73107-6

COA No. 73107-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEAN LAWARD GRAHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Theresa B. Doyle

REPLY BRIEF

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A. REPLY ARGUMENT

1. Summary. Mr. Graham has argued that the sentencing court erred because the evidence failed to prove that the victim, corrections officer Letrondo, was particularly vulnerable, much less in a manner that was a substantial factor in the crime, and further because the court committed legal error (reviewed *de novo*) because the facts do not distinguish the defendant's crime so as to justify an exceptional sentence.

This case involved a typical, violent first degree assault committed by physical beating. The defendant surprise-attacked the officer by punching and hitting him to the ground, and then stomping on him, causing a subdural hematoma among other injuries. Below, the prosecutor secured the guilty verdict by arguing to the jury that Mr. Graham's preceding threats showed that he commenced his assault while harboring a long-percolating intent to use force likely to cause Letrondo great bodily harm or death.

2. The general rule. The general rule is that "particular vulnerability" as a substantial factor requires a showing that the defendant knowingly committed the crime against a person who was

particularly vulnerable at the outset – not a victim who became increasingly helpless as a result of the very physical assault itself. Here, nothing about this routine commission of an admittedly serious crime provides sufficient evidence for a particular vulnerability determination, and further, the court committed legal error because the manner of the commission of the crime does not distinguish the offense so as to justify an exceptional sentence. Appellant's Opening Brief, at pp. 12-25 (citing, inter alia, State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986); State v. Barnett, 104 Wn. App. 191, 204, 16 P.3d 74, 81 (2001); State v. Ogden, 102 Wn. App. 357, 367–68, 7 P.3d 839 (2000), review denied, 143 Wn.2d 1012 (2001); State v. Baird, 83 Wn. App. 477, 489, 922 P.2d 157 (1996)).

3. State's Response. The State responds **(a)** that this case is so much like the unique and special facts of Ogden and Baird that it, too, as those cases did, falls permissibly outside the general rule; and **(b)** that this Court may review the evidence and find the aggravating factor proved pursuant to the appellate prosecutor's newly-imagined theory of guilt that the assault crime did not

commence until that point in time at which Officer Letrondo was already knocked to the ground by the defendant's initial attack – and therefore, Mr. Graham on that basis can be deemed to have attacked a victim who was "vulnerable." Brief of Respondent, at pp. 26-33.

4. The State's first response fails under the case law, as argued in the Opening Brief. The Ogden and Baird cases involved rare, special facts that allowed affirmance of an exceptional sentence despite – at first blush – seemingly involving victims who were not vulnerable at the outset, in contravention of the general rule. Mr. Graham's Opening Brief argues extensively that these cases are not like his case, in which the defendant attacked the victim by an uninterrupted continuing physical beating by the single instrumentality of his fists and kicks. Appellant's Opening Brief, at pp. 12-25.

The appellant therein addressed the Respondent's anticipated contention that this is a case where the crime was followed by "gratuitous additional injuries." BOR, at p. 28 (emphasis added). This assertion fails on its face because the defendant was specifically

charged with that alternative of assault that requires proof he used force or means likely to cause great bodily harm or death. RCW 9A.36.011. The State's evidence of the severity of the ongoing attack was necessary to meet that standard for sufficient evidence to convict for the base, underlying crime. Appellant's Opening Brief, at pp. 19-20.

The appellant also addressed the Respondent's anticipated contention that the Ogden case's difference from this case – that the crime there was not assault as it is here – does not matter. BOR, at p. 31. In fact, it matters tremendously. Because the crime in Ogden was felony murder by death occurring in the course of a robbery, it was tenable to deem the victim particularly vulnerable because the perpetrator used violent force to take the victim to the ground and obtain the person's property, but also inflicted further, particularly gratuitous, deliberate acts of physical disfiguration – including carving of incisions on the victim's face while the victim was prone. Appellant's Opening Brief, at pp. 14-16 and n. 5; Ogden, 102 Wn. App. at 363-68.

The Respondent's additional statement that this case is like Ogden because Mr. Graham was a person who "finds a person lying on the ground" and then commits the crime is also directly contradictory to the record – these were plainly not the facts below. BOR, at p. 31.

The appellant also addressed the Respondent's anticipated contention that it does not matter that the defendant in Baird was charged with assault by a different alternative means than Mr. Graham here. BOR, at pp. 31-32. In Baird, it was highly consequential that that the first degree assault of which Mr. Baird was guilty was committed by and charged under the actual causing of great bodily harm, pursuant to the facts which showed that the perpetrator gradually rendered the victim unconscious by striking, but then took her downstairs, where, over time, he systematically and surgically cut off her nose and eyelids – injuries that were inflicted on a person who was purposefully rendered vulnerable by other, earlier, different means, at another location. Baird, 83 Wn. App. at 480-89; Appellant's Opening Brief, at pp. 16-17.

In this case, Mr. Graham was charged with an assault with intent to cause great harm or death, and the facts showed a single ongoing physical attack. The crime of conviction in the present case was an routine first degree assault proved by a violent beating attack on another.

Of course, for all of the same foregoing reasons, the evidence fails to support the special jury verdict under the jury instructions that required that there be a particular vulnerability that was a substantial factor in the commission of the offense. Appellant's Opening Brief, at p. 10 and n. 3; CP 199, CP 201. The evidence is insufficient to prove anything more.

And finally, as argued, the trial court committed legal error when it imposed the sentence because there was no vulnerability that constituted a substantial and compelling basis to justify a sentence outside the standard range. Appellant's Opening Brief, at pp. 8-10 (citing, inter alia, RCW 9.94A.537 and State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (relying on RCW 9.94A.585(4)).

This question, reviewed *de novo*, also requires reversal because the answer must be "no" where the putative vulnerability was

merely a level of physical helplessness that arose during the mid-point of a routine first degree assault by physical beating.

5. <u>The State's second response is impermissible and further violates Mr. Graham's Due Process rights and violates his right to appeal</u>. Recognizing that the facts of the assault as proved below do not fit the aggravating factor statute or the Washington cases explicating it, the Respondent urges this Court repeatedly that the Court need only shut its eyes to the manner of proof at trial and ask whether a jury could find particular vulnerability under any possible configuration of the facts – including the State's newly-arisen, re-jiggered configuration, which was not the theory below, and is a theory Sean Graham therefore had no opportunity to defend or argue against. BOR, at pp. 28-29, 33.

As argued above, no rational jury could find facts satisfying the particular vulnerability factor.

But further, in a case where the important question is whether the defendant's crime meets a standard of such aggravation as to warrant exceptional punishment, or whether the facts demonstrate merely a routine commission of the crime, the

Respondent is not permitted to defend against the sufficiency challenge by articulating a new theory of guilt that is contrary to that elected by the deputy prosecuting attorney at trial.

Elections have consequences. For example, a prosecutor's election in closing argument of a particular set of trial facts rather than another, upon which to rely to prove the crime, will defeat a defendant's argument that the jury was non-unanimous and that some jurors might have relied on an insufficient basis for guilt. This applies both to a theory of factual guilt relied on by the prosecutor, and to reliance on a particular statutory alternative of proving the crime. And accordingly, the failure to elect will prevent the State from obtaining appellate affirmance under an argument that certain facts sufficiently proved the crime or the alternative means, despite other facts not doing so. See State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); Wash. Const. art. 1, § 21, 22; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005).

For this reason, the Respondent cannot be heard on appeal to argue that the victim was "particularly vulnerable" by positing a

factual theory that Mr. Graham did not commence his assault until at that point in time when Officer Letrondo was lying prone on the ground.

The Respondent's re-ordering of the facts in this artificial manner is contrary to common sense, in addition of course to being directly contrary to the prosecutor's theory of guilt below.

Furthermore, such an argument by the State, if successful as a defense to the sufficiency challenge, violates Mr. Graham's right to appeal, and therefore his right under Due Process to challenge his conviction as based upon insufficient evidence.

The right to appeal comes from Washington's Const. art. 1, sec, 22 (amendment 10), which grants a "right to appeal in all cases." See State v. Sweet, 90 Wn. 2d 282, 286, 581 P.2d 579, 581 (1978); State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959). The important right to appeal is an essential tool for preventing erroneous convictions and maintaining the integrity of the criminal justice system. City of Seattle v. Klein, 161 Wn. 2d 554, 566-67, 166 P.3d 1149, 1156 (2007) (citing Sweet, 90 Wn.2d at 286) (and also holding that the right to appeal from a trial is the protection a party

possesses to challenge a detrimental judgment in violation of Due Process under the Fourteenth Amendment and Article 1, sec. 3 of the state constitution).

However, if the standards of sufficiency for an aggravating factor distinguishing the crime, can be deemed met by virtue of the Respondent's advancement of a theory of guilt that is directly contradictory to the theory that was advanced at trial in order to secure Mr. Graham's conviction, then there truly are no standards by which an appellant can measure the evidence against him in comparison to the legal requirements for sufficiency. If there is no standard for sufficiency, Due Process is violated.

6. Vagueness. Finally, the defendant has a Due Process right to be convicted under a statutory aggravating factor that is not so vague that it would in fact permit the prosecutor to defend the appeal in the manner being attempted by the State here.

If the State can persuade the lay jury in one way and then defeat a sufficiency challenge by arguing the diametric opposite in order to avoid reversal in a case where the State's theory below was persuasive but legally erroneous, then not only are there no

standards against which Mr. Graham can argue insufficiency of the evidence, but there are also, truly, no discernible standards whatsoever for enforcement of the factor. The Respondent writes that it does not understand Mr. Graham's citation to Valerio v. Crawford, 306 F.3d 742, 756-57 (2002), cert. denied sub nom. McDaniel v. Valerio, 538 U.S. 994 (2003), but that case stands for the proposition that narrowing case law promulgated by the appellate court can render an overbroad statute non-vague -- yet remarkably, in this case, the appellate prosecutor is effectively admitting to this Court of Appeals that the only way to defend the conviction is to stretch the law's boundaries even *more* broadly -- thus *increasing* the factor's vagueness.

The State's argument on appeal completely abandons any pretense of the notion that there should be a discernible standard against which a criminal defendant on appeal can measure the evidentiary sufficiency of the aggravating factor on which his exceptional prison sentence is premised.

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Graham asks that this Court reverse his conviction and sentence.

Respectfully submitted this 29th day of February, 2016.

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	)	NO. 73107-6-I
v.	)	
	)	
SEAN GRAHAM,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] IAN ITH, DPA [paoappellateunitmail@kingcounty.gov] [ian.ith@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( )	U.S. MAIL
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	(X)	AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF FEBRUARY, 2016.

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