73350-8

73350-8

No. 73350-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PETERSON BARZIE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura C. Inveen

BRIEF OF APPELLANT

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1. When the aggravating circumstance of aggravated domestic violence was established by evidence of Mr. Barzie's prior criminal convictions, the exceptional sentence based on the aggravating circumstance constituted multiple punishments for the same criminal conduct, in violation of the double jeopardy provisions of Amendment V and Article I, section 9.

2. Supplemental Jury Instruction No. 3 was an improper judicial comment on the evidence, in violation of Article IV, section 16.

3. Supplemental Jury Instruction No. 3 impermissibly relieved the State of its burden of proving every element of the aggravating factor beyond a reasonable doubt, in violation of due process clauses of Amendments V and XIV and Article I, section 3.

4. The trial court erred in giving Supplemental Instruction No. 3.

5. The trial court impermissibly engaged in judicial fact-finding when it found aggravated domestic violence was a "substantial and compelling reason[] justifying an exceptional sentence," in violation of the Amendments VI and XIV and Article I, sections 21 and 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prohibition against double jeopardy protects an individual from multiple punishments for the same offense. Here, to prove the

aggravated circumstance of aggravated domestic violence based on an on-going pattern of abuse manifested by multiple incidents over a prolonged period of time, the State relied on evidence of Mr. Barzie's prior convictions for which he already had been punished and which already were reflected in his offender score. Did Mr. Barzie's exceptional sentence based on his prior convictions violate the double jeopardy provisions of the federal and state constitutions?

2. A trial court may not comment on the evidence. Here, when instructing on the aggravating circumstance that "the offense was part of an ongoing pattern of abuse of the same victim manifested by multiple incidents over a prolonged period of time," the judge instructed "prolonged period of time" meant "more than a few weeks." Was this instruction an improper judicial comment on the evidence?

3. The right to due process requires the State bear the burden of proving every essential element of an aggravating circumstance beyond a reasonable doubt. An essential element of the aggravating circumstance of aggravated domestic violence is "the offense was part of an ongoing pattern of abuse of the same victim manifested by multiple incidents over a prolonged period of time." Here, when the judge instructed "prolonged period of time" meant "more than a few weeks," did the instruction relieve

the State of its burden of proof, in violation of Mr. Barzie's right to due process?

4. The right to trial by jury guarantees a criminal defendant the right to a jury finding of any fact that increases a punishment above the standard range. Here, the court found the special verdict of aggravated domestic violence constituted a "substantial and compelling reason" to impose an exceptional sentence above the standard range. Was this finding a judicial fact-finding, in violation of Mr. Barzie's right to trial by jury?

C. STATEMENT OF THE CASE

Peterson Barzie and Amelia Sasu met in 2005 when Ms. Sasu was visiting family in Seattle, Washington, and they began a romantic relationship. RP 406. At the time, Ms. Sasu lived in New York City and Mr. Barzie visited her after she returned home. RP 406, 409. In New York City, they argued frequently, Mr. Barzie displayed jealousy, and he choked her on one occasion. RP 411. Even so, they remained in contact after the visit. RP 415.

In 2007, Ms. Sasu moved to Seattle to be with her family and in early 2008, Mr. Barzie moved in with her. RP 402-03, 416. Their relationship was tumultuous and they broke up frequently until they finally ended the relationship in late 2013. RP 448.

In August 2014, Ms. Sasu entered into a romantic relationship with Onoya Okonda. RP 452. About one month later, Mr. Okonda received a telephone message from Mr. Barzie threatening to shoot him if he was seen with Mr. Barzie's "girl." RP 315. Mr. Okonda did not think that Mr. Barzie was referring to Ms. Sasu. RP 318. On October 18, 2014, Mr. Okonda ran into Mr. Barzie at a party and he wanted to clear up the misunderstanding but Mr. Barzie pushed Mr. Okonda and seemed to want to fight. RP 316-319. Mutual friends kept the two men apart and Mr. Okonda left the party. RP 319, 324. As he was leaving, Mr. Barzie waved "something like a gun" and yelled, "Whenever I see you, see what I'm gonna do to you." RP 319, 325.

Several weeks later, on November 7, 2014, Ms. Sasu and Mr. Okonda were at home when they heard a loud banging on the front door and Mr. Barzie calling for Ms. Sasu. RP 338-39. Mr. Okonda went into the bedroom to call 911 and Ms. Sasu went outside where she argued with Mr. Barzie and told him to leave. RP 339-40, 525-26, 466. Mr. Barzie lifted up his shirt to show a gun in his waistband, and he said, "Well, I'm just gonna let you know the next time I see you and your boyfriend around my territory I'm gonna blow your head off." RP 467. Ms. Sasu went back inside and repeated the threat to Mr. Okonda. RP 340, 343.

Mr. Barzie was charged with felony harassment of Mr. Okonda, alleged to have occurred on October 18, 2014 (Count 1), felony harassment, aggravated domestic violence, of Ms. Sasu, alleged to have occurred on November 7, 2014 (Count 2), and felony harassment of Mr. Okonda, alleged to have occurred on November 7, 2014 (Count 3). CP 12-13.

At trial, Ms. Sasu described five specific incidents of violence or threats of violence against her by Mr. Barzie between 2008 and 2014, in addition to the charged incidents. RP 418-21, 421-24, 426-27, 429-33, 434-38. The police were called for at least two of the incidents. RP 427, 463. Based on their history, both Ms. Sasu and Mr. Okonda believed Mr. Barzie would kill them at some point. RP 343, 549.

Mr. Barzie was convicted on Count 1 of the lesser offense of harassment, and convicted as charged on Counts 2 and 3. CP 95, 96, 137. At a bifurcated aggravator hearing, the jury was instructed, *inter alia*, a "'prolonged period of time' means more than a few weeks." CP 104. The jury returned a special verdict that Count 2 was an aggravated domestic violence offense. CP 100.

With an offender score of '4,' Mr. Barzie faced a standard range sentence on the felony convictions of 12+-16 months. The court found that the special verdict constituted a substantial and compelling reason to

impose an exceptional sentence on Court 2. CP 129. The court imposed a sentence of 364 days on Count 1, an exceptional sentence of 40 months on Count 2 based on the special verdict, and a standard range sentence of 16 months on Count 3. CP 118, 123, 125.

Mr. Barzie appeals the exceptional sentence.

D. ARGUMENT

1. The exceptional sentence based on Mr. Barzie's prior convictions that were already reflected in his offender score violated the prohibition against double jeopardy.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a defendant from multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). Accordingly, an exceptional sentence above the standard range must be based on factors other than those necessarily reflected in an offender score. *State v. Bartlett*, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995); *accord State v. Barnes*, 117 Wn.2d 701, 706, 818 P.2d 1088 (1991) (any factor used in calculating the presumptive range may not also be relied upon as an aggravating factor).

Mr. Barzie's exceptional sentence was based, in part,[1] on the jury finding that his conviction for harassment of Ms. Sasu was an aggravated domestic violence offense, pursuant to RCW 9.94A.535(3)(h)(i), which provides in relevant part:

> (h) The current offense involved domestic violence, as defined in RCW 10.99.020 ... and ...
> (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; ....

The only evidence presented at the aggravator hearing was certified copies of six judgments and sentences for Mr. Barzie's prior convictions. Ex. 11-16. As the State acknowledged in its opening statement at the aggravator hearing, "So, what you're gonna be relying on in this phase is the testimony of Ms. Sasu and then also I have certified documents of Mr. Barzie's prior criminal convictions, specifically domestic violence criminal convictions." RP 781.

The judgments and sentences establish the existence of the convictions but they do not include any of the facts underlying the convictions.[2] Because these convictions were necessarily reflected in his

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[1] The exceptional sentence was also based on the judicial finding that substantial and compelling reasons justified the sentence. *See* Section (D)(3), *infra*.

[2] The prior convictions consist of a 2011 conviction for felony violation of a no-contact order, domestic violence (Ex. 11), a 2009 conviction for felony violation of a no-contact order, domestic violence (Ex. 12), a 2008 convictions for misdemeanor violation of a no-contact, domestic violence, and harassment, domestic violence (Ex. 13), a 2008

offender score, imposition of an exceptional sentence above the standard range based on the prior convictions already reflected in Mr. Barzie's offender score constituted multiple punishments for the same offenses, in violation of double jeopardy.

In *Barlett*, the defendant was convicted of murder in the second degree with a predicate offense of assault in the second degree that resulted in the death of his infant son. 128 Wn.2d at 327-28. He faced a standard range sentence of 144-196 months but the court imposed an exceptional sentence of 432 months based in part on a finding that the defendant "exhibited a callous disregard for human life indicative of an especially culpable mental state." *Id.* at 328. As evidence of the defendant's mental state, the court relied primarily on the defendant's prior conviction for assault in the second degree of his other son when the son was an infant. *Id.* at 328-29. On appeal, the defendant challenged reliance on his prior conviction to justify the exceptional sentence for his current conviction. *Id.* at 331. The Court stated:

> Prior convictions are already accounted for in calculating the offender score and should not be counted a second time in imposing a sentence outside the standard range. But while courts may not use the fact of a prior conviction alone to justify an exceptional sentence, there is no prohibition against drawing from the **facts** of a prior

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conviction for felony violation of a no-contact order, domestic violence (Ex. 14), a 2008 conviction for assault in the fourth degree (Ex. 15), and misdemeanor violation of a no-contact order and theft (Ex. 16).

> conviction, if they relate to the present case, to show extraordinary circumstances justifying a departure from the standard range.

Id. at 333 (emphasis added).

By contrast here, the judgments and sentences do not set forth any underlying facts upon which the fact-finder could draw to prove the alleged aggravating circumstance. Five of the six prior convictions were for violation of a no-contact order, but there were no facts regarding the circumstances of the contact, such as whether the contact was requested or initiated by Ms. Sasu. Therefore, the mere fact of the prior convictions does not establish a "pattern of psychological, physical, or sexual abuse," to support the exceptional sentence.

Mr. Barzie's exceptional sentence based on his prior convictions for which he was already sentenced and which were reflected in his offender score constituted multiple punishments for the same offenses, in violation of the prohibition against double jeopardy. Reversal of the exceptional sentence is required.

2. The court's instruction that a "prolonged period of time" meant "more than a few weeks" was an impermissible comment on the evidence and relieved the State of its burden of proof.

Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor

comment thereon, but shall declare the law." A comment on the evidence "invades a fundamental right" and may be challenged for the first time on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judicial comment on the evidence is presumed prejudicial and is harmless only if the record affirmatively demonstrates no prejudice could have occurred. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

In addition, a court may not instruct the jury in a way that relieves the State of its burden of proving each element of an aggravating factor beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); U.S. Const. amends. VI, XIV; Const. art. I, § 3.

As discussed, the State alleged Count 2 was committed as part of an ongoing pattern of abuse over a prolonged period of time and constituted aggravated domestic violence. The phrase "prolonged period of time" is not defined by statute and is a factual question to be determined by the jury. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Nonetheless, the court defined the phrase to mean "more than a few weeks," thereby implying that any time period greater than "a few weeks" necessarily qualified as a "prolonged period of

time." CP 104 (Supplemental Instruction No. 3). In fact, in closing argument at the aggravator hearing, the prosecutor stated, "Your question is whether or not this went on for longer than a few weeks." CP 786.

The court's definition was taken directly from Washington Pattern Jury Instruction: Criminal (WPIC) 300.16, which has been since ruled erroneous. In *State v. Brush*, the Court held the definition of "prolonged period of time" in WPIC 300.17 represented an incorrect interpretation of case law. 183 Wn.2d 550, 557, 353 P.3d 213 (2015). The Court noted WPIC 300.17 purported to follow *State v. Barnett*,[3] where the Court of Appeals reversed an exceptional sentence based on a pattern of abuse occurring over two weeks, and stated, "[t]wo weeks is not a prolonged period of time." *Id.* at 557-58. The Court concluded that, although *Barnett* ruled two weeks was not a prolonged period of time, it did not hold that a pattern of abuse occurring for more than two weeks was necessarily sufficient to prove the aggravator. *Id.*

The Court further held WPIC 300.17 constituted an improper comment on the evidence and relieved the State of its burden of proof by implying that any abuse for more two weeks necessarily occurred over a "prolonged period of time." *Id.* at 559. Accordingly, the Court reversed

[3] 104 Wn. App. 191, 203, 16 P.3d 74 (2001).

Mr. Brush's exceptional sentence and remanded with instructions to, if requested, impanel a jury to determine whether the evidence established a "prolonged period of time" under proper instructions. *Id.* at 559-60.

The definition of "prolonged period of time" here is identical to that disapproved in *Brush*. Therefore, Mr. Barzie's exceptional sentences on based on the improper instructions must be reversed.

3. The judicial fact-finding that the aggravating circumstance was a "substantial and compelling reason" for imposition of an exceptional sentence violated Mr. Barzie's right to trial by jury.

The constitutional rights to due process and to trial by jury guarantee a jury finding beyond a reasonable doubt every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. *Blakely*, 542 U.S. at 298; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. VI, XIV; Const. art. I, sec.21, 22. The State must submit to a jury any fact upon which it seeks to increase punishment. *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *State v. Dyson*, 2015 WL 4653226, at *5-6 (Wash. Ct. App. Aug. 6, 2015).

Pursuant to the Sentencing Reform Act (SRA), imposition of an aggravated sentence is a two-step process. First, for most aggravators, a jury must find beyond a reasonable doubt the factual basis for a departure

from the standard range. RCW 9.94A.537(3), (4). Second, the sentencing court must determine whether the jury's finding constitutes a substantial and compelling reason to depart from the standard range. RCW 9.94A.537(6). Accordingly here, the jury found Count 2 was an aggravated domestic violence offense and the sentencing court made the judicial finding that the aggravating circumstance constituted a substantial and compelling reason to impose an exceptional sentence above the standard range. CP 100, 129.

This two-step process violates *Blakely*. A jury finding of an aggravating circumstance does not, in itself, increase the standard range. The standard range is only increased when the jury finding is combined with the judicial finding of substantial and compelling reasons. Therefore, both the aggravating circumstance and the fact of substantial and compelling reasons must be submitted to a jury to comply with *Blakely*.

Moreover, the phrase "substantial and compelling reasons" is not defined in the SRA. By judicial construct, substantial and compelling reasons must "take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987), quoting *State v. Nordby,* 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

The exceptional sentence provisions of the SRA were adopted from Minnesota. *Nordby*, 106 Wn.2d at 521 n.1, citing D. Boerner, *Sentencing in Washington* § 9.3, at 9-6 (1985). Accordingly, Minnesota decisions regarding substantial and compelling reasons are "especially persuasive authority for Washington courts." *Id.* In *State v. Jones*, the Minnesota Supreme Court stated, "[s]ubstantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question." 745 N.W.2d 845, 848 (Minn. 2008) (internal citations omitted). Thus, a finding of "substantial and compelling reasons" necessarily requires an assessment of the evidence and a factual determination that the case before the court is atypical. As such, a finding of "substantial and compelling reasons" is inherently a factual finding, which can only be made by a jury.

In *Blakely*, the Court stated:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*[4]), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

542 U.S. at 305. The Court added in a footnote:

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[4] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

> Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

Id. at 305 n.8. However, this statement and footnote are *dicta* only, as the question of whether a judicial finding of substantial and compelling reasons violated a defendant's jury trial right was not before the Court.

Mr. Barzie recognizes that the above *dicta* have been interpreted as casting the "substantial and compelling reasons" finding as a question of law that may be decided by the court. *See, e.g.*, *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006) ("[A]fter *Blakely,* ... [t]he trial judge was left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence."); *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005) ("*Blakely* left intact the trial judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence under RCW 9.94A.535. That decision is a legal judgment which, unlike factual determinations, can still be made by the trial court."). This is incorrect.

A "question of law" is defined as:

> **1.** An issue to be decided by the judge, concerning the application or interpretation of the law <a jury cannot decide questions of law, which are reserved for the court>. See *legal issue* under issue (1). **2.** A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion <the enforceability of an arbitration clause is a question of law>. **3.** An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is <both parties appealed on the question of law>. See *issue of law* under issue (1). **4.** An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury <whether a contractual ambiguity exists is a question of law>. — Also termed *legal question*; *law question.*

Black's Law Dictionary (10th ed. 2014). A "question of fact" is defined as:

> **1.** An issue that has not been predetermined and authoritatively answered by the law. • An example is whether a particular criminal defendant is guilty of an offense or whether a contractor has delayed unreasonably in constructing a building. **2.** An issue that does not involve what the law is on a given point. **3.** A disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial. — Also termed *fact question.* See fact-finder. **4.** An issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion.

Black's Law Dictionary (10th ed. 2014).

A finding of "substantial and compelling reasons" falls within the definition of "question of fact," rather than "question of law." The finding does not involve an issue concerning the application or interpretation of the law, a question of law that has been authoritatively answered, or an

issue about what the law is on a particular point. The fact that the Legislature delegated to courts the authority to make the finding neither negates nor outweighs the constitutional right to a jury finding beyond a reasonable doubt of every fact essential to the imposition of an exceptional sentence.

In *State v. Alvarado*, in the context of a standard range sentence is "clearly too lenient," the Court noted that a jury fact-finding is not necessary "when a sentencing provision allows an exceptional sentence to flow *automatically* from the existence of free crimes." 164 Wn.2d 556, 568, 192 P.3d 345 (2008) (emphasis in original); *accord State v. Mutch*, 171 Wn.2d 646, 657, 254 P.3d 803 (2011). However, a finding of "substantial and compelling reasons" does not flow automatically from a jury fact-finding of the existence of an aggravating circumstance. Rather, that finding requires a factual determination similar to that involved in the aggravated circumstances of deliberate cruelty or egregious lack of remorse, both of which must be found by a jury. RCW 9.94A.535(3)(a), (q).

The judicial fact finding that substantial and compelling reasons justified the exceptional sentence violated Mr. Barzie's constitutional right to a jury determination beyond a reasonable doubt of every fact necessary

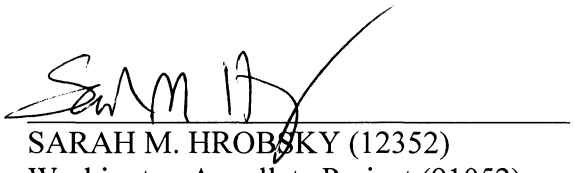
for imposition of a sentence above the standard range. The exceptional sentence must be reversed.

E. CONCLUSION

For the foregoing reasons, Mr. Barzie requests this Court reverse his exceptional sentence and remand for re-sentencing.

DATED this 30th day of October 2015.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. PETERSON BARZIE., Appellant.	)))))))))	NO. 73350-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF OCTOBER, 2015.

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