoped to intimidate Mr. Busch by defending his girlfriend in front of the others, and by making a big "whoosh" by lighting a fire. RP 760-62. After throwing the gas, Mr. Burrus lit a road-side flare and tossed it at Mr. Busch, causing him to ignite. RP 338-39, 372, 466-67. Mr. Busch rolled around on the ground until Mr. Colella quenched the fire with a hose. RP 381-82.

Mr. Busch was treated at the scene by first responders, followed by an extensive stay at the Harborview burn unit. RP 484-88. After being hospitalized for almost two months, Mr. Busch was released home and then went to Alaska to "get back to being myself." RP 484.

Mr. Burrus was charged with one count of attempted murder in the first degree with the aggravating circumstance of deliberate cruelty. CP 13-14.

Testifying at trial about the incident, Mr. Colella, the shop owner, reflected, "I like Chris [Burrus]. He's a good kid. I don't think this is all his fault. I think it's as much his fault [Kasey Busch's] as it is his." RP 392. When asked to explain, Mr. Colella blamed drugs, saying that without the drugs, "He'd have never done that. Stupid." Id. Mr. Colella

also offered some context for Mr. Burrus's actions that night. When asked whether he had even seen anything like this incident before, Mr. Colella did not seem surprised:

> People fool around. People do things. I've been lit on fire before coming out of my house going down my driveway, but it wasn't gasoline. My roommate squirted me with lighter fluid. It was funny. On our way to work. It was dumb, but it didn't do that. I mean, I wasn't expecting to see what I saw. Even as I was seeing it, I didn't realize myself that it would do that. It's not lighter fluid. Not at all. And there was no putting it out.

RP 396.

Chris Burrus testified that he was "horrified" when he saw what happened to Kasey. RP 764. He said he had lit charcoal fluid and hairspray on fire before, and "I thought that it would just kind of poof, you know what I mean? Like a flash … a flash and then not be on fire anymore." RP 762-63, 777. He had never lit gasoline on fire before and did not understand how it would burn. RP 762, 776-77. He said there was "no rhyme, reason, or excuse for" what happened to Kasey. RP 764. He stated he had no reason to kill his friend, no plan to kill him, and that no one should ever have to suffer that much. RP 762-64.

The jury convicted Mr. Burrus of attempted murder in the first degree and found the deliberate cruelty aggravator had been proved. CP 88, 90; RP 895-98.

At sentencing, the State sought an exceptional sentence upward, disregarding the wishes of the victim. CP 105-09. Kasey Busch addressed the court directly, asking for leniency for Mr. Burrus, saying he hoped the court would impose the lowest possible sentence. RP 911. Despite his injuries, Mr. Busch told the court he forgives Mr. Burrus and blames himself as much as Mr. Burrus; he refused a no-contact order. RP 911-16.[2] Mr. Burrus addressed all of his comments at sentencing to Mr. Busch, apologizing and expressing deep remorse for the grief and suffering of Mr. Busch and his family. RP 917-20.

The court, like the State, disregarded the victim's statement, imposing an exceptional sentence which increased Mr. Burrus's sentence by five years. CP 110-18. In total, the court sentenced Mr. Burrus, whose offender score was "0," to 300 months in prison – adding 60 months for the aggravator – plus 36 months community custody. CP 110-18; RP 920.

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[2] Mr. Busch asked the court to give Mr. Burrus "the lowest sentence that you can." Mr. Busch said,

> Ever since I was a kid, I've been a scrapper, a fighter. I liked to get in physical altercations. It was fun for me. And so I had a reputation for that. I sowed that reputation, and that was why I ended up, instead of being in a fist fight, being attacked from a distance, from afar basically. I worked real hard to get that reputation and I got it. …I have a lot of responsibility for what happened that day.

RP 912.

Mr. Burrus appealed, but on April 19, 2021, the Court of Appeals rejected his challenges to his conviction. In a published decision, the Court held that the trial court did not err in omitting premeditation from the to-convict instruction for attempted first degree murder,[3] and the court did not err when it imposed an exceptional sentence based on the jury's finding of deliberate cruelty. This Court should grant review on this issue and reverse.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The exceptional sentence should be reviewed because it violates due process, and because the Washington courts should address vagueness challenges.

This Court should grant review because the exceptional sentence violates Mr. Burrus's right to due process and demonstrates problems with the way courts approach aggravating factors in Washington. Mr. Burrus's crime caused serious injuries which warranted a serious sentence. However, the court added an additional 60 months to the sentence based on vague and unsupported assertions that this spontaneous act was "deliberately cruel," despite evidence from several parties that the act was neither deliberate, nor cruel in its intent. The Court of Appeals has

[3] In light this Court's decision in State v. Orn, Mr. Burrus does not seek further review of the to-convict instruction. 482 P.3d 913 (Mar. 18, 2021).

refused to consider arguments that this aggravating factor is unconstitutionally vague. This Court should address this issue. RAP 13.4(b)(3), (4).

1. The Court of Appeals erroneously prohibits defendants from challenging aggravating factors as vague.

The Washington and federal constitutions prohibit the deprivation of life, liberty, or property without due process of law. Const. art. I, § 3; U.S. Const. amend. XIV. When "a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," it violates due process. Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015).

The Court of Appeals held that Mr. Burrus may not challenge this aggravating factor as unconstitutionally vague. Slip op. at 15-16 (citing State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). In its discussion of whether Baldwin has been invalidated following Blakely,[4] the Court noted that each division of the Court of Appeals has held that Baldwin "remains good law." Slip op. at 13 (quoting State v. Brush, 5 Wn. App.2d 40, 63, 425 P.3d 545 (2018); also citing State v. DeVore, 2

[4] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Wn. App.2d 651, 665, 413 P.3d 58 (2018).

Contrary to the Court of Appeals' conclusion, which relies on an outdated opinion of this Court, the void for vagueness doctrine applies to sentencing factors, just as it applies to other elements of a crime. Johnson, 576 U.S. at 596-97 (invalidating clause of Armed career Criminal Act as unconstitutionally vague).

The lower courts' continual reliance on Baldwin, a 2003 case that predated Blakely, is mistaken. See RCW 9.94A.537; Blakely, 542 U.S. at 303. Following Blakely, our legislature amended the SRA, such that the maximum punishment available absent a jury's finding of the aggravator is the top of the standard range – here, 240 months. Because this aggravator significantly increases the available punishment, it is subject to due process limitations, including the prohibition on vagueness. Cf. State v. Allen, 192 Wn.2d 526, 534-35, 543-44, 431 P.3d 117 (2018) (aggravating factors are elements of crimes and thus are subject to constitutional protections as are elements).

In two recent cases, this Court signaled that defendants might challenge aggravating factors as unconstitutionally vague. See State v. Murray, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018); State v. Duncalf, 177 Wn.2d 289, 298, 300 P.3d 352 (2013). This Court should explicitly

overrule Baldwin to permit defendants to challenge aggravating factors as unconstitutionally vague. RAP 13.4(b)(3), (4).

2. The deliberate cruelty aggravator is unconstitutionally vague and unsupported by the evidence.

The aggravating factor used to increase Mr. Burrus's sentence is unconstitutionally vague and was not supported by sufficient evidence. Because aggravating factors increase the punishment that may be imposed, due process requires the State to prove this element beyond a reasonable doubt. Blakely, 542 U.S. at 303; RCW 9.94A.537(3).

As set out in the statute, it is an aggravating circumstance that the "defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). The State must show "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003).

The evidence does not support the jury's finding that the deliberate cruelty aggravator was proved beyond a reasonable doubt. CP 90. There was no evidence presented at trial concerning gratuitous violence or torture for an extended period of time. E.g., State v. Scott, 72 Wn. App. 207, 214-15, 866 P.2d 1258 (1993), aff'd sub nom State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995), abrogated on other grds. by State v.

O'Dell, 183 Wn.2d 680, 694-95, 358 P.3d 359 (2015).

Here, the State presented no evidence of gratuitous violence or torture. On the contrary, the evidence showed a spontaneous, practically mischievous act of assault, which clearly ended in tragedy. The victim's friend, Mr. Colella – who witnessed the incident and saved his life – acknowledged that he, too, had been "squirted … with lighter fluid" and lit on fire as a prank, and that this behavior was hardly unusual for this group of friends. "People fool around." RP 396.

Even the victim asked the court to show leniency when sentencing Mr. Burrus and rejected a no-contact order, despite his serious injuries. RP 911-16. The evidence at trial did not support the finding that Mr. Burrus's actions were deliberately cruel – just misguided. If the evidence does support the aggravator, then the aggravating factor should be challengeable as unconstitutionally vague, as discussed above.

Because the deliberate cruelty aggravator was imposed in violation of due process, this Court should grant review so that Mr. Burrus can challenge his sentence on constitutional grounds, and so the matter can be remanded for the imposition of a standard range sentence.

E. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed. RAP 13.4(b)(3), (4).

DATED this 13th day of May, 2021.

Respectfully submitted,

s/ Jan Trasen

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APPENDIX

FILED
4/19/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER SEAN BURRUS, Appellant.	No. 80849-4-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — Christopher Burrus poured gasoline on Kasey Busch and threw a lit flare at him, causing him to catch fire. Busch suffered second and third degree burns on 30 percent of his body. The State charged Burrus with attempted first degree murder with the aggravating factor that his conduct manifested deliberate cruelty. The jury found Burrus guilty as charged. Based on the jury's finding of deliberate cruelty, the trial court imposed an exceptional sentence. Burrus challenges the to-convict instruction and the exceptional sentence. We affirm.

I. BACKGROUND

Burrus spent time at an industrial warehouse referred to as "the shop," where he would occasionally work, salvaging materials and electronics, and sleep. Joe Colella, whose family owned the shop, and Ryan Moore lived there and Burrus had known them for years. Busch occasionally looked for welding work at the shop and knew Burrus, Colella, and Moore.

During the summer of 2017, following a dispute, Colella told Burrus he was not welcome in the shop. By November, Burrus was staying with his then-girlfriend Chantal Lotorto and was not sleeping at the shop. Burrus claims that Lotorto dated Busch before dating him, but the State disputes this. Busch testified that he and Lotorto never got along and that he suspected that she had stolen some of his work tools.

In November 2017, Busch lost his home and began sleeping at the shop. A few days later, Lotorto went to the shop to remove her belongings upon Colella's request. Burrus went with her. Because he was unwelcome in the shop, Burrus waited outside by Lotorto's van. Busch noticed that Lotorto was carrying a specialized wrench that he suspected she had stolen from him. He accused her of stealing it and grabbed it. The two struggled over the wrench and then Busch released it, causing Lotorto to fall backwards. Busch testified that Lotorto then raised the wrench as if to strike him, he picked up a tool to defend himself, and she turned and left the shop. Lotorto told Burrus that she had fought with Busch and showed him a small mark on her face that she indicated that Busch caused. Burrus said he was "a little hurt and frustrated" as a result.

Busch went outside to speak with Burrus and offered him $50 to get the wrench back from Lotorto. Busch testified that during this conversation he saw no indication that Burrus was angry with him.

Busch and Moore then left the shop to go to a scrapyard; they were gone for about an hour. When they returned, Moore saw Burrus poke his head around the corner of the building and then duck back into the alley where Lotorto's van

was parked. Burrus emerged from the alley holding a "Big Gulp" cup. As Burrus approached the car, Busch saw something in Burrus's sleeve, which he thought might be his stolen wrench. Burrus spoke briefly with Moore and then approached Busch. He called out to Busch and threw the contents of the cup on Busch. Busch immediately realized that the cup contained gasoline and began to flee. Burrus then lit a roadside flare and threw it at Busch, causing him to catch fire. Busch rolled into the street desperately trying to extinguish the flames. Burrus fled the scene. Moore tried to put out the fire but caught himself on fire as well. Colella dragged a hose from the shop and extinguished the flames. Multiple passersby called 911. When first responders arrived, Busch was in extreme pain. Busch suffered second and third degree burns on over 30 percent of his body. Busch underwent skin grafts and remained in the hospital for almost two months to recover.

The State charged Burrus with attempted first degree murder with the aggravating factor that his conduct manifested deliberate cruelty.

During trial, Burrus admitted to dumping gasoline on Busch and throwing a lit flare at him. But he denied intending to kill Busch. Burrus testified that his intention was to intimidate Busch and look like he was standing up for Lotorto in front of the others by causing a quick burst of flames. Burrus said he expected that lighting gasoline would result in a similar flame as lighting lighter fluid and was horrified by what actually happened. Burrus said he had not decided to engage in this conduct until he was approaching Busch and that he had the

gasoline in a cup because he had been "huffing"[1] it. He also said that he had the flare because he had picked it up and put it in his pocket earlier that day.

The trial court instructed the jury on attempted first degree murder. The to-convict instruction for attempted first degree murder did not contain the element of premeditation. After the jury had begun its deliberation, Burrus requested that the trial court instruct the jury on the lesser included count of attempted second degree murder. The court did so. The parties gave supplemental closing arguments based on the added instruction.

The jury found Burrus guilty of attempted first degree murder and found that the State proved the aggravating factor of deliberate cruelty.

The State sought an exceptional sentence of 300 months. The standard sentence range for the crime is 180–240 months. During the sentencing hearing, Busch asked the court to give Burrus the lowest sentence possible. Burrus requested a mid-range sentence of 210 months and apologized to Busch. The trial court found that the aggravating factor of deliberate cruelty was a compelling reason to justify an exceptional sentence and imposed a sentence of 300 months.

II. ANALYSIS

A. Instructional Error

Burrus says that the trial court erred by omitting the element of premeditation in its to-convict instruction for attempted first degree murder.[2] The

[1] "Huffing" refers to inhaling fumes to achieve a high.

[2] Though Burrus did not object on this ground below, "[t]he issue of omission of an element from that instruction is of sufficient constitutional magnitude to warrant

State responds that the court was not required to do so. We agree with the State.

"[W]e review the challenged instructions de novo in the context of the instructions as a whole." State v. Imokawa, 194 Wn.2d 391, 396, 450 P.3d 159 (2019).

"Jury instructions satisfy due process 'when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.'" State v. Orn, No. 98056-0, slip op. at 21–22 (Wash. Mar. 18, 2021) https://www.courts.wa.gov/opinions.pdf/980560.pdf (quoting State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)); U.S. CONST. amend. XIV; CONST. art. I, § 3. A to-convict instruction must "'contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence.'" Orn, slip op. at 22 (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)).

"The statutory crime of attempt 'contains two essential elements the State has to prove to secure a conviction: (1) intent to commit a specific crime and (2) any act constituting a substantial step toward the commission of that crime.'" Id. (quoting State v. Nelson, 191 Wn.2d 61, 71, 419 P.3d 410 (2018)). A to-convict instruction for an attempt crime "need not also set out the elements of the substantive crime attempted," those elements "may be contained in a separate,

review when raised for the first time on appeal." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); see RAP 2.5(a)(3).

definitional jury instruction." Id. (citing State v. DeRyke, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003); State v. Nelson, 191 Wn.2d 61, 72, 419 P.3d 410 (2018)).

Our Supreme Court held in Orn that a to-convict instruction for attempted first degree murder need not include the element of premeditation. Id. at 22–24. In Orn, the trial court instructed the jury on attempted first degree murder based on WPIC 100.02. Id. at 23. The instruction provided

> To convict the defendant of the crime of attempted murder in the first degree . . . each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 2, 2016, the defendant did an act that was a substantial step toward the commission of murder in the first degree;
>
> (2) That the act was done with the intent to commit murder in the first degree; and
>
> (3) That the act occurred in the State of Washington.

Id. (alteration in original). A separate instruction defined first degree murder as follows: "A person commits the crime of murder in the first degree when, with a *premeditated* intent to cause the death of another person, he or she causes the death of such person." Id. (emphasis added). The court determined that the "to-convict instruction did not omit any essential element of the crime of attempt, and 'taken as a whole' the jury instructions 'properly inform[ed] the jury of the applicable law.'" Id. at 24 (quoting Tili, 139 Wn.2d at 126).

Here, the trial court gave this to-convict instruction to the jury:

> To convict the defendant of the crime of attempted murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 7, 2017, the defendant did an act that was a substantial step toward the commission of murder in the first degree;

(2) That the act was done with the intent to commit murder in the first degree; and

(3) That the act occurred in the State of Washington.

As in Orn, this instruction is based on WPIC 100.02. A separate instruction provided, "A person commits the crime of murder in the first degree when, with a *premeditated* intent to cause the death of another person, he or she causes the death of such person or of a third person." (Emphasis added.) And the trial court defined premeditation in another instruction.

The instructions given here are nearly identical to those given in Orn. Our Supreme Court has held that a trial court does not err by giving such instructions. We conclude that the trial court did not err in omitting premeditation from the to-convict instruction for attempted first degree murder.

B. Exceptional Sentence

Burrus says that for several reasons, the trial court erred in imposing an exceptional sentence based on the jury's finding of deliberate cruelty.[3] We disagree with his arguments.

Under the Sentencing Reform Act, generally, a court must impose a sentence within the standard range. RCW 9.94A.505. A court may impose a sentence outside the standard range if it finds "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The existence of an aggravating factor may support an exceptional sentence. RCW 9.94A.535(3). Aside from limited exceptions, the facts supporting an aggravating factor must be

[3] Because we conclude that the trial court did not improperly instruct the jury, we do not address Burrus's contention that improper instruction resulted in an improper exceptional sentence.

found by a unanimous jury. RCW 9.94A.535; RCW 9.94A.537(3). One such aggravating factor is when "[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a).

The trial court instructed the jury that it must determine "[w]hether the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim." The instructions defined deliberate cruelty as "gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime." The jury returned a special verdict form finding that Burrus's conduct manifested deliberate cruelty. The trial court imposed an exceptional sentence based on the jury's finding.

1. Sufficiency of the evidence

Burrus says insufficient evidence supports the jury's finding of deliberate cruelty. He contends that because the State failed to provide comparative evidence of typical attempted first degree murders, the jury had insufficient evidence to determine whether the facts here were atypical. The State responds that it was not required to provide examples of typical attempted first degree murders and that the jury was able to use its common experience to determine whether Burrus's actions were deliberately cruel. We agree with the State.

The State must prove the facts supporting an aggravating factor to a jury beyond a reasonable doubt. RCW 9.94A.537(3). We review the sufficiency of the evidence for an aggravating factor in the same way as we review it for the

elements of a crime. State v. Zigan, 166 Wn. App. 597, 601, 270 P.3d 625 (2012). "Under this standard, we 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 the aggravating circumstances beyond a reasonable doubt." Id. at 601–02.

Burrus cites State v. Suleiman, 158 Wn. 2d 280, 143 P.3d 795 (2006), to support his contention that the State is required to provide comparative evidence of typical attempted first degree murders. But Suleiman is distinguishable. The case concerns whether the defendant's stipulation of facts sufficed to waive the requirement that a jury find facts supporting an aggravating factor beyond a reasonable doubt. Id. at 294. The court held that the aggravating factors the sentencing court relied upon necessarily involved judicial fact finding, which ran afoul of Blakely's[4] requirement that a jury find those facts. Id. at 294 n.5. Burrus relies on this language in Suleiman: "a determination of whether this crime was far more egregious than the typical vehicular assault also necessarily requires a factual comparison." Id. But that language concerns whether the sentencing court exercised judicial fact finding, it does not create a requirement that the State must provide comparative evidence. Burrus does not cite any case imposing such a requirement. It is within a jury's capability, based on their common sense and common experience, to determine that dousing a person in gasoline, lighting them on fire, and then leaving them to burn is deliberately cruel. See State v. Boyle, 183 Wn. App. 1, 13, 335 P.3d 954 (2014) ("A juror properly

[4] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2533 (2004).

brings his or her opinions, insights, common sense, and everyday life experience into deliberations."). We conclude that the lack of comparative evidence does not mean that insufficient evidence supported the jury's finding of deliberate cruelty.

2. Vagueness

Burrus says the aggravating factor of deliberate cruelty is unconstitutionally vague. He contends that aggravating factors are elements of the charged crime and are thus subject to a vagueness challenge. The State responds that the vagueness doctrine does not apply to the deliberate cruelty aggravating factor, and even if it did, the factor is not unconstitutionally vague. We conclude that the vagueness doctrine does not apply to the aggravating factor of deliberate cruelty.

"We review the constitutionality of a statute de novo." State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). "Vagueness challenges 'are evaluated in light of the particular facts of each case,' unless the First Amendment is implicated." Id. (quoting City of Bremerton v. Spears, 134 Wn.2d 141, 159, 949 P.2d 347 (1998)).

Under the due process clauses of the Washington and United States constitutions, a legal prohibition is "'unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.'" State v. Wallmuller, 194 Wn.2d 234, 239, 449 P.3d 619 (2019) (quoting State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d

712 (2018)); U.S. CONST. amend. XIV; CONST. art. I, § 3. "For purposes of the vagueness doctrine, our cases do not distinguish between state and federal protections." Wallmuller, 194 Wn.2d at 239.

a. State v. Baldwin

Our Supreme Court held in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), that the vagueness doctrine did not apply to the then-existing aggravating factors in the Sentencing Reform Act. Under former RCW 9.94A.120 (2000), the trial court was permitted to impose an exceptional sentence upon finding substantial and compelling reasons to do so. Id. at 458–59. Former RCW 9.94A.390[5] listed aggravating factors, including deliberate cruelty, that the trial court could use to justify an exceptional sentence, but it was not required that a jury find the facts underlying the factors. Id. at 459. The defendant challenged those provisions as unconstitutionally vague. Id. at 457.

The court determined that the vagueness doctrine focuses on two concerns: fair notice of proscribed conduct and preventing arbitrary application of the law. Id. at 458. The court said the doctrine "focus[es] on laws that prohibit or require conduct," and because the sentencing guidelines did not define conduct or allow for arbitrary application, the "due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." Id. at 459.

[5] "The statutes' present equivalents lie in RCW 9.94A.535." State v. DeVore, 2 Wn. App. 2d 651, 661, 413 P.3d 58 (2018).

In reaching its holding, the court noted that the sentencing guidelines "do not inform the public of the penalties attached to a criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature." Id. The court also emphasized, "[f]undamental to both statutes being challenged is the notion that a court is free to exercise discretion in fashioning a sentence." Id. at 460. The court said, "[t]he 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." Id. at 461.

b. Whether Baldwin controls

Burrus says that Blakely invalidates Baldwin's holding. In Blakely, the United States Supreme Court held that under the Sixth Amendment, the facts supporting an exceptional sentence beyond the standard range must be found by a jury. Id. at 296. The Court explained that a court may impose a sentence above the standard range only if a jury finding of an aggravating factor supports an exceptional sentence. Id. In light of Blakely, the legislature amended the Sentencing Reform Act to require that a jury find the underlying facts for an aggravating factor unless limited exceptions apply. See RCW 9.94A.535; RCW 9.94A.537(3). Thus, Burrus contends, the trial court's sentencing decision is no longer discretionary in the way that it was when the court decided Baldwin and its reasoning no longer applies.

Yet this court has rejected the contention that Baldwin no longer applies after Blakely. See State v. DeVore, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018) ("we hold that challenges to the destructive impact factor and other aggravating factors under RCW 9.94A.535(3) do not merit review under the void for vagueness doctrine."); State v. Brush, 5 Wn. App. 2d 40, 63, 425 P.3d 545 (2018) ("We hold that Baldwin remains good law. Accordingly, we apply Baldwin and hold that Brush cannot assert a vagueness challenge to RCW 9.94A.535(3)(h)(i).").

Burrus says that Brush and DeVore incorrectly rely on a determination that a jury's finding of an aggravating factor does not alter the sentencing range. Burrus contends that because a jury's finding of an aggravator allows a court to impose an exceptional sentence up to the statutory maximum, rather than within the standard range, the existence of an aggravating factor does alter the sentencing range. Burrus recognizes that the aggravating factors here do not change the minimum sentence but says that the increase in the allowable sentence length renders the reasoning in Brush and DeVore flawed.

We disagree. As this court noted in Brush, "the aggravating factors in RCW 9.94A.535(3) do not fix sentences or the ranges of sentences for any crime and do not vary any statutory minimum or maximum sentence." 5 Wn. App. 2d at 61; see also DeVore, 2 Wn. App. 2d at 665 ("The trial court must still sentence the defendant within the statutory maximum of the crime"). A jury's finding of deliberate cruelty does "not specify that a particular sentence must be imposed" or "require[ ] a certain outcome." Baldwin, 150 Wn.2d at 461. "RCW 9.94A.535

still provides the trial court with discretionary authority to impose or not to impose an exceptional sentence even when the jury finds an aggravating factor." Brush, 5 Wn. App. 2d at 62.

Burrus also says that the two United States Supreme Court cases that DeVore and Brush cite—Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) and Beckles v. United States, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017)—support his position.

In Johnson, the Court applied the vagueness doctrine to a provision of the Armed Career Criminal Act, which increased the applicable sentence from a maximum of 10 years to a minimum of 15 years. 576 U.S. at 593, 596. The Court stated that the vagueness doctrine applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id. at 596.

In Beckles, the Court held that a provision containing almost identical language to the provision at issue in Johnson was not subject to the vagueness doctrine specifically because the provision was an advisory sentencing guideline. 137 S. Ct. at 892. The Court noted "the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Id. The Court also said that the guidelines "advise sentencing courts how to exercise their discretion within the bounds established by Congress." Id. at 895.

Burrus contends that the aggravating factors in this case are distinguishable from the advisory guidelines in Beckles and therefore are subject

to the vagueness doctrine. Burrus emphasizes that, unlike in Beckles, the "existence of an aggravator is necessary to impose" an exceptional sentence. But Burrus confuses a necessary factor with a sufficient once. Though the jury's finding of deliberate cruelty increases the permissible sentence to the statutory maximum, it does not require an exceptional sentence. As in Beckles, the trial court is still free to exercise its discretion in determining the appropriate sentence.

Burrus also says that because Beckles holds that the vagueness doctrine applies to laws that permit a jury to "prescribe the sentences or sentencing range available," it applies to aggravating factors. Id. at 894–95. Burrus contends that RCW 9.94A.535 is a law permitting the jury to prescribe the sentencing range because it allows the trial court to impose a sentence up to the statutory maximum. But as discussed above, the jury's finding of deliberate cruelty permits but does not require a sentence up to the statutory maximum, which remains unchanged.

In light of the foregoing, we conclude that Baldwin controls here. The trial court's sentencing decision remains discretionary despite Blakely's requirement that a jury find the facts supporting the aggravating factors. Because the jury's finding of deliberate cruelty does not change the statutory minimum or maximum sentence, and does not require a specific sentence, it does not affect a person's ability to know the penalty for certain conduct. See Baldwin, 150 Wn.2d at 459 (noting that the former aggravating factors do not "inform the public of the penalties attached to a criminal conduct nor do they vary the statutory maximum

and minimum penalties assigned to illegal conduct by the legislature."). We conclude that the vagueness doctrine does not apply to the aggravating factor of deliberate cruelty.[6]

We affirm.

Chun, J.

WE CONCUR:

Cobun, J.

Andrus, A.C.J.

[6] Burrus also relies on State v. Allen to say that because aggravating factors are considered elements of a crime, they should be subject to the vagueness doctrine. 192 Wn.2d 526, 544, 431 P.3d 117 (2018) ("The aggravating circumstances therefore no longer meet the definition of "sentencing factors" for Sixth Amendment purposes. They are elements."). But the Allen court determined that aggravating circumstances in a different statutory provision from RCW 9.94A.535, which increased the minimum sentence, were elements for purposes of the double jeopardy analysis. Id. at 533, 544. Allen does not address the vagueness doctrine or the RCW 9.94A.535 aggravators.

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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. 80849-4-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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