

63303-1

63303-1

NO. 63303-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

QUINTIN DESHAUN RAINES,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 08-1-00053-3

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

- A. Whether the presence of the victim can justify an exceptional sentence for the crime of First Degree Burglary which is based on an assault. ***State concedes this issue.***
- B. Whether the Appellant waived a void for vagueness objection to the instruction regarding the term “particularly vulnerable” when the Appellant failed to object at trial and failed to offer a definition instruction.
- C. Whether the defendant can show beyond a reasonable doubt that RCW 9.94A.535(3)(b) is unconstitutionally vague when a person of ordinary intelligence can understand the terms and it provides standards that are sufficient to prevent arbitrary enforcement.

II. STATEMENT OF THE CASE

A. Procedural Facts

Quintin Raines, hereinafter “defendant,” was charged with one count of First Degree Burglary and one count of Attempted Robbery in the First Degree, arising out of an incident that occurred on March 11, 2008. CP 62-64. For the burglary charge, the State alleged two aggravating factors: (1) that “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance”; and (2) that “the current offense is a burglary and the victim of

the burglary was present in the building or residence when the crime was committed.” CP 63. The defendant asserted a diminished capacity offense. 3/13/09 RP 219-52.

The jury found the defendant guilty as charged of both First Degree Burglary and Attempted First Degree Robbery. CP 49-50. The jury likewise answered “yes” to both special verdict forms. CP 51-52.

At sentencing, the trial court concluded there were substantial and compelling reasons to impose an exceptional sentence upward for count 1. CP 18.¹ The court found the exceptional sentence was justified by one or both of the aggravating factors found by the jury. CP 18. The standard sentence range for count 1 was 26-34 months. CP 10. The standard range for count 2 was 30.75-40.5 months. CP 10. The court imposed an exceptional sentence of 60 months for count 1, and a standard range sentence of 40.5 months for count 2. CP 13.

B. Substantive Facts

On March 11, 2008, 71-year-old Wilma Boyden was home sick with shingles. 3/10/09 RP 30. Mrs. Boyden was home alone eating breakfast when the doorbell rang. 3/10/09 RP 30. Before opening the

¹ Attached to Appellant’s Brief as an Appendix.

door, Mrs. Boyden placed her foot behind it. 3/10/09 RP 31. She opened the door part-way to find a man standing there. 3/10/09 RP 31. The man, later identified as the defendant, then pushed his way in while pulling a nylon stocking down over his face and pulling what appeared to be a handgun from a satchel. 3/10/09 RP 31. The defendant pointed the gun at Mrs. Boyden and asked if anyone else was in the house. 3/10/09 RP 32. Mrs. Boyden said her husband was home though he was actually at work.² 3/10/09 RP 32. The defendant demanded money. 3/10/09 RP 32.

Mrs. Boyden and the defendant ended up in the kitchen where Mrs. Boyden produced money from her purse. 3/10/09 RP 35-36. Mrs. Boyden thought she had seen the defendant before and told him, "I think I know you," to which he said "Oh, no you don't. I don't know you." 3/10/09 RP 39. The defendant decided he would not take the money. 3/10/09 RP 36. He ordered Mrs. Boyden to unplug the telephone, to which she complied. 3/10/09 RP 36. After being in the home at least five minutes, during all of which the defendant kept the pistol leveled at Mrs. Boyden, the defendant exited the house through the front door. 3/10/09 RP 37.

Mrs. Boyden locked herself in the bathroom and attempted to call

² This was the first day in two months Mr. Boyden had gone to work because he had been home caring for his sick wife. 3/10/09 RP 32.

911, but she was so upset she could not remember the phone number and called her husband, Robert Boyden, instead. 3/10/09 RP 40. After speaking with her husband, Mrs. Boyden called 911 and law enforcement officers soon arrived. 3/10/09 RP 54-55. While speaking with the officers, Mrs. Boyden remembered who she thought the intruder was. 3/10/09 RP 54-55. She believed that he was a “young man” she met at a business exposition in Coupeville, Washington. 3/10/09 RP 54. The young man owned a car detailing business in Oak Harbor, Washington and Mrs. Boyden decided she wanted to “help him out.” 3/10/09 RP 54-55. Some weeks later, the defendant and his wife came to Mrs. Boyden’s house and picked up her car. 3/10/09 RP 57. The three talked for 20 minutes. 3/10/09 RP 57-58. The defendant and his wife dropped the car back off a few days later and the three visited again. 3/10/09 RP 58.

Mrs. Boyden was able to locate the business name in her check register. 3/10/09 RP 55-60, 111-113. Law enforcement prepared a photo lineup and Mrs. Boyden picked the defendant. 3/10/09 RP 114-116.

When Robert Boyden arrived home he was interviewed by the officers. 3/10/09 RP 98. Mr. Boyden told the officers that a man had come to the door of the home the previous morning and inquired about a car parked down the street. 3/10/09 RP 98-102. The man left in the

opposite direction of the car. 3/10/09 RP 98-102. The man was wearing dark coveralls and Mr. Boyden had thought the man was “checking the place out.” 3/10/09 RP 101-102. At trial, the defendant admitted to coming to the house the day before the robbery and asking Mr. Boyden about the car next door. 3/10/09 RP 20-21.

The defendant was arrested at his place of business. 3/10/09 RP 118, 3/11/09 RP 144. He admitted to the attempted robbery of Mrs. Boyden and made a recorded statement. 3/11/09 RP 146-147. Law enforcement recovered the stocking, a black hat, gloves and dark blue coveralls that the defendant wore during the burglary as well as the pistol which turned out to be a loaded CO2 pellet gun.³ 3/11/09 RP 146-147, 153, 154, 155, 159.

III. ARGUMENT

- A. THE STATE CONCEDES THAT THE VICTIM’S PRESENCE IS A NECESSARY COMPONENT OF THE CRIME OF FIRST DEGREE BURGLARY BASED ON AN ASSAULT AND THAT THE TRIAL COURT ERRED IN CONSIDERING THAT FACTOR FOR AN EXCEPTIONAL SENTENCE.

³ Law enforcement also made contact with Charlotte Cross whose house was up the bluff from the Boyden’s. 3/10/09 RP 68-73. The defendant had come to her home the morning of the burglary inquiring about a different car parked at her neighbor’s house. 3/10/09 RP 68-77.

A court may impose a sentence outside the standard range “if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Pursuant to RCW 9.94A.535(3)(b) a court may impose an exceptional sentence if a jury determines that “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” Likewise, under RCW 9.94A.535(3)(u) if a jury determines that “[t]he current offense is a burglary and the victim was present in the building or residence when the crime was committed,” a court may impose an exceptional sentence.

1. *The State concedes that the presence of the victim is inherent in the crime of Burglary in the First Degree based on an assault and therefore may not be used as a reason to support an exceptional sentence for that crime.*

The defendant was charged with Burglary in the First Degree under the assault prong. This included the element “(t)hat in so entering or while in the building or in immediate flight from the building, the defendant assaulted a person.” CP 47. “An element of the charged offense may not be used to justify an exceptional sentence.” *State v. Ferguson*, 142 Wn.2d 631, 647-648, 16 P.3d 1271 (2001).

In *State v. Post*, 59 Wn.App 389, 401-402, 797 P.2d 1160 (1990), the Court concluded that invasion of the victim's privacy was not a valid basis for imposition of an exceptional sentence when the crime was Burglary in the First Degree and unlawful entry into the victim's home was an element of the crime for which the sentence was imposed. However, *State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993), overruled on other grounds by *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), appears to support the victim's presence as a proper aggravating factor for any burglary. In *Smith*, the Court held that "consideration of the victim's presence is an appropriate aggravating factor when meting out an exceptional sentence for burglary." *Id.* However, *Smith* dealt with a case of Second Degree Burglary, the elements of which are entering or remaining unlawfully in a building (as opposed to a residence).⁴ RCWA 9A.52.030. The *Smith* court reasoned that the presence of a person during such a burglary increases the chance that a serious injury could result. *Smith*, 123 Wn.2d at 57.

In defendant's case, however, the State charged Burglary in the First Degree based on an assault. Because the victim's presence is

⁴ Prior to 1990 there were only two classes of burglary crimes in Washington, Burglary in the Second Degree which dealt with buildings, and Burglary in the First Degree which dealt with residences. 1989 2nd ex.s. c 1 § 4; 1989 c 412 § 4

necessary for a Burglary in the First Degree based on assault to occur, the reasoning of *Smith* is not persuasive.

The State agrees with the defendant that the justification in *Smith* does not apply where the underlying crime is First Degree Burglary based on an assault because the victim's presence is inherent in the elements of the crime. Therefore, the trial court erred when it relied on the presence of the victim under RCW 9.94A.535(3)(u) to impose an exceptional sentence based on that factor in Defendant's case.

B. THE SENTENCE SHOULD NOT BE REVERSED AND REMANDED FOR IMPOSITION OF A STANDARD RANGE SENTENCE BECAUSE THE COURT WOULD HAVE IMPOSED THE SAME SENTENCE IF BASED ONLY ON THE FINDING THAT THE VICTIM WAS PARTICULARLY VULNERABLE.

Though the State concedes that the trial court improperly relied on the victim's presence as an aggravating factor, the trial court would have imposed the identical sentence if it had relied only on the proper factor that the victim was particularly vulnerable or incapable of resistance under RCW 9.94A.535(3)(b). The trial court's Findings of Fact and Conclusions of Law For an Exceptional Sentence state:

“The exceptional sentence is justified by the following aggravating circumstances:

(a) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance;

(b) Count I is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.”

CP 18.

Remand for resentencing is only necessary when the trial court places significant weight on an inappropriate factor, or where some factors are inappropriate and the exceptional sentence significantly deviates from the standard range. *State v. Fisher*, 108 Wn.2d 419, 430 n. 7, 739 P.2d 683 (1987). The Court in *Fisher* explained that cases with an invalid aggravating factor or factors are not automatically remanded because: “If we automatically remanded every case where we upheld only some of the sentencing court’s reasons for an exceptional sentence, we could be imposing an unnecessary burden on the trial court.” *Id.* at 430 n. 7. When a trial court relies on invalid factors as well as valid factors for imposing an exceptional sentence, a reviewing court should affirm the sentence if the “reviewing court is confident that the trial court, on remand, would

impose the same sentence even without considering the improper justifications.” *State v. Edwards*, 53 Wn.App. 907, 914, 771 P.2d 755 (1989), citing *In Re George*, 52 Wn.App. 135, 758 P.2d 13 (1988). Even when the exceptional sentence significantly deviates from the standard range and the trial court has relied in part on inappropriate factors, remand is not necessary if the reviewing court is confident that the trial court would have imposed the same sentence if it had considered only valid reasons. *State v. Scott*, 72 Wn.App 207, 221, 866 P.2d 1258 (1993).

Here, the sentencing court did not place significant weight on an inappropriate factor. Certainly, the trial Court considered the inappropriate factor, however, the trial court specifically states in its Findings of Fact and Conclusions of Law for Exceptional Sentence that the identical sentence would have been imposed if only one of the two aggravating factors had been found. CP 18. Remand is therefore unnecessary because this Court can be confident the same sentence would have been imposed if the trial court considered only the valid factor that the victim was particularly vulnerable or incapable of resistance.

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C. THE STATUTE AND INSTRUCTION PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF “THE DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT THE VICTIM OF THE CURRENT OFFENSE WAS PARTICULARLY VULNERABLE OR INCAPABLE OF RESISTANCE” ARE NOT VAGUE IN VIOLATION OF DUE PROCESS, AND APPELLANT’S FAILURE TO OBJECT AND PROPOSE A DEFINITION AT TRIAL PRECLUDES REVIEW OF THE CLAIM.

1. *Defendant’s failure to object and propose a definition of the term “particularly vulnerable” at trial precludes review of a claim that term was unconstitutionally vague.*

A defendant’s failure to propose a definition of an aggravating factor precludes review of a claim that the undefined term was unconstitutionally vague. *State v. Whitaker*, 133 Wn.App 199, 233, 135 P.3d 923 (2006). See, *State v. Scott*, 110 Wn.2d 682, 691, 757 P.2d 492 (1998).

At no time did the defense object to the trial court’s instructions or proffer a definitional instruction for the term “particularly vulnerable or incapable of resistance.” 3/11/09 RP 209-210. All of the instructions were agreed to by the parties.⁵ 3/11/09 RP 209-210. Because the defendant failed to object to the jury instructions and failed to offer a

⁵ The defense offered only one instruction and that was in regard to the defense of diminished capacity, to which the State agreed. Neither party objected to any of the trial court’s instructions, or offered any additional instructions. 3/11/09 RP 209-210.

definition instruction, the defendant cannot now raise the issue that RCW 9.94A.535(3)(b) and therefore the jury instruction, was void for vagueness.

2. *Failure to define a term in the jury instructions is not manifest constitutional error which may be raised for the first time on appeal.*

A party may only raise a claim of error on appeal when not raised at trial if the claim is of “manifest error affecting constitutional right.” RAP 2.5(a). To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must show “(1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, __Wn.2d__, 217 P.3d 756, 760 (2009), citing, *State v. Kirkman*, 159 Wn.2d 918, 926, 155 p.3d 125 (2007), (citations omitted). To be of constitutional dimension, the appellant must demonstrate how the alleged error actually affected the appellant’s rights at trial. *O’Hara*, 217 P.3d at 760, citing *Kirkman*, 159 Wn.2d at 926-27.

If the reviewing court determines the alleged error to be of constitutional dimension, the reviewing court must then determine if the error is manifest. *Id.*, at 761. To be “manifest”, RAP 2.5(a)(3) requires a showing of actual prejudice. *Id.*, at 761 (citations omitted). To demonstrate actual prejudice, the appellant must show that the asserted error “had practical and identifiable consequences in the trial of the case.”

Id., at 761, quoting *Kirkman*, 159 Wn.2d at 935. If the facts necessary to determine the claimed error are not in the record on appeal, no actual prejudice is shown and the alleged error is not manifest. *Id.*, at 761, citing, *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).⁶

Generally, unpreserved claims of error involving jury instructions are subject to an analysis of whether the alleged error is manifest constitutional error. *O'Hara*, 217 P.3d at 762.

“Jury instructional errors which have been found to have constituted manifest constitutional error include: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968), shifting of the burden of proof to the defendant, *State v. McCullum*, 98 Wn.2d 484, 487-488, 656 P.2d 1064 (1983); failing to define the “beyond a reasonable doubt” standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977), failing to require a unanimous verdict, *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is--not constituting manifest constitutional error--include the failure to instruct on a lesser included offense, *State v. Kwan Fai Mak*, 105 Wn.2d 692, 745-49, 718 P.2d 407 (1986); and the failure to define individual terms, *Scott*, 110 Wn.2d at 690-91, 757 P.2d 492.”

⁶ Appellant’s reliance on *State v. LeFaber*, 128 Wn.2d 896, 900, 913 p.2d 369 (1996), is misplaced as *LeFaber* was abrogated by *State v. O’Hara*, ___ Wn.2d ___, 217 P.3d 756 (2009).

O'Hara, 217 P.3d at 762.

This case involves at most, a failure to define an individual term. As in *Scott*, such a situation does not constitute manifest constitutional error and therefore cannot be raised for the first time on appeal.

D. RCW 9.94A.535(3)(b) IS NOT UN-CONSTITUTIONALLY VAGUE BECAUSE A PERSON OF ORDINARY INTELLIGENCE CAN UNDERSTAND THE TERM “PARTICULARLY VULNERABLE OR INCAPABLE OF RESISTANCE” AND IT PROVIDES STANDARDS SUFFICIENT TO PREVENT ARBITRARY ENFORCEMENT.

A statute is presumed constitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). The party challenging a statute under the void for vagueness doctrine bears the burden of proof. *Id.* Constitutionality of a statute is subject to de novo review. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997). Vagueness challenges “are evaluated in light of the particular facts of each case,” unless the First Amendment is implicated. *City of Bremerton v. Spears*, 134 Wn.2d 141, 159, 949 P.2d 347 (1998) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990)). A statute is vague if it either fails to define the offense with sufficient precision that a person of

ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. *State v. Eckblad*, 152 Wn. 2d 515, 518, 98 P.3d 1184 (2004).

The term “particularly vulnerable or incapable of resistance” is not so vague that a person of ordinary intelligence cannot understand it. The jury was instructed in this case to decide “whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.” CP 44. Further, the jury was instructed that; “A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of Burglary in the First Degree. CP 44. The victim’s vulnerability must also be a substantial factor in the commission of the crime.” CP 44. The jury was able to observe the victim in this case and decide whether she was particularly vulnerable or incapable of resistance. Particular vulnerability “connotes some disability due to age or a physical disability due to age or a physical or mental condition which renders the victim helpless, defenseless, or unable to resist.” *State v. Payne*, 58 Wn.App 215, 220, 795 P.2d 134 (1990), quoting *State v. Wall*, 46 Wn.App 218, 222, 729 P.2d (1986).

Prior to *Blakely v Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Washington State Appellate Courts routinely held

that elderly victims were “particularly vulnerable” as a matter of law. “The fact that the victim was particularly vulnerable due to advanced age may alone, as a matter of law, be used to justify an exceptional sentence.” *State v. George*, 67 Wn.App 217, 221, 834 P.2d 664 (1992) overruled, on other grounds. *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995); see, e.g., *State v. Jones*, 130 Wn.2d 302, 312, 922 P.2d 806 (1996) (77-year-old woman); *State v. Butler*, 75 Wn.App 47, 53, 876 P.2d 481 (1994) (89-year-old woman), *State v. Clinton*, 48 Wn.App 671, 676, 741 P.2d 52 (1987) (67-year-old woman).

Though particular vulnerability is now a question fact, in the case at bar, the jury could see that the defendant was a young man and that the victim was an elderly woman. 3/10/09 RP 30. The jury heard the testimony that the defendant had been to countless homes on and off Whidbey Island to pick up automobiles to detail and that out of all those homes he chose Mrs. Boyden to attempt to rob. 3/11/09 RP 186-188. The jury heard that the defendant had come to the victim’s home the day prior but left when he found out Mr. Boyden was home. 3/10/09 RP 98-102. The jury heard the defendant testify that because he recognized the rims on Mr. Boyden’s van, he knew when Mr. Boyden was home or not home. 3/11/09 RP 193. The jury knew that the victim tried to block her door

with her foot, but the defendant simply pushed the door open. 3/10/09 RP 31. Lastly, the jury knew that it had been months since the defendant had lawfully been to Mrs. Boyden's home but it was still her, instead of anyone else, that he chose to attempt to rob. 3/10/09 RP 58.

The defendant cannot show beyond a reasonable doubt that a person of ordinary intelligence could not understand the term "particularly vulnerable or incapable of resistance." Likewise, the defendant cannot show beyond a reasonable doubt that the term does not provide standards sufficiently specific to prevent arbitrary enforcement. Certainly, a person of ordinary intelligence can see that there is a difference between, as in this case, an athletic male in his twenties and a woman in her seventies. The two persons' ability to resist would be drastically different.

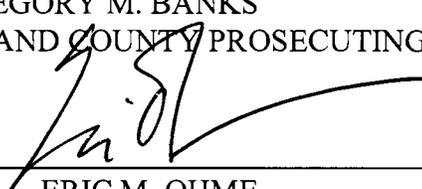
The terms used in RCW 9.94A.535(3)(b) are such that a person of ordinary intelligence can understand them. Further, the terms are sufficiently specific to prevent arbitrary enforcement. Certainly, a defendant is free to argue that someone was not "particularly vulnerable" or "incapable of resistance" without jurors being completely baffled as to the meanings of the terms. The defendant cannot show beyond a reasonable doubt that RCW 9.94A.535(3)(b) is unconstitutional.

IV. CONCLUSION

This Court should affirm the defendant's sentence. The trial court indicated in its Findings of Fact and Conclusions of Law for Exceptional Sentence that the identical sentence would be imposed based on either of the aggravating factors standing alone. Further, the defendant did not object at trial to lack of a definitional instruction regarding the aggravating factor of a particularly vulnerable victim and the alleged error is not a manifest error allowing review. Lastly, even if the Court was to consider the defendant's constitutional challenge to RCW 9.94A.535(3)(b), the defendant cannot show that the statute is void for vagueness beyond a reasonable doubt.

Respectfully submitted this 24th day of November, 2009.

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By: 

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

QUINTIN DESHAUN RAINES,

Defendant/Appellant.

NO. 63303-1-I

DECLARATION OF SERVICE

I, CAROLINE MORSE, declare under penalty of perjury under the

laws of the State of Washington that the following is true and correct:

That on the 25th day of November, 2009, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Maureen Cyr
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 25th day of November, 2009.


CAROLINE MORSE

2009 NOV 30 AM 11:40
STATE OF WASHINGTON
CLERK OF COURT