NO. 45296-1-II
Cowlitz Co. Cause NO. 12-1-01482-2

# COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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**STATE OF WASHINGTON,**

Respondent,

v.

**NAKIA LEE OTTON,**

Appellant.

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

PAGE

## TABLE OF AUTHORITIES

Page

**Cases**

**Statutes**



**Other Authorities**



**Rules**

## I. PROCEDURAL HISTORY

The appellant was charged by information with assault in the second degree and felony harassment, both crimes were alleged to involve domestic violence. CP 1-2. Prior to trial, the State gave notice of its intent to seek an exceptional sentence above the standard range based on three aggravating factors: (1) unscored misdemeanor convictions, (2) victim vulnerability, and (3) ongoing pattern of domestic violence or deliberate cruelty. CP 6-7. The appellant proceeded to jury trial on August 6, 2013 before the Honorable Judge Pro Tem James Stonier.

After hearing the testimony of the witnesses and arguments of the parties, the jury found the appellant guilty as charged. CP 38, 42. The jury also returned special verdicts finding that the appellant knew or should have known Ms. Dugan was particularly vulnerable, and that her vulnerability was a substantial factor in the commission of the crimes. CP 41. At sentencing, the trial court imposed an exceptional sentence above the standard range, based on the victim vulnerability and unscored misdemeanor aggravating factors, of 30 months in prison for the assault in the second degree. CP 49, 53. The instant appeal timely followed.

## II. STATEMENT OF FACTS

The appellant and Ms. Dugan began dating in 2010. RP 126. At the time of trial, Ms. Dugan was 58 years old, while the appellant was 38. RP 125-26. In October of 2011, Ms. Dugan suffered a brain hemorrhage requiring surgical intervention. In total, Ms. Dugan endured six separate brain surgeries, rendering her disabled and unable to work. As part of her disability, Ms. Dugan also suffers memory problems and has difficulty speaking. RP 123-24, 133.

On December 8th, 2012, Ms. Dugan called 911 to report that she had been assaulted. RP 174-77. When the police arrived, Ms. Dugan appeared to have been crying recently, and was nervous and trembling. Ms. Dugan told the responding officer that she had been asleep in bed when the appellant came home and passed out drunk on the floor. RP 177-79. After a time, the appellant awoke and accused Ms. Dugan of hitting him. The appellant then pinned Ms. Dugan against a wall, while she was sitting in bed, and using his arm to strangle her. RP 179. While strangling her, the appellant also forced Ms. Dugan's head into the wall, and threatened to kill her. Id. The police noticed that Ms. Dugan had injuries to her neck and arm. RP 187-90.

As part of the investigation, Ms. Dugan completed a written statement for the police, detailing the appellant's assault on her. RP 193,

ex. 14. Ms. Dugan made the statement voluntarily, and after being advised the statement was made under penalty of perjury. RP 196-99. However, at trial, Ms. Dugan testified that the appellant had returned home from drinking and simply "flopped" on her in the bed. RP 129-30. Ms. Dugan indicated she had difficulty remembering what had happened due to her brain surgeries, and stated she would not have lied to the police about the incident. RP 133. Ms. Dugan agreed that she wrote the written statement, ex. 14, but denied that the appellant had actually assaulted or threatened her. RP 135-37. The trial court ultimately admitted her written statement, over the appellant's objection, as a prior inconsistent statement under ER 801(d)(1)(i). RP 211-12.

## III. ISSUES PRESENTED

1. Did the trial court err by admitting a prior inconsistent statement under ER 801(d)(1)(i)?

2. Was the appellant's statement to Ms. Dugan a "true threat"?

3. Was the appellants' right to have a jury decide the aggravating factor for unscored misdemeanor history violated?

4. Was there sufficient evidence to support the aggravating factor for victim vulnerability?

## IV. SHORT ANSWERS

1. No.

2. Yes.

3. Yes.

4. Yes.

## V. ARGUMENT

### I. THE TRIAL COURT PROPERLY ADMITTED MS. DUGAN'S PRIOR WRITTEN STATEMENT UNDER ER 801(D)(1)(I).

The appellant argues that the trial court erred by admitting a prior inconsistent statement by Ms. Dugan, ex. 14, under ER 801(d)(1)(i) and State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982). This claim is premised on the theory that Smith was overruled by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, the appellant's argument is incorrect and without any legal basis. This Court should find the trial court properly admitted Ms. Dugan's prior sworn statement.

At trial, the court admitted a prior written statement by Ms. Dugan, sworn under oath, as substantive evidence. Ex. 14. This Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion

occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The appellant's brief concedes the statement at issue was properly admitted under ER 801(d)(1)(i) and the test set forth in Smith, but argues that Smith must be reconsidered in light of the Crawford decision. This argument completely misapprehends the nature of the Crawford holding. At issue in Crawford was whether the admission of hearsay statements, without the opportunity to cross-examine the declarant, violated the confrontation clause of the Sixth Amendment to the United States Constitution. 541 U.S. at 42-43. The Crawford court ultimately held that testimonial hearsay cannot be admitted into evidence unless the defendant has an opportunity to cross-examine the declarant. 541 U.S. at 61-63. The court rejected the prior "reliability" test for satisfying the confrontation clause in favor of actual cross-examination. 541 U.S. at 67-69.

Thus, the Crawford rule is expressly limited to instances were hearsay is admitted without the declarant being available for cross examination by the defendant. 541 U.S. at 59, fn.9; see also State v. Williams, 137 Wn.App. 736, 744-45, 154 P.3d 322 (2007); State v. Mohamed, 132 Wn.App. 58, 130 P.3d 401 (2006); State v. Thach, 129

Wn.App 297, 309, 106 P.3d 782 (2005). Here, Ms. Dugan testified at trial and was extensively cross-examined by the appellant. RP 123-158. The admission of her prior written statement, made under oath, does not violate the confrontation clause or Crawford.

Indeed, this very issue has already been decided by this Court in the Thach case. There this Court addressed the admission of a prior inconsistent statement under ER 801(d)(1)(i) and Smith, and rejected a claim that Crawford precluded the admission of such statements, as the declarant in Thach had testified and was subject to cross-examination. 129 Wn.App. at 309. The appellant's argument is wholly without merit, and should be rejected by this court.[1]

## II. THE APPELLANT'S THREAT AGAINST MS. DUGAN WAS A TRUE THREAT.

The appellant argues there was insufficient evidence at trial for the jury to find that his threat to kill Ms. Dugan was a "true threat". To determine whether particular speech is a criminal "true threat" the court looks to "all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). The "entire context" of the threat

[1] The sole authority cited by the appellant for his position is a decision from a Florida court in 1985. Delgado-Santo v. State, 471 So.2d 74 (Fla. Ct. App. 1985). The case is not controlling, and simply amounts to a foreign court's disagreement with the Washington Supreme Court. As such, it should carry no weight with this Court.

must be considered. State v. Kilburn, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004). As criminalizing speech implicates the protections of the First Amendment, the court must "independently examine the whole record" for "crucial facts." Kilburn, 151 Wn.2d at 50-51; State v. Locke, 179 Wn.2d 1021, 307 P.3d 771 (2013). This determination does not extend to factual determinations of witness credibility. State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006).

Here, the evidence showed that the appellant returned to Ms. Dugan's home late at night and intoxicated, and began arguing with her. The appellant then began beating Ms. Dugan, strangling her and slamming her head against a wall. Ex. 14. RP 177-79. While strangling Ms. Dugan, the appellant told her "[s]ee how easy it would be to kill you." RP 183.

The jury was instructed that for a statement to be a threat it must:

> [O]ccur in a context or under such circumstances where a reasonable person in the position of the speaker would forsee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

RP 273. The definition tracks the legal definition of a true threat. Kilburn, 151 Wn.2d at 43-44. Under this standard, it strains credulity to argue that threatening to kill a person, while strangling them, could be interpreted as "jest or idle talk." A reasonable person making such a statement would necessarily have to realize his words would be taken for a very real threat,

as the statement coincides with an actual attempt to seriously injure another person. There was ample evidence from which the jury, and this Court, could find the appellant's statements were a criminal true threat.

As the statements at issue qualify legally as a true threat, the appellant's guilt on this charge becomes a question of fact for the jury to resolve. On this issue, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, there was more than sufficient evidence to support the jury's conclusion that the appellant's threat to kill Ms. Dugan, in the midst of severely assaulting her, was a true threat. The appellant's conviction for harassment should stand.

## III. THE STATE CONCEDES THE AGGRAVATING FACTOR FOR UNSCORED MISDEMEANOR CONVICTIONS WAS IMPROPER.

The appellant argues that the trial court erred by including a finding that the appellant's prior unscored misdemeanor offenses resulted in the standard range sentence being clearly too lenient. The appellant relies upon State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) and State v. Saltz, 137 Wn.App. 576, 154 P.3d 282 (2007), arguing that the "clearly too lenient" determination is a factual finding that must be made by a jury rather than the trial court.[2] The State concedes that under the controlling case-law this aggravating factor was not properly found, and could not be relied up on by the trial court to impose an exceptional sentence for the appellant. However, as will be seen below, the appellant is not entitled to resentencing as the trial court based its sentence on a separate, valid, aggravating factor.

Even where one of multiple aggravating factors is found invalid, resentencing is unnecessary if the trial court would still have imposed the same sentence. In State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003), the Washington Supreme Court held that:

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[2] Despite these rulings, RCW 9.94A.535(2) on its face still allows for the trial court, without any finding by a jury, to impose an exceptional sentence due to unscored misdemeanor or foreign convictions.

> [w]here the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing.

See also State v. Saltz, 137 Wn.App. 576, 154 P.3d 282 (2007). Here, the trial court specifically found that it would impose the same sentence even if only one of the aggravating factors was valid. CP 52. Based on this finding, remand is unnecessary so long as one of the aggravating factors is upheld by this Court.

## IV. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING FACTOR FOR VICTIM VULNERABILITY.

The appellant next argues there was insufficient evidence to support the jury's finding that Ms. Dugan was particularly vulnerable, and that this vulnerability was a substantial factor in the commission of the crimes. CP 41. The appellant does not dispute that Ms. Dugan was disabled and particularly vulnerable, but claims instead that this was not a substantial factor in the commission of the offense. Specifically, the appellant argues that the crimes were committed because of the relationship between Ms. Dugan and himself, rather than her vulnerability. The appellant cites to State v. Barnett, 104 Wn.App. 191, 195, 16 P.3d 74 (2001) in support of this argument. However, the appellant's reliance on

Barnett is misplaced, and there was sufficient evidence that Ms. Dugan's vulnerability was a substantial factor in the offenses.

Ms. Dugan testified that she was disabled as the result of brain hemorrhaging in October of 2011 that led to six subsequent surgical interventions. RP 123-24. As a result, Ms. Dugan was able to work and has difficult speaking. RP 125,128. Additionally, Ms. Dugan's condition requires her to take medication to prevent further seizures from occurring. RP 125. Ms. Dugan's memory is also affected by her disability, and she occasionally suffers from "blackouts". RP 133, 137. Plainly, Ms. Dugan is severely disabled and vulnerable.

Whether a victim is "particularly vulnerable" as to justify an exceptional sentence is a question of fact that is reviewed to determine whether there are sufficient facts in the record to support the fact-finder's conclusion. State v. Suleiman, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). The appellant argues that under State v. Barnett, there is insufficient evidence that Ms. Dugan's disability caused the appellant to assault her. However, in Barnett, the court found that the victim, a healthy 17 year old, was not vulnerable as she suffered from no disability but was instead simply attacked while home alone. 104 Wn.App. at 205. Thus, Barnett is better characterized as a case where the "vulnerable victim" aggravating

factor was inappropriate as the victim was not in fact vulnerable. Clearly that is not the case here.

The appellant attempts to argue that Ms. Dugan's vulnerability must be the cause for the crime having occurred.[3] This claim lacks any grounding in the plain text of RCW 9.94A.535(3)(b), which does not require any sort of "but for" causation. Instead, the analysis under the statute is whether the victim was more vulnerable than a typical person. State v. Ogden, 102 Wn.App. 357, 7 P.3d 839 (2000). Clearly, Ms. Dugan is more vulnerable than a typical person, given her significant physical and cognitive limitations. The second step of the analysis if whether the victim's vulnerability is a "substantial factor" in the commission of the offense, not whether the vulnerability somehow caused or was the sole reason for the offense as argued by the appellant.

In State v. Gore, 143 Wn.2d 288, 318, 21 P.3d 262 (2001), the Washington Supreme Court upheld an exceptional sentence based on victim vulnerability where the defendant targeted young girls of small stature for rape. Notably, the court did not require that this be the *only* reason the defendant targeted the victims, but only that it was a substantial factor. The court noted that the small size of the victims aided the defendant in overpowering them. Id. See also State v. Ford, 87 Wn.App.

[3] Appellant's brief at 21.

794, 942 P.2d 1064 (1997) (exceptional sentence for vulnerable victim properly imposed where defendant attacked elderly and disabled men); State v. Ritchie, 126 Wn.2d 388, 398, 894 P.2d 1308 (1995) (exceptional sentence for vulnerable victim proper where the victim was disabled and in poor health.)

Here, Ms. Dugan was disabled and suffering the effects of multiple brain surgeries. In addition, her ability to speak and communicate was impaired as a result of her condition, and she was significantly older than the appellant. Her condition rendered her more vulnerable to the appellant's attack than the average person, and allowed him to easily overpower and strangle her. Additionally, Ms. Dugan's difficulty communicating and recalling events made her more vulnerable, as her ability to report the crime to the police or courts was significantly impaired. There was more than sufficient evidence to support the jury's finding that Ms. Dugan's vulnerability was a substantial factor in the commission of the offense. See Gore.

Thus, there is a proper basis for the "vulnerable victim" aggravating factor. The trial court specifically noted that it would impose the same sentence even if only one of the factors was valid. CP 52. Given this, it is unnecessary to remand the case for resentencing, as this Court can be confident that the trial court would necessarily impose the same

sentence again. See Jackson, 150 Wn.2d at 276, State v. Cardenas, 129 Wn.2d 1, 13, 914 P.2d 57 (1996). This Court should uphold the exceptional sentence at issue here.

## VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal. The appellant has failed to show any error justifying relief. The State asks this Court to affirm the judgment and sentence in this cause.

Respectfully submitted this 12th day of June, 2014.

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**CERTIFICATE OF SERVICE**

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 12th 2014.

Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## June 12, 2014 - 1:18 PM

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