

NO. 35056-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRENT ALLEN HEATH,

Appellant.

BRIEF OF APPELLANT

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DIVISION II
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STATE OF WASHINGTON
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REPLY

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for aggravated first degree murder because the state failed to present substantial evidence on this charge.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it sentenced him to life without the possibility of release because the aggravating factor the state charged is void for vagueness as applied to this case.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it sentenced him to life without the possibility of release because the state failed to present substantial evidence on the one alleged aggravating factor.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment against the defendant for aggravated first degree murder when the state fails to present substantial evidence on this charge?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it imposes a sentence of life without the possibility of release based upon a single aggravating factor the definition of which is so vague as to leave jurors of average understanding to speculate as to its meaning and application to the facts of the case before them?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it imposes a sentence of life without the possibility of release based upon a single aggravating factor unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

At about 10 p.m. on the evening of November 11, 2005, Beverly Hankel was driving her mini-van on St. John's road in Vancouver taking a friend home. RP 244.¹ It was dark and either was or had been raining. RP 202-205, 245. As she drove under the I-205 overpass she noticed a car parked on the side of the road with a person sitting in the partially opened driver's door. RP 245-246. She thought this unusual and mentioned it to her friend. *Id.* At about this same time a Vancouver construction worker named Brad Bedard was also driving under the I-205 overpass on St. John's street in his blue El Camino pickup truck when he saw the same vehicle stopped by the side of the road. RP 237-237. Thinking it might be his girlfriend, he passed the vehicle, turned around, and then pulled his truck up so that the front ends of both vehicles were facing each other. *Id.*

At about this same time Billy Liddell and his wife Laurene also drove under the I-205 overpass on St. John's Road while returning home after a card game with friends. RP 201-202, 211. As they passed under I-205 they both saw two vehicles parked to the side of the road. RP 205-206, 214-215.

¹The record in this case contains eight verbatim reports with volume numbers I, II, III-A, III-B, IV-A, IV-B, V, and VI. Since all of the pages are all continuously numbered there are referred to herein as "RP" with the appropriate page number.

One vehicle was a dark blue sedan and the other one was a blue truck. RP 205, 214. The vehicles were parked facing each other. RP 206. Neither of the Liddells noticed anyone around nor thought much about the matter RP 216. Once Mr. Bedard got out of his pickup he approached the driver's side of the blue car and for the first time noticed that the driver's side door was open and a woman was partially out of it. RP 238-239. Upon walking up to her he noticed that she was not moving, and that her body was cold when he touched it. *Id.* Thinking that she was dead he ran back to his pickup to get a penlight. *Id.* At some point during this time frame yet another person by the name of Pamela Jensen drove under I-205 on St. John's Road on the way to pick up her son. RP 221-223. As she did, she noticed two vehicles parked by the side of the road facing each other. RP 223-224. One was a blue sedan while the other was a blue El Camino. RP 224. As she went by she saw the silhouette of what she thought was a man standing between the two vehicles. RP 225. Not thinking much of the matter other than there might be some teenagers out in the area, she did not stop. RP 223.

After Ms. Jensen picked up her son, and after Ms. Hankel dropped off her friend, they both retraced their steps back under I-205 on St. John's Road. RP 226, 247. As Ms. Hankel drove back under I-205 on St. John's Road, she now saw an El Camino pickup parked facing the blue sedan along with a man waving a penlight at her. RP 247-248. When she stopped, the man

frantically asked if she had a cell phone to call the police because he thought the woman in the car was dead. *Id.* As Ms. Jensen drove back with her son on St. John's Road under I-205 she also noticed for the first time that there was a woman in the driver's seat of the blue car with her legs out the partially opened door. RP 226. Seeing this and thinking that the woman might be dead, she drove home, dropped her son off, called 911 and returned to find a number of other people present. RP 226-229.

Within a few minutes of the first 911 call, a number of Clark County Sheriff's Deputies arrived on the scene. RP 118. When they did they found 28-year-old Heidi Renee Heath partially sitting in the driver's seat of her late model blue sedan. RP 117-121. She was dead. *Id.* A subsequent autopsy determined that she died of two small caliber gunshot wounds to the head. RP 96-99. One projectile had entered Ms. Heath's left ear, hit bone, and fragmented. RP 97-98. The other projectile had gone through the inner portion of Ms. Heath's right eye and fragmented as it hit the bone surrounding her pituitary gland. RP 99. According to the medical examiner, both shots were probably fired from somewhere beyond 18 to 24 inches in distance from Mr. Heath's head because he found no powder residue or other evidence that would have been present had the shots been within that distance. RP 103-105. In fact, one of the deputies found one .22 caliber shell casing on the ground at Ms. Heath's feet. RP 264-265.

One of the deputies called out to the scene was James Buckner. RP 135. Once he arrived he identified Ms. Heath from her driver's license in her purse. RP 137. After speaking with a couple witnesses at the scene, he went with another officer to the decedents's address in Battle Ground to contact her husband, the defendant Brent Heath. RP 138. Just prior to arriving at the Heath residence, he received a call from dispatch stating that Mr. Heath had called 911 because his wife had left earlier to go to the store and had not returned. RP 140-141. Once inside the house Deputy Buckner informed Mr. Heath and two of his friends that Ms. Heath was dead. RP 143.

According to Deputy Buckner, the defendant told him that his wife had gone to Winco foods at about 9:30 that evening to pickup food and drinks for two friends who were on their way down from the Seattle area. RP 143-145. After she left he called her two or thee times to tell her to pick up certain items at the store. RP 146. When their friends arrived, he again attempted to call her but she didn't answer. *Id.* He assumed that she was in the store because the cell phone reception was not good in the Winco building. RP 145-146. However, when more time passed he became worried, tried to call her again, and then went to look for her with his friend Dale Young. RP 147. The next day the defendant met Deputy Buckner at the Battle Ground police department so they could have a quite place to talk. RP 149. The defendant then gave a lengthy recorded statement. RP 149-

176. He denied any marital difficulties between him and his wife. RP 176.

Two days after Ms. Heath's murder, Deputy Buckner responded to the defendant's neighborhood to talk with a person by the name of William Crego. RP 178. According to Mr. Crego, he was acquainted with the defendant, as well as the defendant's good friends Kyle and Christina Hughes, who live across the street from him. RP 316-319. According to Mr. Crego, two evenings previous at about 7:30 he and his wife come home from having dinner and saw the defendant's truck sitting in the Hughes' driveway. RP 320-321. Mr. Crego then saw the defendant come out of the Hughes house carrying what he thought was a small caliber rifle. RP 321-322. They both said hello and the defendant got in his truck and drove away, leaving Mr. Crego with the impression that the defendant had tried to conceal the rifle from him. *Id.* The next day Kyle and Christine Hughes came back from the beach and told the Cregos that Heidi Hughes had been shot to death. RP 323.

Once Mr. Crego gave his statement to Deputy Buckner, the two of them went to speak with the Hughes. RP 178. They told Deputy Buckner that the defendant had been watching their dogs while they were away at the beach so he had a key to their house. RP 343-344. On the previous day they had received a telephone call from the defendant telling them that Heidi had been murdered. RP 346. They immediately returned back to Battle Ground and went over to see the defendant. RP 347. After doing so they stopped by

the Cregos house to tell them what had happened and then went home. PR 348-351. Once inside their house Ms. Hughes noticed that the door to the closet where they keep their firearms was open and that a few .22 caliber bullets were on her computer table nearby. RP 348-351, 369. When they had left for the beach the door was shut and the .22 caliber bullets were all in the closet. RP 348-351. With permission, Deputy Buckner took their Rossi .22 caliber single shot rifle and their Ruger .22 caliber rifle for testing. RP 183.

In fact, testing the next day revealed that one of the bullets found in Ms. Heath's head had been shot through the Rossi, and the other had been shot through a firearm with the exact same characteristics (12 lands and grooves with a right twist) as the Rossi. RP 347-349. Upon receiving this information Deputy Buckner went and arrested the defendant. RP 301. At the time of his arrest the defendant told Officer Buckner that his wife had been having an affair for about six months, that he did not know her boyfriend's name, and that on the night of her death she was on her way to see her boyfriend. RP 298-300.

Procedural History

By information filed November 22, 2005, the Clark County Prosecutor charged the defendant with one count of murder in the first degree. RP 1. The allegation included a firearms enhancement. *Id.* Following the entry of two speedy trial waivers, the case eventually came on

for trial before a jury on June 19, 2006. CP 15, 24; RP 54. Two and one-half weeks before trial the court granted the state's motion to amend the information to charge aggravated murder in the first degree under RCW 10.95.020(7). CP 34. The information alleged:

That he, BRENT ALLEN HEATH, in the County of Clark, State of Washington, on or about November 11, 2005 with a premeditated intent to cause the death of another person, the defendant caused the death of such person, to-wit: Heidi Renee Heath; and furthermore, the murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge; contrary to Revised Code of Washington 9A.32.010(1)(a) and 10.95.020(7).

CP 34.

Three days prior to trial the court held a CrR 3.5 hearing at which two deputies testified concerning whether or not the defendant had invoked his rights following his arrest. RP 1-51. The defense argued that none of defendant's post-arrest statements were admissible because the defendant had immediately ambiguously invoked his rights and the police had continued questioning without attempting to clarify the ambiguous invocation. RP 39-46. The state argued that the defendant had only later ambiguously invoked his rights and that when the police sought to clarify, the defendant indicated that he wanted to speak further. *Id.* The defense argued that at that point the defendant had unambiguously invoked his right. *Id.* The court ruled that the

only invocation of the rights came about half-way into the post-arrest interview, that it was unambiguous, and that the defendant's responses to further questioning would not be admitted at trial. RP 57-60. In fact, the state did not introduce any of the defendant's post-arrest statements at trial. RP 52-445.

On June 19, 2006, the case came on for trial before a jury. RP 54. During trial the state called 20 witnesses with one witness recalled for further testimony. RP 67, 92, 117, 128, 135, 200, 210, 219, 236, 243, 252, 286, 243, 252, 286, 292, 316, 333, 341, 357, 384, 406, 423. After this evidence, the state rested its case, and the defense rested its case without calling any witnesses. RP 453, 460. In fact, the court canvassed the defendant concerning his right to testify or remain silent, and the defendant indicated that he wished to remain silent. RP 457. The court then instructed the jury on the offense charged, along with an instructions on the lesser included offenses of first degree murder and second degree murder as requested by the defense. CP 53-76. Neither party objected to any of these instructions nor took exception to the failure to give any other proposed instructions. RP 459.

Following instruction by the court the parties presented closing argument and the jury retired for deliberation. RP 461-506. The jury later returned a verdict of "guilty" to the original charge of aggravated first degree murder. CP 91. The jury also returned a special verdict that the defendant

was armed with a firearm at the time of the commission of the crime. CP 94. Four days after the jury returned its verdict the court sentenced the defendant to life without the possibility of release. RP 103-114. The defendant thereafter filed timely notice of appeal. CP 115-127.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR AGGRAVATED FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that

the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with aggravated first degree murder under RCW 10.95.020. The first portion of this statute provides as follows:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

RCW 10.95.020.

In order to obtain a conviction under this statute the state has the burden of first proving that the defendant committed first degree murder as defined in RCW 9A.32.030(1)(a). This statute provides:

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person;

RCW 9A.32.030(1)(a).

Consequently, in the case at bar the state had to first prove that the defendant, with premeditated intent, killed his wife. While the state did present substantial evidence that someone had intentionally killed the defendant's wife, the state failed to call any witness who could put the defendant at the scene of the crime or any witness to identify the defendant as the one who perpetrated the offense. The presentation of such in-court identification of the defendant as the perpetrator of the crime would be, by itself, substantial evidence on the identification issue regardless of the success the defense has in questioning the accuracy of that identification. *See State v. Edwards*, 23 Wn.App. 893, 600 P.2d 566 (1979) (eyewitness identification of the defendant as the perpetrator of the offense constitutes substantial evidence in spite of the credibility of the alibi witnesses); *see also State v. Lane*, 4 Wn.App. 745, 484 P.2d 432 (1971) (eyewitness identification of a defendant although "not as strong as that of his co-defendant" still

“constitutes substantial evidence”). By contrast, the absence of an in-court identification leaves the question open whether or not the state has presented substantial evidence on identification.. As the cases of *State v. Giles*, 53 Wn.2d 386, 333 P.2d 923 (1959), *State v. Smith*, 12 Wn.App. 720, 531 P.2d 843 (1975), and *State v. Nicholas*, 34 Wn.App. 775, 663 P.2d 1356 (1983) explain, substantial evidence of identification must come from another source.

In *State v. Giles*, *supra*, the defendant, his wife, their twenty-one-month-old baby, and one other person attended a drive-in movie marathon from 6:00 pm to 4:30 am the next morning. At 4:24 am that morning, the child was found dead of multiple acute blunt force injuries to the left scalp that had been inflicted some time while the child was in the presence of the three adults. The state later charged the defendant with the homicide, and eventually obtained a conviction for manslaughter. Following entry of the verdict in the case, the defendant moved for arrest of judgment on the basis that the state had failed to prove that he was the criminal agent, or in the alternative, for a new trial. The trial court denied the motion for arrest of judgment but did grant a new trial. The state then appealed the order granting a new trial, and the defendant cross-appealed the denial of the motion for arrest of judgment.

On appeal, the Washington Supreme Court vacated the conviction and

ordered the Information dismissed on the basis that the state had failed to present substantial evidence that the defendant had committed the offense charged. The court stated:

Two other persons besides the defendant and his infant daughter were in the car during the performance. Throughout the night the adults drank bottled beer provided by defendant. There is, however, no proof as to who inflicted the injuries from which the child died. Reprehensible and repulsive as the conduct of the defendant is, nevertheless, it is not proof of manslaughter.

State v. Giles, 53 Wn.2d at 386-387.

In *State v. Smith, supra*, the defendant also appealed his conviction for killing his own child. In this case, the defendant had left at midnight for a walk with his 2½-year-old son. When he returned alone the next morning, he gave inconsistent answers to his wife's questions about where their son was. A short time later, the police found the child drowned in a creek behind the defendant's house. The state later charged the defendant of First Degree Murder. Following conviction, the defendant appealed, arguing in reliance upon *Giles* that the state had failed to prove that he was the perpetrator of the criminal act. However, the Court of Appeals disagreed, finding sufficient corroborating evidence that the defendant committed the offense. The court held:

There was also substantial evidence of the identity of Smith as the criminal agent. In addition to the inculpatory statements listed above was evidence placing him in the creek. Officer Stanley, who received the pants Smith had been wearing on the evening and morning in

question from Officer Lentz, testified that upon examination he found sand throughout them. Moreover, they were wet, with the area 2 inches above the knee and down wetter than the rest, indicating that Smith had stooped down in the stream. His jacket and socks were wet and had sand in them. There were dark spots on the back of the pants.

State v. Smith, 12 Wn.App. at 731.

Finally, in *State v. Nicholas, supra*, the defendant was charged with First Degree Rape and First Degree Burglary after a police dog tracked him from the victim's house just after the attack to a location a few blocks away. Following his conviction, the defendant argued that his conviction should be vacated because under the decision in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), dog tracking evidence does not constitute substantial evidence sufficient to sustain a conviction absent corroborating evidence proving that the defendant was the perpetrator of the crime. Although the Court of Appeals agreed with his legal argument, it affirmed, finding sufficient corroboration. The court stated:

Nicholas fit the victim's description of the rapist. He was extremely sweaty. He was reasonably close to the victim's residence and he was not excluded from consideration by the medical tests. He had fresh bleeding cuts on his cheek and nose and a scratch on the other side of his nose. Fingernail scrapings taken from the victim contained human blood. This evidence, taken together with the tracking dog identification, was sufficient to satisfy the standard of *State v. Green, supra*.

State v. Nicholas, 34 Wn.App. at 779

In the case at bar and when seen in the light most favorable to the

state, the record fails to raise to the level of substantial evidence of identity. Only one witness actually saw any person at the scene of the murder under the St. John's Overpass, and that person was not even asked to attempt to identify the defendant as that person. This failure to elicit an in-court identification is unsurprising given that fact that the witness only saw the person for a portion of a second and then only in silhouette. In addition, the state was unable to present a witness who could testify that the defendant's truck was at the scene of the murder. This lack of an eyewitness was exacerbated by the fact that the police were unable to uncover any forensic evidence from which to conclude that the defendant was the one who shot his wife.

By far, the most damaging evidence the state was able to produce on identification was the testimony that (1) the defendant left his friends house the evening before the murder with a small caliber rifle in his possession, and (2) a small caliber rifle belonging to the defendant's friends was used to commit the crime. However, this put the evidence of identification squarely within the type of evidence presented in *Giles* since the defendant was not the only person with access to this weapon. Three other people had access to the murder weapons: the defendant's friend, that person's wife, and that person's son. Thus, while the defendant certainly was a person who could have committed the offense, he was not the only person who could have

committed the offense. As the court clarified in *Giles* this is simply not substantial evidence of identification absent a confession or some other evidence of identification. Since none existed in this case the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated when the court entered judgment against for a crime that was unsupported by substantial evidence.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT SENTENCED HIM TO LIFE WITHOUT THE POSSIBILITY OF RELEASE BECAUSE THE AGGRAVATING FACTOR THE STATE CHARGED IS VOID FOR VAGUENESS AS APPLIED TO THIS CASE.

The due process clause of Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct and ensures that citizens receive notice as to what conduct the law proscribes and prevents the law from being arbitrarily enforced. *State v. Sullivan*, 143 Wn.2d 162, 181, 19 P.3d 1012 (2001). Absent this requisite notice a statute is void for vagueness. *Id.* This vagueness doctrine serves two important purposes: first, it provides citizens with fair warning of what conduct they must avoid; and second, it protects them from arbitrary, ad hoc, or discriminatory law enforcement. *State v.*

Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993).

However, a statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt. *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005). The constitution does not require impossible standards of specificity or mathematical certainty because some degree of vagueness is inherent in the use of our language. *State v. Riles*, 135 Wn. 2d 326, 348, 957 P.2d 655 (1998). Finally, when assessing vagueness in a non-First Amendment case, the court examines the actual facts rather than hypothetical situations. *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997). The statute is not unconstitutionally vague if the defendant's conduct "falls squarely" within its "core prohibitions." *State v. Smith*, 111 Wn.2d 1, 759 P.2d 372 (1988).

The decision in *State v. Locklear*, 105 Wn.App. 555, 20 P.3d 993 (2001), illustrates these principles. In this case the defendant and two others decided to drive up to and shoot at the house of a person they believed had slighted them. Upon making this agreement, the defendant and one of his accomplices armed themselves with a .30-.30 rifle and a 12 gauge shotgun. Once they were armed, the third person drove them to a location within a couple blocks of the target house. The defendant and the other passenger then got out of the car, walked to the occupied house, fired a number of shots at it, and returned to the vehicle and fled the area. Their actions seriously

endangered the people inside the house. The state later charged and convicted the defendant of a relatively new offense entitled “drive-by shooting.” This statute states as follows in pertinent part:

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm ... in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045.

The defendant thereafter appealed, arguing that the phrase “from the immediate area of a motor vehicle” was unconstitutionally vague as it applied to the facts of his case.

In addressing the defendant’s claims the court first noted that the legislature did not give specific definitions to the terms “immediate area” and “scene.” The court then proceeded to explain the following about the “core prohibitions” in the statute.

Undoubtedly, a person of ordinary intelligence would know without guessing that this nexus exists when a car transports the shooter or the gun to the scene, and the shooter fires from inside the car. RCW 9A.36.045(1) provides that a person commits a felony “when he or she recklessly discharges a firearm ... and the discharge is ... from a motor vehicle[.]” RCW 9A.36.045 (2) permits the trier of fact to infer recklessness when a person “unlawfully discharges a firearm from a moving motor vehicle[.]”

Undoubtedly, a person of ordinary intelligence would know without guessing that the required nexus exists when a shooter is transported to the scene in a car, gets out, and fires from within a few

feet or yards of the car. RCW 9A.36.045(1) provides that a person commits a felony “when he or she recklessly discharges a firearm ... and the discharge is ... from the immediate area of a motor vehicle that was used to transport the shooter or the firearm ... to the scene of the discharge.” Moreover, the term “immediate area of a motor vehicle” includes, at its core, the area within a few feet or yards of such motor vehicle.

State v. Locklear, 105 Wn.App. at 560.

Having defined the “core” prohibitions of the statute the court looked to the facts of the case before it and found the term unconstitutionally vague given that the shooting had certainly fallen well out of this core area. The court held:

In contrast, however, a person of ordinary intelligence would not know without guessing whether the required nexus exists when a shooter is transported to the scene in a car, walks two blocks away, then fires the gun. Although the term “immediate area of a motor vehicle” includes at its core the area within a few feet or yards of the motor vehicle, how is one to know whether it includes a location two blocks away? Although the term “scene of the discharge” includes at its core the area within a few feet or yards of the gun when the gun is fired, how is one to know whether it includes a location two blocks away? A person of common intelligence cannot answer these questions without guessing, and the statute is unconstitutionally vague as applied to this case.

State v. Locklear, 105 Wn.App. at 560.

While the court reversed the defendant’s conviction on the basis that the drive-by shooting statute was unconstitutionally vague as applied to the defendant’s case, the court failed to address the defendant’s argument that he was entitled to dismissal because the state had failed to present substantial

evidence of the crime charged. The defendant then obtained review by the Washington Supreme Court, which ruled that the defendant was entitled to dismissal. *State v. Rogers*, 146 Wn.2d 55, 43 P.3d 1 (2002). In addressing the defendant's arguments, the court added the following explanation concerning the phrase "from the immediate area of a motor vehicle."

If Locklear's culpability could be established merely by showing that he discharged a firearm from the "area" of Ishaq's motor vehicle or from the "area of town" that her vehicle was located in, then it might be said that the evidence supports Locklear's conviction. The drive-by shooting statute is, however, more narrowly drawn and requires the State to produce evidence that the firearm was discharged by the defendant from the "immediate area" of the vehicle which transported the shooter. It seems obvious that one is not in the immediate area of a vehicle that is parked two blocks away from the place where that person discharges a firearm. That is the case we have here and, thus, we have no difficulty saying that the evidence is insufficient to support the trial court's conclusion of law that Locklear was guilty of drive-by shooting. In making this determination, we find it helpful to accord the term "immediate" its dictionary definition, which Webster's Third New International Dictionary defines as "existing without intervening space or substance ... being near at hand: not far apart or distant." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1129 (1986). Similarly, Black's Law Dictionary defines "immediate" as "[n]ot separated in respect to place; not separated by the intervention of any intermediate object." BLACK'S LAW DICTIONARY 749 (6th ed.1990).

State v. Rogers, 146 Wn.2d at 61-62.

Although the case at bar does not deal with the crime of "drive-by shooting" as defined in RCW 9A.36.045, the language of the statute is identical as the following italicized and bold portions of the comparison indicates:

A person is guilty of drive-by shooting when he or she recklessly ***discharges a firearm as defined in RCW 9.41.010*** in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge ***is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.***

RCW 9A.36.045(1) (italics and bold added).

The murder was committed during the course of or as a result of a shooting where the ***discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;***

RCW 10.95.020(7) (italics and bold added).

Thus, while *Locklear* and *Rogers* deal with the drive-by shooting statute, the rulings in them also apply to the instant case in which the defendant also argues that the phrase “from the immediate area of a motor vehicle” is also unconstitutionally vague as applied to the facts of this case.

For the purpose of making the vagueness argument herein, the defendant admits, *arguendo*, that seen in the light most favorable to the state, the facts of this case could support a conclusion that (1) some time during the evening of November 11, 2005, the defendant traveled from his home to somewhere in the vicinity of the St. John’s underpass in Vancouver, (2) that he traveled to that area in a motor vehicle, (3) that he took a rifle with him, and (4) that at that location he shot and killed his wife. The timing of these actions is particularly problematic because the police testified that the

defendant gave contrary statements concerning the purpose of his wife's travels. Initially he stated that she was driving to the store, and later he told them that she was leaving for the evening to meet with her paramour. However, while the timing is problematic, the question of where the defendant parked the vehicle in relation to his wife's car is insoluble for the following reasons.

First, while the defendant owned a truck and a couple of witnesses remember seeing a truck parked close to the decedent's vehicle, one of the witnesses who stopped at the scene was also driving a truck, which he parked next to the decedent's vehicle. It is interesting to note on this point that while the state took great pains to introduce a photograph of the defendant's large truck into evidence, the state did not ask a single witness who traveled under the St. John's underpass whether that was the truck they saw as opposed to the truck belonging to the first witness who stopped. In fact, there is no evidence that the defendant even traveled in his truck, as opposed to traveling in another vehicle.

Second, the location of the .22 caliber casing next to the foot of the decedent puts the shooter at the side of the decedent's vehicle standing at the edge of the roadway at the time of the shooting. This evidence puts the shooting "in the immediate area" of the decedent's motor vehicle, not "in the immediate area" of any vehicle used to transport the defendant to that area

unless that vehicle was parked in the street next to the decedent's vehicle. No evidence supports this conclusion. Thus, under the facts as presented at trial, the vehicle transporting the defendant to the scene could have been parked three car lengths away, 10 car lengths away, a block away over a hill, or two blocks away on a side street. In each of these possibilities the shooting occurred well outside the "core area" of inside or within a few feet of the vehicle used to transport the shooter. Thus, in the same manner that the phrase "from the immediate area of a motor vehicle" was unconstitutionally vague under the facts of *Locklear*, so the same phrase is unconstitutionally vague under the facts of the case at bar.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT SENTENCED HIM TO LIFE WITHOUT THE POSSIBILITY OF RELEASE BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THE ONE ALLEGED AGGRAVATING FACTOR.

As was previously mentioned, in the case at bar the state charged the defendant with aggravated first degree murder under RCW 10.95.020(7). The initial portion of the statute along with the seventh paragraph states as follows:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

. . .

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

RCW 10.95.020(7).

The use of the term “aggravating circumstances” in the initial part of RCW 10.95.020 is somewhat confusing as the current case law from the Washington Supreme Court leaves the question open as to whether these “aggravating circumstances” are independent elements of a new crime or simply sentence enhancements as are firearms enhancements, deadly weapons enhancements, or school zone enhancements to name a few. *See* discussion in footnote 90 in *State v. Mason*, 127 Wn.App. 554, 110 P.3d 290 (2005). However, whether enhancement or element, the state still bears the burden of proving the aggravating factor beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) (aggravated murder case remanded for retrial on enhancements because one aggravating factor was unsupported by substantial evidence and the instructions were such that it was impossible to determine whether or not the jury necessarily found the other alleged aggravating factor proven beyond a reasonable doubt). Thus, in the same manner that due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment allows a

defendant to argue that substantial evidence does not support all of the elements of the offense, so a defendant may argue under the state and federal due process clauses that substantial evidence does not support the alleged aggravating factors under RCW 10.95.020.

In this case the sole aggravating factor alleged in the information was out of the seventh paragraph to RCW 10.95.020. This paragraph states:

The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

RCW 10.95.020(7).

As was mentioned in Argument II, the “core prohibitions” found in this paragraph is that a defendant discharge a firearm from within a motor vehicle or within a few feet or yards of a motor vehicle after having used that vehicle to transport the shooter or the firearm to the place of the shooting. Thus, as was mentioned in *Locklear, supra*, and *Rogers, supra*, evidence that a defendant walked away from the vehicle that was used to transport the shooter or the weapon is insufficient to prove that the defendant discharged the firearm “from the immediate area of the motor vehicle.”

As was also mentioned in Argument II, in the case at bar there was some evidence to indicate that the defendant might have transported himself to the area surrounding the St. John’s underpass in a motor vehicle, but there

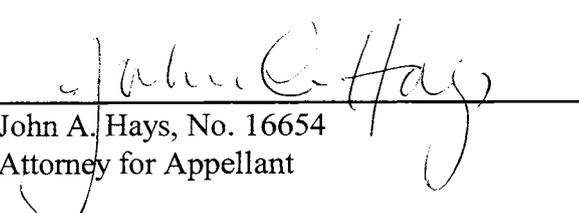
is no evidence at all concerning where the vehicle was at the time of the shooting. It might have been somewhere close to the area of the shooting, and it might equally well have been parked blocks away. Thus, without some affirmative evidence that the defendant had discharged the firearm from the immediate area of the motor vehicle used to transport him to the scene of the discharge, substantial evidence does not support the finding of the aggravating factor. As a result, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it imposed a sentence consistent with the finding of the alleged aggravating factor. Consequently, at a minimum, this court should remand with instructions to resentence the defendant without the aggravating factor.

CONCLUSION

The trial court erred when it entered judgment for aggravated murder in the first degree because the state failed to present substantial evidence on either the murder in the first degree charge or on the aggravating factor alleged. In addition, the aggravating factor as alleged under the facts of this case denied the defendant his right to due process because it was unconstitutionally vague.

DATED this 29th day of January, 2007.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.36.045
Drive-by shooting

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9A.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

(3) Drive-by shooting is a class B felony.

RCW 10.95.020
Definition

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that

he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were “family or household members” as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

