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COURT OF APPEALS  
STATE OF WASHINGTON  
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NO. 64369-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS DIAZ-GALVIN,

Appellant.

REC'D  
APR 28 2010  
King County Prosecutor  
Appellate Unit

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

The Honorable Christopher Washington, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There is no evidence to support the jury's finding that appellant committed Assault in the First Degree "within sight or sound" of the victim's daughter.

2. The trial court erred when it failed to instruct jurors that the State bears the burden to prove aggravating sentencing circumstances beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1. In seeking an exceptional sentence against appellant, the State alleged that he committed Assault in the First Degree "within sight or sound" of the victim's minor child. The evidence revealed, however, that the assault occurred outdoors at a time when the victim's daughter was inside a nearby home. Moreover, the daughter testified she did not hear or see the assault. Should this Court vacate appellant's exceptional sentence where the trial court relied on this aggravating circumstance when choosing to impose that sentence?

2. Due process and the right to trial by jury require the State to prove aggravating circumstances to a jury beyond a reasonable doubt. Appellant's jury was never instructed on the State's burden. On this additional ground, should this Court vacate

the jury's finding on the "sight and sound" aggravator and reverse appellant's exceptional sentence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Carlos Diaz-Galvin with (count 1) Assault in the First Degree; (count 2) Assault in the Second Degree; (count 3) Assault in the Third Degree; and (count 4) Assault in the Fourth Degree. Count 1 included two aggravating circumstances: that Diaz-Galvin knew the victim was pregnant and that the offense occurred within sight or sound of the victim's minor child. CP 24-26.

A jury convicted Diaz-Galvin of the assaults in counts 1 and 4, convicted him of the lesser-included offense of unlawfully displaying a weapon on count 2, and acquitted him on count 3. CP 67, 75, 78-80. Jurors answered "yes" on special verdict forms asking whether the two aggravating circumstances for count 1 had been proved. CP 69-70.

Diaz-Galvin's standard range on count 1 was 93 to 123 months. CP 86. Based on both aggravating circumstances, the

court imposed an exceptional sentence of 216 months. 8RP<sup>1</sup> 16-18; CP 86, 88. With a deadly weapon enhancement on that same count, the total sentence is 240 months. CP 68, 88. The court imposed concurrent 12-month sentences for each of the other two convictions, both of which are gross misdemeanors. CP 82-84.

Diaz-Galvin timely filed his Notice of Appeal. CP 93-105.

## 2. Substantive Facts

In August 2008, Hortencia Salas and Diaz-Galvin were dating. 6RP 61. Salas was 5 ½ months pregnant with Diaz-Galvin's child. 6RP 63. The two moved in to a basement apartment in a house that belonged to Bob and Carol Yancey. 4RP 105; 6RP 61. Salas had known the Yanceys for years. She and their daughter, Brianna Yancey, were good friends. Brianna's eleven-year-old son, Emilio, and Salas' eleven-year-old daughter, Kimberly, had attended school together. 4RP 103-104; 6RP 59. Bob and Carol Yancey lived in the home right across the driveway from the rental property they owned. 4RP 57.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – August 31, 2009; 2RP – September 1, 2009; 3RP – September 2, 2009; 4RP – September 8, 2009; 5RP – September 9, 2009; 6RP – September 10, 2009; 7RP – September 14, 2009; 8RP – October 8, 2009.

Salas worked all day on August 15, 2008, while Diaz-Galvin stayed home because he had the day off. 6RP 63-64. Salas was exhausted and upset when she arrived home to find Diaz-Galvin sitting on the couch and a sink full of dirty dishes. 6RP 64-65. Diaz-Galvin got up and offered to do the dishes, but Salas would not let him. She could tell he had been drinking. 6RP 65.

On this particular night, Brianna Yancey was next door visiting her parents. 4RP 62, 105. Emilio and Kimberly were playing outside. It was late and Salas called Kimberly in for the night. 6RP 65. Salas climbed into bed. Diaz-Galvin entered the bedroom, kissed Salas goodnight, and returned to the living room to watch television. 6RP 66.

Kimberly then crawled into bed with her mother. 5RP 96; 6RP 66. Diaz-Galvin saw Kimberly in the bed and told her to leave because Salas needed to sleep. Salas told Diaz-Galvin it was fine. With a raised voice, Diaz-Galvin again told Kimberly to leave. When he said it a third time, Salas got out of bed and told Diaz-Galvin he could not speak to Kimberly that way. 5RP 98; 6RP 66-67.

When Kimberly tried to leave the room, Diaz-Galvin blocked her path and pushed her down. 5RP 100-102, 106; 6RP 68. Salas told Kimberly to run and she did. When Diaz-Galvin started to follow

Kimberly, Salas tried, unsuccessfully, to restrain him. 5RP 106; 6RP 68. Kimberly ran across the driveway and into the Yancey residence crying and asking for help. 5RP 106-108. Diaz-Galvin followed her just inside the doorway, but quickly left once he saw Kimberly with the Yancey family. 4RP 108-109; 5RP 107.

Outside, Salas approached Diaz-Galvin and said, "let's go home." Diaz-Galvin punched her, causing her to fall to the ground. 6RP 69. Bob Yancey stepped outside just as Salas was being hit and he saw Diaz-Galvin pull her down a small flight of stairs. 4RP 69-70. Bob Yancey kept Diaz-Galvin away from Salas while Carol and Brianna Yancey, who also had stepped outside, tended to her. 4RP 72-77, 110-112; 5RP 53-54.

Carol Yancey dialed 911 and handed the phone to Brianna. 4RP 112. As Carol and Bob Yancey got Salas to her feet, Diaz-Galvin moved closer to the group and stabbed Salas in the chest with a sharp object before running away. 5RP 18; 6RP 71-72. Bob Yancey chased Diaz-Galvin, who turned around and displayed a short metal object in his hand. 4RP 79-80. Armed with a small metal bistro table, Yancey chased Diaz-Galvin away. 4RP 80-82.

Salas did not scream when she was stabbed. And she felt no pain. 6RP 71-72. But she noticed that she was bleeding. 6RP 72.

She was placed on a couch inside the Yancey home, where she passed out. 6RP 73. She was transported by ambulance to the hospital, and doctors determined a sharp object had slipped between her ribs and pierced the right ventricle of her heart. Surgeons repaired the damage, likely saving her life and that of her unborn child.<sup>2</sup> 5RP 18-43.

Meanwhile, police had located Diaz-Galvin crossing the street a few blocks from the incident. Officers told him to stop, which he did, and after confirming his identity, they placed him under arrest. 6RP 5-8. Officers searched the surrounding area, but never located the object used to stab Salas. 5RP 82; 6RP 10. Once at the police station, Diaz-Galvin kicked an officer in the groin. 5RP 130-131.

The two assault charges for which Diaz-Galvin was convicted, Assault in the First Degree and Assault in the Fourth Degree, were based on the stabbing of Salas and the pushing or hitting of Kimberly. CP 24, 26, 38, 53. The conviction for Unlawful Display of a Weapon was based on Diaz-Galvin holding the sharp object in a threatening manner when confronted by Bob Yancey. CP 25, 49. The charge of Assault in the Third Degree, on which Diaz-Galvin was

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<sup>2</sup> Four months later, Salas gave birth to a healthy baby boy. 5RP 14, 115.

acquitted, was based on kicking the officer in the groin. CP 25, 51.

3. Aggravating Circumstances

Diaz-Galvin's primary trial defense was that based on his level of intoxication, he did not intentionally assault anyone. 7RP 34-35, 40; CP 34. But the defense also attacked the sufficiency of the evidence on one of the alleged aggravating factors – that Diaz-Galvin had committed the First-Degree Assault against Salas “within sight or sound” of Kimberly. 7RP 36-37.

The evidence at trial revealed that once Kimberly ran from Diaz-Galvin and entered the Yancey home, she did not leave that house. The Yanceys told her to stay inside, and she did so, with Emilio, while the adults went outside. 5RP 108-109. From inside the house, she could not see her mother. 5RP 108. She did hear her mother scream when Diaz-Galvin punched her. Looking out of a bathroom window, she saw her mother on the stairs “like she fell” and saw Carol Yancey trying to help her get up. 5RP 109-110, 116. She also looked through the glass on a door and saw Bob Yancey trying to hold Diaz-Galvin. But she never saw her mom get up after being punched. The next time she saw her mom was when the others brought her inside the home after the stabbing. 5RP 111.

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When asked directly, Kimberly testified that she neither heard nor saw her mother get stabbed. 5RP 116.

The trial court denied a defense motion to dismiss the aggravating factor at the close of the State's case for lack of evidence and a similar motion at sentencing. 6RP 87-93; 8RP 1-2. Through oversight, jurors were never instructed that the State bore the burden to prove both aggravating circumstances beyond a reasonable doubt. See CP 27-60, 69-70 (jury instructions and special verdict forms).

Diaz-Galvin now appeals to this Court.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE.

1. The Evidence Was Insufficient To Prove That The First-Degree Assault Occurred Within Sight Or Sound Of Salas' Daughter.

As an aggravating circumstance, the State alleged that the First-Degree Assault against Salas involved domestic violence and "occurred within sight or sound of the victim's . . . minor children under the age of eighteen[.]" RCW 9.94A.535(3)(h)(ii); CP 24-25. By statute, the State must prove this circumstance to a jury beyond a reasonable doubt. RCW 9.94A.535(3) ("Such facts should be

determined by procedures specified in RCW 9.94A.537.”); RCW 9.94A.537(3) (“The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. . . .”).

The record must support the jury’s finding on the circumstance. RCW 9.94A.585(4). “As this is a factual inquiry, the [jury’s] reasons will be upheld unless they are clearly erroneous.” State v. Hale, 146 Wn. App. 299, 307, 189 P.3d 829 (2008) (quoting State v. Fowler, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). A finding is clearly erroneous if not supported by substantial evidence, meaning evidence sufficient to persuade a fair-minded person of its truth. State v. Wilson, 96 Wn. App. 382, 387, 980 P.2d 244 (1999), review denied, 139 Wn.2d 1018 (2000).

There is not substantial evidence in the record to support the jury’s finding that Diaz-Galvin committed a First-Degree Assault in Kimberly’s presence. Kimberly was inside the Yancey home during that assault. 5RP 108-111. She testified that she did not hear or see her mother get stabbed. 5RP 116.

The prosecutor argued to the trial court and the jury that “within sight or sound” was satisfied if the events were “in the scope of things [Kimberly] could have seen” and that the aggravating circumstance had been proved because Kimberly was close by and

had seen her mother both before and after the assault. 6RP 88-93; 7RP 24-25.

But the statute does not allow for an exceptional sentence where the child is merely close by or sees the parent's injuries after the fact. While the Legislature certainly could have drafted the statute to cover those scenarios, the statute requires that the "offense occurred within sight or sound of the victim's" child. RCW 9.94A.535(3)(h)(ii); see also State v. Lindahl, 114 Wn. App. 1, 8, 18, 56 P.3d 589 (2002) (victim holding child during portion of attack), review denied, 149 Wn.2d 1013 (2003); State v. Zatkovich, 113 Wn. App. 70, 80, 52 P.3d 36 (2002) (record revealed ongoing abuse and violence toward victim "in front of their minor children").

Where a statute is plain on its face, the Legislature is presumed to mean exactly what it says. Criminal statutes are given a literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). RCW 9.94A.535(3)(h)(ii) requires sight or sound, neither of which was proved here, since Kimberly could not see or hear the assault from inside the home. That she *might have been able* to see or hear the assault had she gone outside or looked out a window, or done something else to place her within sight or sound of the event at the critical time, is not the test.

Remand is necessary if it is uncertain whether the trial court would have imposed the same sentence in the absence of the inappropriate finding. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996). It is uncertain here. When justifying Diaz-Galvin's exceptionally high sentence, the judge cited to both aggravating circumstances. CP 86 ("Court relies on Jury verdicts finding two aggravating factors . . . ."); See 8RP 16 (adopting State's recommendation "because of the aggravating factors that I think that did exist in this case"); 8RP 17-18 ("So the sentence of 240 months is imposed for the aggravating factors that I've indicated."); Compare Cardenas, 129 Wn.2d at 12 (sentencing court expressly stated that any one of the circumstances, standing alone, would justify chosen sentence). This Court should remand for resentencing without consideration of the "sight or sound" aggravating circumstance.

2. Jurors Were Never Instructed On The State's Burden To Prove The Aggravating Circumstances Beyond a Reasonable Doubt.

RCW 9.94A.535 and 9.94A.537 are constitutionally based. Due process and the right to trial by jury require the State to prove sentencing enhancements to a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 302-04, 124 S. Ct. 2531, 159

L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Instructing jurors in a manner that relieves the State of this burden is reversible error. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); State v. Tongate, 93 Wn.2d 751, 753-756, 613 P.2d 121 (1980).

The trial court violated Diaz-Galvin's due process rights when it failed to instruct jurors that the State carried the burden to prove, beyond a reasonable doubt, that he committed First-Degree Assault "within sight or sound" of Kimberly.

A Washington Pattern Jury Instruction addresses this very burden. WPIC 300.07 provides in pertinent part:

The State has the burden of proving the existence of each aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

The defendant has no burden of proving that a reasonable doubt exists as to these additional facts. It is presumed that these additional facts do not exist. This presumption continues throughout this entire proceeding unless during your deliberations you find that it has been overcome by the evidence beyond a reasonable doubt.

Washington Pattern Jury Instructions, WPIC 300.07, at 702 (West

2008).<sup>3</sup>

Diaz-Galvin's jury never received this instruction. See CP 27-60. Jurors were told they had to be unanimous on each verdict, which arguably would include the special verdicts on the aggravating circumstances. CP 59. But they were never told the aggravating circumstances had to be proved beyond a reasonable doubt and never told the State bore that burden. Rather, the verdict form simply asked, "Was the crime of assault in the first degree as charged in Count I, committed within sight or sound of the victim's child, who was under the age of 18?" CP 69.

Jurors were instructed generally that the State had to prove each of the elements of the charged crimes beyond a reasonable doubt. CP 31. But that instruction is insufficient. In State v. Tongate, the Supreme Court held that a special verdict – in that case a deadly weapon finding – requires its own instruction on the standard of proof:

The special verdict is a separate finding made after the guilt-determining stage of the jury's deliberations. It cannot be assumed that a reasonable jury, in the absence of an explicit instruction on the standard of

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<sup>3</sup> Succeeding paragraphs of this WPIC define reasonable doubt and instruct jurors to consider each circumstance separately. A copy of the WPIC, in its entirety, is attached to this brief as an appendix.

proof, will understand the applicable standard to be applied to the separate finding where, as here, the fact to be found is not an element of the crime as charged.

Tongate, 93 Wn.2d at 756. In the absence of a separate instruction, the Court remanded for resentencing without the special verdict. Id.

Where, as here, jurors received *some* instruction regarding the State's burden to prove criminal liability beyond a reasonable doubt, but jurors did not receive a specific instruction on a sentencing enhancement, the State must demonstrate the error was harmless beyond a reasonable doubt. State v. Fowler, 114 Wn.2d 59, 63-64, 785 P.2d 808 (1990), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 487, 816 P.2d 718 (1991).

The State cannot make that showing regarding the "sight and sound" finding. In addition to the general instruction informing jurors the State had to prove every element of the charged crimes beyond a reasonable doubt, jurors also were instructed – for counts 1 and 2 – the State had to prove beyond a reasonable doubt that Diaz-Galvin was armed with a deadly weapon. CP 54. Jurors would have noted the absence of a similar instruction for the "sight or sound" aggravating circumstance and naturally concluded no similar burden applied.

Moreover, this aggravating circumstance was hotly contested.

Diaz-Galvin is asking this Court to find, as he did below, an absence of any evidence to support it. But assuming this Court disagrees, it is clear the evidence was not strong. Jurors struggled with this aggravator. See CP 63-64 (jurors request clarification on what aggravator requires). This Court cannot be confident the jurors' verdict on the circumstance would have been the same had they been specifically instructed on the State's burden. And, as already discussed, the jury's finding was important in the court's decision to impose Diaz-Galvin's exceptional sentence.

In response, the State may note that Diaz-Galvin did not raise this claim below. This is true. But under RAP 2.5(a), he is entitled to raise for the first time on appeal manifest error affecting a constitutional right. State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). There is no doubt constitutional rights are at issue. Moreover, the error is manifest, meaning it had practical and identifiable consequences reasonably likely to have prejudiced the defendant. See State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (discussing standard); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (failure to instruct on State's burden "a grievous constitutional failure" that can be raised for the first time on appeal).

On this alternative ground, this Court should vacate Diaz-Galvin's sentence.

D. CONCLUSION

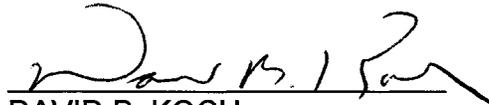
The evidence is insufficient to support the jury's finding that Diaz-Galvin committed Assault in the First Degree within sight or sound of the victim's minor daughter. Moreover, the court's failure to instruct jurors on the State's burden regarding this aggravating circumstance denied Diaz-Galvin his constitutional rights to due process and trial by jury.

This Court should vacate his exceptional sentence and remand for a new sentencing hearing.

DATED this 28<sup>th</sup> day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

## **APPENDIX**

**WPIC 300.07****AGGRAVATING CIRCUMSTANCE PROCEDURE—  
BURDEN OF PROOF—MULTIPLE FACTORS  
ALLEGED**

The State has the burden of proving the existence of [the] [each] aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

[The defendant has no burden of proving that a reasonable doubt exists [as to these additional facts.] It is presumed that these additional facts do not exist. This presumption continues throughout this entire proceeding unless during your deliberations you find that it has been overcome by the evidence beyond a reasonable doubt.]

[A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the allegation, you are satisfied beyond a reasonable doubt.]]

[Multiple aggravating circumstances have been alleged. You should consider each of the allegations separately. Your verdict on one allegation should not control your verdict on [any] [the] other allegation.]

**NOTE ON USE**

Use the first paragraph in all cases.

Use the second and third paragraphs as applicable; these paragraphs will not be needed for (1) unitary trials, or (2) bifurcated trials in which the sentencing phase jurors heard the guilt phase and the sentencing phase instructions are being used to supplement the guilt phase instructions.

Use the fourth paragraph for cases involving multiple aggravating circumstances.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64369-0-1
	)	
CARLOS DIAZ-GALVIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CARLOS DIAZ-GALVIN  
DOC NO. 334797  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF APRIL, 2010.

x Patrick Mayovsky