FILED
SUPREME COURT
STATE OF WASHINGTON
9/13/2018 4:35 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. _________

Court of Appeals No. 35071-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANA JO CHAVEZ,

Appellant.

ON REVIEW FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR ASOTIN COUNTY

PETITION FOR REVIEW

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER……………………………..……….1

B. COURT OF APPEALS DECISION……………………..…...……….1

C. ISSUES PRESENTED FOR REVIEW………………………………1

D. STATEMENT OF THE CASE……………………………………..1

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED…………..5

1. There is insufficient evidence to support the finding of an aggravating circumstance of a particularly vulnerable victim…...………………………………………………..….5

   i. There is insufficient evidence that Ms. Chavez knew of Mr. Mingus's vulnerability……………….……………..7

   ii. There is insufficient evidence that Mr. Mingus was *particularly* vulnerable………………………………...8

F. CONCLUSION……………………………………………………10

G. CERTIFICATE OF SERVICE…..…………………………………..11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996)…...................4, 9, 10

State v. Ferguson, 142 Wn.2d 631, 15 P.3d 1271 (2001)…………………7

State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990)…………………7

State v. McAlpin, 108 Wn.2d 458, 740 P.2d 824 (1987)………...………..6

State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986)…………..……2, 6, 7

State v. Pappas, 176 Wn.2d 188, 289 P.3d 634 (2012)………...………5, 7

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)……………….....6

State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010)……………………5

State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006)…………..…..3, 6

Washington Court of Appeals Decisions

State v. Crutchfield, 53 Wn. App. 916, 771 P.2d 746 (1989)……………..8

State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009)……………......7

State v. Jackmon, 55 Wn. App. 562, 778 P.2d 1079 (1989)………………8

State v. Jones, 59 Wn. App. 744, 801 P.2d 263 (1990)……………….......7

State v. Nguyen 68 Wn. App. 906, 847 P.2d 936 (1993)……………….....7

State v. Morris, 87 Wn. App. 654, 943 P.2d 329 (1997)…………..…...6

State v. Ross, 71 Wn. App. 556, 861 P.2d 473 (1993)…………………….....7

State v. Thomas, 57 Wn. App. 403, 788 P.2d 24 (1990)…………………..3

State v. Vermillion, 66 Wn. App. 332, 832 P.2d 95 (1992)……………….....7

Statutes

RCW 9.94A.535……………………………………..…………1, 5

RCW 9.94A.537………………………………………………..….2, 5

A. IDENTITY OF PETITIONER

Petitioner, Tana Jo Chavez, through her attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

Ms. Chavez requests review of the unpublished opinion of the Court of Appeals in 35071-1-III, filed on August 14, 2018. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. There is insufficient evidence to support the finding of an aggravating circumstance of a particularly vulnerable victim.

D. STATEMENT OF THE CASE

Ms. Chavez was charged with one count of Vehicular Homicide by DUI from an incident alleged to have occurred on August 29, 2016 regarding alleged victim Charles Mingus. CP 1. The State filed notice of intent to seek an exceptional sentence above the standard sentencing range pursuant to RCW 9.94A.535(3)(b), based on the alleged particular vulnerability of the victim. CP 16.

Ms. Chavez agreed to waive her right to a jury trial and instead proceed with a stipulated facts trial. CP 17, 22. Ms. Chavez did not stipulate to facts regarding the aforementioned aggravator of particularly vulnerable victim. RP 27-29; CP 26. The parties then presented stipulated

facts for the court to review at trial, which Ms. Chavez signed. CP 23-27. The court reviewed the stipulated facts, which stated the following, in summary.

On August 29, 2016, Ms. Chavez was driving a pickup truck and turned left from an intersection when the traffic light for her lane was green. CP 24. Mr. Mingus, who was ninety years old, was operating a motorized wheelchair which was marked with an orange flag. CP 24. Mr. Mingus was crossing the marked crosswalk to the left of Ms. Chavez, which had a "walk" traffic signal. CP 24. Ms. Chavez's vehicle then collided with Mr. Mingus as she was making a left-hand turn. CP 24.

Law enforcement contacted Ms. Chavez and administered field sobriety tests, which Ms. Chavez failed. CP 24. Ms. Chavez admitted to drinking a pint or more of vodka and her speech was observed to be slurred. CP 24. An analysis of Ms. Chavez's blood was completed, indicating 0.27g/100mL of ethanol and 6.8 ng/mL of THC detected. CP 25. On August 30, 2016, Mr. Mingus passed away from the injuries that he sustained. CP 25. Based on the facts submitted, the trial court found Ms. Chavez guilty of Vehicular Homicide. RP 32-33.

The court then proceeded with a hearing regarding the particularly vulnerable victim aggravator. RP 33. In its opening statements, the State relied on *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986) in its

argument that by Mr. Mingus simply being a pedestrian, he was particularly vulnerable. RP 33-34. The State also presumably relied on *State v. Thomas*, 57 Wn. App. 403, 788 P.2d 24 (1990) in its argument that Mr. Mingus "had no way to expect that he was going to be hit by a vehicle at that time". RP 34.

The State called Ken Woltering, son-in-law of Mr. Mingus to testify. RP 37. He testified that Mr. Mingus had macular degeneration and had impaired vision in both eyes, he required hearing aids, his left arm was only two-thirds the length of his other arm and lacked musculature, he had one knee replacement, he had COPD from being a lifelong smoker, and he had balance issues due to fluid on the brain. RP 37-40. Mr. Mingus rode a motorized scooter which had an orange flag on it. RP 44.

In closing arguments, the defense relied on *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006) in its argument that there is a three factor test required to justify an exceptional sentence for a particularly vulnerable victim: (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime. RP 48. Just because Mr. Mingus was infirm, did not make him any more vulnerable than any other person might be in a crosswalk. RP 48. The defense also made the distinction that a crosswalk does not have the same expectation of safety

as a person's private property, thereby distinguishing the instant case from *State v. Cardenas*, 129 Wn.2d 1, 10–12, 914 P.2d 57, 61–62 (1996) (while driving through residential area defendant lost control of vehicle, which went over retaining wall and struck victim in her own backyard). RP 49-50.

The court found that Mr. Mingus was particularly vulnerable in its oral ruling and subsequent findings of fact. RP 52-53; CP 104-105. The court found Mr. Mingus was particularly vulnerable based on the following: (a) he was an elderly man of ninety years old; (b) his eyesight and hearing were impaired; (c) his balance and reactions were impaired; (d) his mobility was limited and he had to move via scooter; (e) his scooter was red for safety purposes; (f) the scooter had an orange flag for safety purposes; (g) he had a path of travel to include marked crosswalks at intersections with traffic lights and curb cuts for safety purposes; and (h) he was crossing a city street in daylight hours in a marked crosswalk with a "Walk" light in his favor at the time he was struck. CP 104. Ms. Chavez had an offender score of zero at the time of sentencing, with a standard range sentence of 78 to 102 months. CP 107. The court imposed an exceptional sentence of 120 months based on the "particularly vulnerable victim" aggravator. CP 109.

This appeal follows.

E. ARGUMENT

1. There is insufficient evidence to support the finding of an aggravating circumstance of a particularly vulnerable victim.

A trial court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Facts supporting aggravated sentences shall be determined pursuant to the provisions of RCW 9.94A.537. *Id*. There is an exclusive list of factors that can support a sentence above the standard range as determined by the procedures set forth in RCW 9.94A.537. RCW 9.94A.535(3). One of these factors is that the "defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance". RCW 9.94A.535(3)(b). This aggravating circumstance is required to be proven beyond a reasonable doubt. RCW 9.94A.537(3). Before the court imposes an exceptional sentence, the court must also find that "there are substantial and compelling reasons justifying an exceptional sentence". RCW 9.94A.535; *State v. Pappas*, 176 Wn.2d 188, 192, 289 P.3d 634 (2012); *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written

findings of fact and conclusions of law". *Id.*; *see also Suleiman*, 158 Wn.2d at 288.

Ultimately, "[i]n order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *Suleiman*, 158 Wn.2d at 291-292.

When reviewing an exceptional sentence, the reviewing court must first determine whether the trial court's reasons are supported by the record. *State v. McAlpin*, 108 Wn.2d 458, 462, 740 P.2d 824 (1987); *Nordby*, 106 Wn.2d at 517. Because this is a factual question, the sentencing judge's reasons will be upheld if they are not "clearly erroneous." *McAlpin*, 108 Wn.2d at 462; *Nordby*, 106 Wn.2d at 517-18. A finding of fact is clearly erroneous only if no substantial evidence supports it. *State v. Morris*, 87 Wn. App. 654, 659, 943 P.2d 329 (1997). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Second, the reviewing court must independently determine whether, as a matter of law, the trial court's reasons are substantial and compelling. *McAlpin*, 108 Wn.2d at 463;

Nordby, 106 Wn.2d at 518. The legal sufficiency of an exceptional sentence is reviewed *de novo*. *Pappas*, 176 Wn.2d at 192 (citing *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)).

i. There is insufficient evidence that Ms. Chavez knew of Mr. Mingus's vulnerability.

For a victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability, and the vulnerability must be a substantial factor in the accomplishment of the crime. *State v. Jones*, 59 Wn. App. 744, 753, 801 P.2d 263 (1990) (citing *State v. Handley*, 115 Wn.2d 275, 284–85, 796 P.2d 1266 (1990)); *State v. Gordon*, 153 Wn. App. 516, 223 P.3d 519 (2009). When analyzing particular vulnerability, the focus is on the victim: Was the victim more vulnerable to the offense than other victims and did the defendant know, or should she have known, of that vulnerability? *State v. Vermillion*, 66 Wn. App. 332, 349, 832 P.2d 95, 104 (1992), review denied, 120 Wn.2d 1030, 847 P.2d 481 (1993); *see also State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (1993), review denied 123 Wn.2d 1019, 875 P.2d 636; *State v. Nguyen* 68 Wn. App. 906, 847 P.2d 936 (1993), review denied, 122 Wn.2d 1008, 859 P.2d 603 (1993).

In the instant case, the evidence presented at trial indicated that Ms. Chavez did not observe Mr. Mingus in the crosswalk before her

vehicle hit him. There was no evidence provided that she knew or should have known that Mr. Mingus was elderly or infirm. Moreover, the findings of fact do not even indicate that Ms. Chavez knew or should have known that Mr. Mingus was "particularly vulnerable". Given the foregoing, there is insufficient evidence that Ms. Chavez knew or should have known that Mr. Mingus was particularly vulnerable.

ii. There is insufficient evidence that Mr. Mingus was *particularly* vulnerable.

In *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079, 1082 (1989), the court found that a victim who had a broken ankle was not particularly vulnerable to attempted murder since he was shot from behind without warning, therefore there was no indication that an able-bodied person would have been able to escape the attack. *See also State v. Crutchfield*, 53 Wn. App. 916, 923-24, 771 P.2d 746 (1989) (finding that victim, who had ingested cocaine shortly before she was strangled, was particularly vulnerable was not supported where the record did not contain enough evidence from which to determine whether her cocaine use was a substantial factor in the homicide).

Likewise, in the instant case, there was no evidence presented that would indicate that an able-bodied person in the same position would not have succumbed to injuries the same way that Mr. Mingus did. The head

trauma sustained seems likely to have resulted in death regardless of whoever may be present in the crosswalk. *See* CP 64. As the defense argued in closing, even if Mr. Mingus was an Olympic athlete, there is no evidence to indicate that he would have fared differently than if he was infirm. Mr. Mingus was not *particularly* vulnerable as anyone in the same position would have been just as vulnerable.

The instant case is distinguishable from *State v. Cardenas*, 129 Wn.2d 1, 914 P.2d 57 (1996), which the Court of Appeals heavily relied on. In *Cardenas*, the defendant was speeding 45 miles per hour in a 25 mile per hour zone, lost control of his vehicle, cashed through a retaining wall, and struck the victim in her backyard, pinning her against some trees. *Cardenas*, 129 Wn.2d at 4. The court reasoned that the victim was a vulnerable victim because she was in a backyard with "no reason to think that as she was putting out the garbage in her own backyard an out-of-control car would suddenly scale a retaining wall, barrel into her yard, and crush her". *Cardenas*, 129 Wn.2d at 10. The *Cardenas* court noted that "without a requirement that the defendant should have known of a risk to vulnerable victims, virtually every vehicular assault involving a pedestrian would justify an exceptional sentence". *Cardenas*, 129 Wn.2d at 11-12.

By the Court of Appeals' reasoning, every vehicle versus pedestrian vehicular assault case involves a particularly vulnerable victim.

This is overly broad, as there must still be a nexus between whether someone knew or should have known of a particular vulnerability. In Ms. Chavez's situation, she did not see Mr. Mingus so she could not have known whether he was particularly vulnerable or not. *See Cardenas*, 129 Wn.2d at 14 ("it seems reasonable to conclude that, as Cardenas was driving his automobile in the vicinity of Michel's home just prior to the accident, he was not actually aware of Michel's presence in her backyard") (Alexander dissenting). She could not have reasonably known that he was particularly vulnerable, without viewing him or knowing that there were pedestrians in the vicinity.

Given the above, the trial court's imposition of an exceptional sentence is not supported by the record and was clearly erroneous due to insufficient evidence that Ms. Chavez knew of Mr. Mingus's vulnerability and/or that Mr. Mingus was *particularly* vulnerable. This case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

F. CONCLUSION

Given the foregoing, Ms. Chavez respectfully requests this court to grant review.

DATED this 13th day of September, 2018.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Asotin County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on September 13, 2018 to email address bnichols@co.asotin.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Tana Jo Chavez, a true and correct copy of the document to which this certification is affixed on September 13, 2018 via first class mail postage prepaid to Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660

(360) 707-7040
sean@greccodowns.com

APPENDIX A

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 14, 2018

Sean M. Downs
Grecco Downs, PLLC
500 W 8th St Ste 55
Vancouver, WA 98660-3085
sean@greccodowns.com

E-mail
Benjamin Curler Nichols
Asotin County Prosecutors Office
PO Box 220
Asotin, WA 99402-0220

CASE # 350711
State of Washington v. Tana Jo Chavez
ASOTIN COUNTY SUPERIOR COURT No. 161001418

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable Scott D. Gallina

c: Tana Jo Chavez
#397192
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

FILED
AUGUST 14, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 35071-1-III
Respondent,	)	
	)	
v.	)	
	)	
TANA JO CHAVEZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, J. — Tana Chavez seeks reversal of her conviction for vehicular homicide by attacking the validity of the State's charging information. Chavez seeks reversal of a sentencing aggravator by attacking the sufficiency of evidence for the imposition of the aggravator. We find no error and affirm the conviction and the sentencing.

FACTS

On August 29, 2016, 6:20 p.m., Tana Chavez drove her pickup truck westbound on Chestnut Street, in Clarkston, until she approached the intersection of Chestnut and Sixth Street. Chavez turned left at the intersection onto Sixth Street when the traffic light controlling her lane shone green. Simultaneously ninety-year-old Charles Mingus, riding a red scooter with an orange safety flag, headed east on Chestnut and crossed the Sixth Street intersection within the marked crosswalk which had a "walk" traffic signal.

Chavez's pickup struck Mingus. Mingus flew from his scooter and, as he landed on his back, struck hit his head on the street.

Once on the scene, law enforcement officers administered field sobriety tests on Tana Chavez, which Chavez failed. Chavez slurred her speech, while admitting to drinking a pint or more of vodka. Tests registered Chavez's blood alcohol level at 0.27 and her blood THC level at 6.8 ng/ml. The next day, August 30, 2016, Mingus died from the injuries he sustained at the Clarkston intersection.

PROCEDURE

On August 31, 2016, the State of Washington charged Tana Chavez with vehicular homicide. The information succinctly alleged:

> on or about the 29th day of August 2016, in Asotin County, Washington, the Defendant operated a motor vehicle while under the influence of alcohol or drugs, and this conduct was the proximate cause of injury which caused the death of Charles J. Mingus.

Clerk's Papers (CP) at 1. On December 14, 2016, the State filed notice of intent to seek an exceptional sentence above the standard sentencing range pursuant to RCW 9.94A.535(3)(b), based on an aggravating circumstance of the particular vulnerability of the victim.

Tana Chavez waived her right to a jury trial and elected a stipulated facts trial. Chavez, however, did not stipulate to any facts regarding the sentence aggravator. The trial court found Chavez guilty of vehicular homicide.

After declaring Tana Chavez guilty of the charged crime, the trial court conducted an evidentiary hearing on the particularly vulnerable victim aggravating factor. The State called Charles Mingus' son-in-law as a witness. The son-in-law testified to the physical capabilities and impairments of Mingus and the provision of the scooter to Mingus to assist in his mobility. In an oral ruling, the trial court found Mingus to be particularly vulnerable and explained:

> This was a gentlemen 90 years of age with vision and hearing problems, one knee replaced, the other one waiting, dystrophic left arm, COPD, oxygen dependent at night, ah, confined to a scooter to get around. I don't know how much more, ah, vulnerable you get than that.
>
> The[y] knew or should have known, ah, if that were an element to be considered, anybody observing an elderly gentlemen in a Rascal [scooter] in a crosswalk with a bike flag should understand that that is a particularly vulnerable person. They should be aware. Whether they are or not is not part of the element. They should be aware that that is a particularly vulnerable victim.

Report of Proceedings at 52.

In written findings of fact, the trial court found Charles Mingus vulnerable based on these factors:

(a) he was ninety years old,

(b) his eyesight and hearing were impaired,

(c) his balance and reactions were impaired,

(d) his mobility was limited as he had to move about in a scooter,

(e) his family selected the color red for the scooter for safety purposes,

(f) the scooter displayed an orange warning flag,

(g) his family developed for him a safe "path of travel," which included crosswalks at intersections controlled by traffic lights and exhibiting curb cuts,

(h) he followed this "safe" route when Chavez struck and killed him, and

(i) when struck, he crossed a city street in daylight hours in a marked crosswalk with a "walk" light in his favor.

Tana Chavez carried an offender score of zero and faced a standard range sentence of 78 to 102 months' confinement. The trial court imposed an exceptional sentence of 120 months' confinement based on the particularly vulnerable victim aggravator.

LAW AND ANALYSIS

Sufficiency of Charging Information

On appeal, Tana Chavez contends that the charging information suffered from a constitutional deficiency. She also argues that insufficient evidence supported the trial court's imposition of the sentence aggravator of a particularly vulnerable victim. We address the assignments of error in such order.

Chavez did not object to the sufficiency of the information before the trial court. Chavez does not attempt to argue that the claimed error constitutes a manifest error affecting a constitutional right. Yet, the State does not challenge Chavez's ability to raise this contention for the first time. At least one Washington court has held that a deficient information reaches a constitutional magnitude reviewable for the first time on appeal.

State v. Davis, 60 Wn. App. 813, 816, 808 P.2d 167 (1991), a*ff'd*, 119 Wn.2d 657, 835 P.2d 1039 (1992).

The State must include all essential elements of a crime, statutory or otherwise, in a charging document in order to afford notice to the accused of the nature and cause of the accusation against her. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This rule assists an accused in preparing a defense. *State v. Kjorsvik*, 117 Wn.2d at 101. When considering a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the charging instrument and analyzes whether the necessary facts appear in any form or, by fair construction, can be found in the charging document. *State v. Kjorsvik*, 117 Wn.2d at 105. If the information lacks necessary facts, we presume prejudice and reverse the conviction. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

An accused commits vehicular homicide when the death of the victim ensues within three years as a proximate result of injury caused by the driving of a vehicle if, among other ways, the driver operated the motor vehicle while under the influence of intoxicating liquor or any drug. RCW 46.61.520(1)(a). Accordingly, the pattern "to convict" instruction lists five essential elements that must be proven to convict someone of the crime. If the State asserts the accused drove while intoxicated, the essential elements are: (1) that on or about an identified date, the defendant operated a motor vehicle, (2) that the defendant's operation of the motor vehicle proximately caused injury

to another person, (3) that at the time of causing the injury, the defendant operated a motor vehicle while under the influence of intoxicating liquor or drugs, (4) that the injured person died within three years as a proximate result of the injuries, and (5) that the defendant's acts occurred in Washington State. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 90.02, at 264 (4th ed. 2016).

Tana Chavez asserts numerous defects in wording invalidate the State's charging information. She first argues that the document did not indicate that death was a proximate cause of injury. Nevertheless, this argument twists the event that causes another event. Death is never a proximate cause of injury. Instead, an injury causes death. Death being a proximate cause of injury is not an element of vehicular homicide. The fact that a defendant's conduct proximately caused the injury is an element of the crime along with the element that the victim died as a proximate result of the injuries. The State pled both of these elements in the information charging Chavez.

Tana Chavez next argues the State's charging information omitted an allegation that injury was a proximate cause of being under the influence of intoxicants. Again, Chavez thinks backward. The State need not prove that an injury resulted in the accused being intoxicated. Next Chavez argues that the information failed to allege that injury was the proximate cause of her operating a motor vehicle. For the third time, Chavez confuses what action must lead to what result. The State must prove that Chavez's drunken driving led to Charles Mingus' injuries and the injuries led to death. The

information alleged that "the Defendant operated a motor vehicle while under the influence of alcohol or drugs, and this conduct was the proximate cause of injury." CP at 1.

Tana Chavez next complains that the State's information alleged that "conduct" caused Charles Mingus' injuries and death, but that the information failed to identify the discrete conduct that caused the injuries and death. Nevertheless, the information read that "this conduct" caused the injuries and death and the same sentence described the pertinent conduct as intoxicated driving. The information identified no other conduct.

Finally, Tana Chavez accurately observes that the State's information failed to allege that Charles Mingus died within three years of his injuries. We agree, however, with the State that *State v. Champoux*, 33 Wash. 339, 74 P. 557 (1903) rejects Chavez's contention that the failure to allege death within three years annuls the charging instrument. James Champoux claimed that a charging document, which omitted language asserting that the death occurred within one year and a day of the injuries, was fatally flawed. The Court answered:

> But in any event, the phraseology criticized is not material; for the information informs the accused that the mortal wounds from which Lottie Brace died were inflicted on the 5th day of November, 1902, and the information is dated on the 8th day of November, 1902, three days after. So that it must necessarily follow that the death occurred within three days from the infliction of the wounds. The information in all respects seems to be sufficient to sustain the judgment.

State v. Champoux, 33 Wash. at 346-47.

The State filed and dated its information against Tana Chavez on August 31, 2016. The State alleged that Chavez drove her motor vehicle while intoxicated on August 29, 2016, which driving injured and killed Charles Mingus. Mathematics informs us that Mingus must have died within two days of Chavez's criminal behavior.

Sufficiency of Evidence for Aggravator

The trial court sentenced Tana Chavez outside the standard sentencing range for the crime of vehicular homicide based on Chavez's offender score. Whenever the sentencing court imposes a sentence outside the standard range, the trial court shall set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. Our trial court did so and based its decision on the vulnerable nature of the victim.

When reviewing an exceptional sentence, the reviewing court must first determine whether the record supports the trial court's reasons for the sentence. *State v. McAlpin*, 108 Wn.2d 458, 462, 740 P.2d 824 (1987). Because this is a factual question, we will uphold the sentencing court's reasons if they are not clearly erroneous. *State v. McAlpin*, 108 Wn.2d at 462. A finding of fact is clearly erroneous only if no substantial evidence supports it. *State v. Morris*, 87 Wn. App. 654, 659, 943 P.2d 329 (1997). The test for determining the sufficiency of the evidence is whether, after viewing the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order for a victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability poses as a substantial factor in the commission of the crime. *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). The trial court record, particularly testimony from Charles Mingus' son-in-law Ken Woltering, amply supports the trial court's factual finding of particular vulnerability. Woltering held intimate knowledge of his father-in-law's medical and physical condition and limitations.

Tana Chavez disputes the sufficiency of evidence that she observed Charles Mingus in the crosswalk and knew of his age, infirmity, or vulnerability before her car struck him. In so arguing, Chavez misreads the elements of the crime. Whether she saw Mingus in the crosswalk is immaterial because the standard is whether the defendant "knew *or should have known*" of the victim's vulnerability. *State v. Suleiman*, 158 Wn.2d at 291 (emphasis added).

The trial court, based on sufficient evidence, concluded that Tana Chavez should have known of Charles Mingus' vulnerability. The court noted that ninety-year-old Mingus crossed the street in a red scooter with an orange flag which signaled his vulnerability to anyone observing him. If Chavez looked, she could have readily seen Mingus in his scooter.

Tana Chavez next argues that insufficient evidence showed that Charles Mingus'

vulnerability played a substantial factor in the crime in that an able bodied person struck by her car would have also died. Case law, however, defeats this contention. Under Washington law, a pedestrian victim of a vehicular assault may be considered particularly vulnerable due to an inability to take evasive action and due to a lack of protection afforded when being in another vehicle. *State v. Cardenas*, 129 Wn.2d 1, 10, 914 P.2d 57 (1996); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). Under this principle, whether an able-bodied person would have succumbed to the same injuries as Mingus lacks relevance. Mingus could be found particularly vulnerable based alone on his status as a pedestrian.

Another principle of law defeats Tana Chavez's assignment of error. A pedestrian is particularly more vulnerable when he or she has no reason to suspect that he or she may be in danger. *State v. Cardenas*, 129 Wn.2d at 10. Tana Chavez stipulated and the trial court found that Mingus crossed the street at a marked crosswalk with a "walk" signal in his favor in broad daylight. Given these facts, Mingus had no reason to suspect he would be in danger, and this lack of danger rendered him relatively defenseless.

After determining if substantial evidence supports the reasons for the exceptional sentence or aggravator, the reviewing court must independently determine whether, as a matter of law, the trial court's reasons are substantial and compelling. *State v. McAlpin*, 108 Wn.2d at 463 (1987). In making this determination, the appellate court must consider whether the legislature considered the aggravating factor when establishing the

underlying standard sentencing range for the crime and whether the facts sufficiently distinguish the discrete crime committed by the accused from others in the same category. *State v. Morris*, 87 Wn. App. at 659-60 (1997). Tana Chavez does not dispute that the legislature did not consider an aged, defenseless man on a scooter in a crosswalk when setting the standard sentencing range for vehicular homicide. Chavez also does not dispute that the facts of this case could be compelling enough to distinguish it from other vehicular homicide convictions.

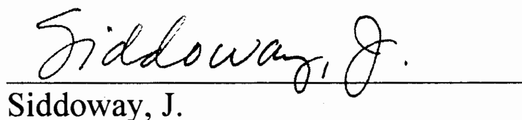
CONCLUSIONS

We affirm Tana Chavez's convictions and the trial court's imposition of the sentencing aggravator. Because Chavez has failed to file a report of continued indigency, we direct that our court commissioner determine whether to award costs to the State.

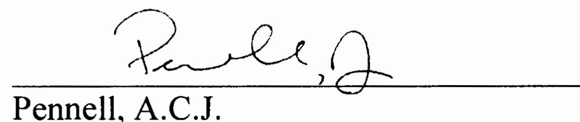
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:



Siddoway, J.



Pennell, A.C.J.

GRECCO DOWNS, PLLC

September 13, 2018 - 4:35 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington v. Tana Jo Chavez (350711)

The following documents have been uploaded:

- PRV_Petition_for_Review_20180913163502SC633521_4116.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Chavez Petition for Review.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us

Comments:

Sender Name: Sean Downs - Email: sean@greccodowns.com
Address:
500 W 8TH ST STE 55
VANCOUVER, WA, 98660-3085
Phone: 360-707-7040

Note: The Filing Id is 20180913163502SC633521