

Original

FILED
JAN 10 2011
COURT OF APPEALS
DIVISION II
SEATTLE, WA
C. M. M.

NO. 36135-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CRAVEN ADRIAN STURGIS,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENTS OF ERROR

 1. Assignments of Error 1

 2. Issues Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE 3

D. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BECAUSE THE FINDINGS UPON WHICH THE COURT RELIED ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE FINDINGS DO NOT LEGALLY JUSTIFY A DEPARTURE FROM THE STANDARD RANGE 7

(1) The Findings of Fact upon Which the Court Relied When Imposing the Exceptional Sentence Are Not Supported by Substantial Evidence 7

(2) The Findings of Fact the Court Entered Are Not Legally Sufficient to Support Imposition of an Exceptional Sentence 9

II. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BECAUSE THE STATE FAILED TO MEET THE REQUIREMENTS OF RCW 9.94A.537 FOR THE IMPOSITION OF EXCEPTIONAL SENTENCES 12

III. THE TRIAL COURT’S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED UPON ITS OWN FINDINGS OF FACT VIOLATED THE DEFENDANT’S RIGHT UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT TO HAVE A JURY DETERMINE ALL FACTS NECESSARY FOR IMPOSITION OF PUNISHMENT AND THIS ERROR WAS NOT HARMLESS 15

E. CONCLUSION	23
F. APPENDIX	
1. United States Constitution, Sixth Amendment	24
2. RCW 9.94A.535	24
3. RCW 9.94A.537	30

TABLE OF AUTHORITIES

Page

Federal Cases

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 16, 18

Blakely v. Washington,
542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) . . . 12, 17-19, 21, 22

Washington v. Recuenco,
--- U.S. ----, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) 18

State Cases

State v. Agee, 89 Wn.2d 416, 573 P.2d 355 (1977) 7

State v. Fisher, 108 Wn.2d 419, 739 P.2d 1117 (1987) 7

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988) 8

State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991) 10

State v. Hartley, 41 Wn.App. 669, 705 P.2d 821 (1985) 11, 12

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) 8

State v. Hughes, 154 Wn.2d 119, 110 P.3d 192 (2005) 17-19

State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) 14

State v. Mulcare, 189 Wash. 625, 66 P.2d 360 (1937) 14

State v. Nelson, 108 Wash.2d 491, 740 P.2d 835 (1987) 10

State v. Taiit, 93 Wn.App. 783, 970 P.2d 785 (1999) 11

State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996) 14

State v. Womac, — Wn.2d —, 160 P.3d 140 (2007) 18, 20, 21

Constitutional Provisions

United States Constitution, Sixth Amendment 16

Statutes and Court Rules

RCW 9.94A.525 7
RCW 9.94A.535 10
RCW 9.94A.537 12-16, 21

Other Authorities

D. Boerner, *Sentencing in Washington*, § 25(a) (1985) 9, 10

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it imposed an exceptional sentence because the findings upon which the court relied are not supported by substantial evidence and the findings do not legally justify a departure from the standard range. CP 156-158.

2. The trial court erred when it imposed an exceptional sentence because the state failed to meet the requirements of RCW 9.94A.537 for the imposition of exceptional sentences. CP 140-154.

3. The trial court's imposition of an exceptional sentence based upon its own findings of fact violated the defendant's right under United States Constitution, Sixth Amendment to have a jury determine all facts necessary for imposition of punishment and this error was not harmless beyond a reasonable doubt. CP 140-158.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it imposes an exceptional sentence based upon findings unsupported by substantial evidence and findings which do not legally justify a departure from the standard range?

2. Does a trial court err if it imposes an exceptional sentence when the state failed to meet the requirements of RCW 9.94A.537 for the imposition of exceptional sentences?

3. Does a trial court's imposition of an exceptional sentence based upon its own findings of fact violate a defendant's right under United States Constitution, Sixth Amendment to have a jury determine all facts necessary for imposition of punishment if that violation is not harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

By information filed April 30, 2003, the Clark County Prosecutor charged the defendant Cravenn Adrian Sturgis out of a single incident with first degree assault, unlawful imprisonment, and felony harassment. CP 1-2.

The body of each count includes the following allegation:

And further, that this crime was committed by one family or household member against another, and that this is a domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040. [DV]

CP 1-2 (brackets in original).

The information does not contain a notice that the state alleges any aggravating facts or that the state intends to seek an exceptional sentence. *Id.* The case later came on for trial before a jury, which rendered verdicts of guilty on each count. CP 3-6. The jury also rendered a special verdict that in committing the charge of felony harassment “the defendant’s threat to cause bodily” consisted “of a threat to kill the person threatened or another person.” CP 7. The verdicts contain no findings that the defense committed a domestic violence offense, the state did not propose a special verdict on domestic violence, and the court did not submit any type of special verdict to the jury on domestic violence. CP 1-7.

At sentencing the court found that the defendant had no prior felony convictions that counted against his offender score and that counts I and III

constituted the “same criminal conduct.” CP 73, 86. Thus, the court determined that the defendant’s offender score was one point on each conviction, and that his standard ranges were as follows: 102 to 136 months on count I, and 4 to 12 months each on counts II and III. CP 74. The court then imposed an exceptional sentence of 180 months on Count I, based upon factual findings that the defendant disputed. CP 76, 87-91.

Following imposition of sentence the defendant appealed both his convictions and the exceptional sentence. CP 92-101. The court of appeals affirmed the convictions, but reversed the sentence, finding that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court’s imposition of an exceptional sentence based upon facts to which the defendant did not stipulate violated the defendant’s right under the Sixth Amendment to have a jury determination of all facts necessary to punishment. CP 92-101. Consequently, the court remanded the case back to the trial court for resentencing. *Id.* Prior to the resentencing hearing the state filed a motion to empanel a jury to determine aggravating factors, a motion that the defense opposed. CP 113-115, 116-131. The state then successfully obtained a stay of sentencing pending the decision of the Washington Supreme Court in *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). RP 132-133.

After the court issued its decision in *Pillatos*, the Clark County

Prosecutor abandoned its motion to empanel a sentencing jury, but none the less moved that the court again declare an exceptional sentence, arguing that the jury's verdict constituted implicit findings of an aggravating factor under RCW 9.94A.535(3)(h). CP 132-134. The defense again opposed the state's request. CP 135-137. Following brief argument on the issue the trial court again imposed an exceptional sentence of 180 months on count I, based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The jury found the defendant guilty after jury trial of: Count I, Assault in the First Degree - Domestic Violence; Count II, Unlawful Imprisonment - Domestic Violence and Count III, Felony Harassment - Domestic Violence on 10-28-03.
2. In finding the defendant guilty of Count III, the charge of Felony Harassment, the jury found that the defendant made a threat. to the victim to kill her.
3. In finding the defendant guilty of count III, the jury found that the defendant threatened to kill the victim during the time that the blows were administered to the victim.
4. Special interrogatories were not submitted to the jury concerning aggravating circumstances which would support an exceptional sentence.

CONCLUSIONS OF LAW

1. The court has proper venue and jurisdiction to hear the above entitled matter.
2. The jury's verdicts of guilty in counts 1, 2, and 3 establish substantial and compelling reasons that justify an exceptional sentence above the standard range pursuant to RCW 9.94A.535.

3. The jury's verdict of guilty in count 1, Assault in the First Degree, reflected that the crime involved domestic violence as defined in RCW 10.99.020. The jury's verdict of guilty in count 3, felony harassment, reflects that the defendant's conduct during his commission of Assault in the First Degree, specifically his threat to kill the victim, manifested intimidation of the victim. This is an aggravating circumstance under RCW 9.94A.535(2)(h)(iii).

4. The Court concludes that this basis is a substantial and compelling justification sufficient to impose an exceptional sentence and an exceptional sentence is appropriate given the factor listed above.

5. In light of the purposes of the Sentencing Reform Act, which seeks to ensure punishment that is proportionate to the seriousness of the offense and the protection to the public, the court hereby imposes an exceptional sentence of 180 months.

6. Further, this court finds that this sentence is appropriate based upon the conduct even if a higher Court finds that all three crimes merge for purposes of same criminal conduct.

CP 156-158.

After imposition of this new exceptional sentence, the defendant again filed timely notice of appeal. CP 159.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BECAUSE THE FINDINGS UPON WHICH THE COURT RELIED ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE FINDINGS DO NOT LEGALLY JUSTIFY A DEPARTURE FROM THE STANDARD RANGE.

In order to obtain reversal of a sentence in excess of the standard range, the defendant has the burden of proving at least one of three arguments: (1) “that the reasons supplied by the sentencing judge are not supported by the record which was before the judge,” (2) “that these reasons do not justify a sentence outside the standard range for that offense”, or (3) that the exceptional sentence that is “clearly too lenient.” RCW 9.94A.525(4)(a)&(b). The first issue is a question of fact reviewed under a clearly erroneous standard. *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 1117 (1987). The latter two issues are questions of law and should be independently reviewed by the court on appeal. *Id.* In the case at bar, the defendant makes the first two claims. The following sets out these arguments.

(1) The Findings of Fact upon Which the Court Relied When Imposing the Exceptional Sentence Are Not Supported by Substantial Evidence.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial

evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has assigned error to Finding of Fact 3 and that portion of Conclusions of Law 3 which includes factual findings. Finding of Fact 3 and the contested portion of Conclusion of Law 3 state the following:

FINDINGS OF FACT

3. In finding the defendant guilty of count III, the jury found that the defendant threatened to kill the victim during the time that the blows were administered to the victim.

CONCLUSIONS OF LAW

3. . . . The jury's verdict of guilty in count 3, felony harassment, reflects that the defendant's conduct during his commission of Assault in the First Degree, specifically his threat to kill the victim, manifested intimidation of the victim.

CP 156-158.

In fact, the jury was not asked by special verdict to determine beyond a reasonable doubt the timing of the threat to kill that constituted Count III in relation to the timing of the crime of First Degree Assault. Rather the court simply gave the jury a general verdict form, which the jury filled out as follows:

We, the jury, find the defendant, CRAVENN STURGIS, guilty of the crime of Harassment.

CP 6.

Consequently, the trial court's finding of fact that the "jury found that the defendant threatened to kill the victim during the time that the blows were administered to the victim" is not supported by the record. It was simply the trial court's speculation on the matter. Thus, Finding of Fact 3 and the second half of Conclusion of Law 3 are not supported by substantial evidence and the trial court erred when it relied upon this fact to support imposition of an exceptional sentence.

(2) The Findings of Fact the Court Entered Are Not Legally Sufficient to Support Imposition of an Exceptional Sentence.

As was pointed out by Professor David Boerner in his treatise on Sentencing in Washington, the primary goal under the Sentencing Reform Act (SRA) is to impose proportional punishment. *See generally*, D. Boerner, *Sentencing in Washington*, § 25(a) (1985). The principle method employed to achieve this proportionality is the use of standard range sentences under

which the court is limited to a sentence range based upon two factors: the seriousness of the offense, and the number and character of the defendant's prior offenses. *Id.*

While the majority of defendants are sentenced within the standard range, the SRA does recognize the fact that some defendants are either far less culpable or far more culpable than the majority of defendants committing the same crime. In these circumstances, the SRA created the option for an exceptional sentence outside the standard range. RCW 9.94A.535.

Although the SRA provides a list of mitigating and aggravating factors which will justify departure from the standard range, the list is illustrative only. *Id.* Thus, the court may rely on any factor supported by the record that "significantly distinguishes" the defendant's crime from others in the same category unless that factor is necessarily considered by the legislature in establishing the standard range. *State v. Grewe*, 117 Wn.2d 211, 813 P.2d 1238 (1991).

Under these principles, it is axiomatic that the trial court cannot rely upon the defendant's commission of one of the elements of the offense or the commission of another offense already included in the offender score in order to impose a sentence in excess of the standard range. *State v. Nelson*, 108 Wash.2d 491, 499, 740 P.2d 835 (1987). In addition, under the real facts doctrine, the court cannot impose an exceptional sentence based upon facts

that constitute the elements of a more serious offense. *State v. Taiit*, 93 Wn.App. 783, 970 P.2d 785 (1999).

For example, in *State v. Hartley*, 41 Wn.App. 669, 705 P.2d 821 (1985), the defendant pled guilty to taking a motor vehicle without permission. At sentencing the court determined that the defendant had eight prior felony convictions and an offender score of seven points, which yielded a presumptive range of 14 to 18 months in prison. However, the trial court imposed an exceptional sentence of 36 months upon its findings that the defendant was a danger to the community in that he kept committing felony after felony every time he was released. The defendant appealed, arguing that his prior convictions had already been considered in determining his offender score and could not justify imposition of an exceptional sentence. The Court of Appeals agreed, holding as follows:

These reasons, which incorporate the court's oral decision, are insufficient. They boil down to the court's belief that the standard range simply does not provide enough punishment to Hartley and enough protection to society in view of his criminal history. The problem with this is that the standard range already reflects an offender's criminal history. The Legislature, acting through its duly authorized Sentencing Guidelines Commission, has determined that the standard range sentence for this offense of auto theft is 14 to 18 months. (We are assuming for the moment that the judge computed the range correctly.) The standard range takes into account the particular offense and the extent and nature of the offender's criminal history, including the seriousness of any prior offenses and whether or not they were violent in nature. The range expresses the legislative judgment as to the length of sentence appropriate to fulfill the Act's purposes of protecting the public, promoting respect for the law, and

providing punishment proportionate to the seriousness of the crime and the offender's criminal history. An exceptional sentence must be based on more than the belief that a defendant's criminal history warrants a longer term of punishment than the standard range would allow. The sentence must be reversed.

State v. Hartley, 41 Wn.App. At 671-672 (citations omitted).

In the case at bar the trial court imposed an exceptional sentence on Count I based upon the fact that the defendant committed Count III at the same time he committed Count I. The problem with this justification for imposing an exceptional sentence is the same problem that existed in *Hartley*: the legislature has already taken the commission of prior and concurrent offenses into consideration in determining the offender score for each concurrent offense. Thus, as in *Hartley*, the trial court's use of this reason to justify imposition of an exceptional sentence simply reflects the trial court's dissatisfaction with the legislature's judgment on what the appropriate sentence should be. As a result, in the case at bar, as in *Hartley*, the trial court's findings do not justify imposition of an exceptional sentence, and as in *Hartley*, the defendant's case should be remanded for imposition of a sentence within the standard range.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BECAUSE THE STATE FAILED TO MEET THE REQUIREMENTS OF RCW 9.94A.537 FOR THE IMPOSITION OF EXCEPTIONAL SENTENCES.

Effective April 15, 2005, and following the United States Supreme

Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Washington State legislature adopted RCW 9.94A.537, a new statute setting out the procedures by which the state could seek and obtain imposition of an exceptional sentences. The first section of this statute provides as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1).

Under the plain language of this section, before the court may impose an exceptional sentence the state must give notice of its intent to seek an exceptional sentence "prior to trial or entry of the guilty plea." In addition, that notice must state the "aggravating circumstances upon which the requested sentence will be based." The statute provides no exceptions to these requirements. In the case at bar the state never did give notice to the defendant that it would seek an exceptional sentence "prior to trial or entry of the guilty plea." Thus, the trial court acted without authority when it imposed an exceptional sentence.

In addition, the second section of RCW 9.94A.537 has another condition precedent to the trial court's authority to impose an exceptional sentence. This section states:

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(2).

Under this subsection the facts the state claims support imposition of an exceptional sentence "shall" be proved to the jury beyond a reasonable doubt, the jury's decision on those facts "must be unanimous," and the court "must" submit the decision to the jury "by special interrogatory." In statutory interpretation "words of command," such as "shall" or "must" are accorded their plain meaning and are "imperatives." *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994). Thus, in RCW 9.94A.537 these words set out conditions precedent to the creation of the court's authority to impose an exceptional sentence since the trial court has no inherent authority to impose any sentence except as created by the legislature. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996); *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

In the case at bar the trial court did not "subject the facts the state claims support imposition of an exceptional sentence to the jury," the jury did not find the existence of those facts "beyond a reasonable doubt," and the jury did not find those facts "by special interrogatory." Since each of these requirements is a condition precedent to the trial court's authority to impose

an exceptional sentence, the absence of these conditions in the case at bar precluded the court from imposing an exceptional sentence.

The third section of RCW 9.94A.537 also includes conditions precedent to the trial court's authority to impose an exceptional sentence.

The first sentence of this section states:

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t).

RCW 9.94A.537(3).

In the case at bar the state alleged an aggravating factor under RCW 9.94A.535(3)(h). CP 133-134. Under RCW 9.94A.537(3), any such claim "shall be presented to the jury during the trial of the alleged crime." Once again, the legislature used the imperative "shall" and did not provide for an exception to this requirement. Thus, the trial court's failure in the case at bar to present the alleged aggravating factor "to the jury during the trial of the alleged crime" precludes the court from imposing an exceptional sentence.

Finally, in section five of RCW 9.94A.537, the legislature reiterates its decision that the trial court only has discretion to impose an exceptional sentence if and only if "the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence." This section states:

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537(5).

By the language “if the jury finds . . . the court may sentence” reiterates the legislature’s decision to condition the trial court’s authority to impose an exceptional sentence upon the jury’s unanimous finding beyond a reasonable doubt that the defendant committed the alleged aggravating fact. Thus, this section reinforces the argument that in the case at bar the trial court did not have authority to impose an exceptional sentence because the jury did not find the existence of any alleged aggravating fact beyond a reasonable doubt. Thus, in the case at bar, the trial court exceeded its statutory authority when it imposed an exceptional sentence against the defendant.

III. THE TRIAL COURT’S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED UPON ITS OWN FINDINGS OF FACT VIOLATED THE DEFENDANT’S RIGHT UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT TO HAVE A JURY DETERMINE ALL FACTS NECESSARY FOR IMPOSITION OF PUNISHMENT AND THIS ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that under the Sixth Amendment “[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The court subsequently clarified this rule in *Blakely v. Washington, supra*, and held that the term “prescribed statutory maximum” meant the “standard range” for the offense not the “statutory maximum” for the offense. These two cases left open the question whether or not it was still possible to impose an exceptional sentence under the Washington Sentencing Reform Act, particularly for those exceptional sentences which were reversed for *Apprendi* and *Blakely* violations.

In *State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005), the Washington Supreme Court addressed this question. In this case, the state argued that the trial court had inherent authority to empanel sentencing juries for those exceptional sentences reversed under *Apprendi* and *Blakely* even though the RCW 9.94A did not establish a procedural basis for such actions. The state also argued that errors under *Apprendi* and *Blakely* could be harmless beyond a reasonable doubt under appropriate facts. The defense responded that (1) *Apprendi* and *Blakely* made Washington’s statutory scheme for imposing exceptional sentences unconstitutional on its face, (2) that no inherent judicial authority existed to establish procedures for empaneling sentencing juries, and (3) the failure to submit aggravating factors to the jury constituted a structural error that could never be harmless

beyond a reasonable doubt. The Washington Supreme Court agree with each of the defense arguments.

Following the court's decision in *Hughes*, two things happened. First, the legislature adopted new procedures for imposing exceptional sentences in light of *Apprendi* and *Blakely*. Second, the United States Supreme Court accepted review in *Washington v. Recuenco*, --- U.S. ----, 126 S.Ct. 2546, 2551, 165 L.Ed.2d 466 (2006), in order to review that portion of the Washington Supreme Court's decision in *Hughes* wherein the court held that *Apprendi* and *Blakely* errors could never be harmless beyond a reasonable doubt. In that case the court abrogated this finding in *Hughes* and held that errors in failing to submit aggravating factors to the jury could well be harmless beyond a reasonable doubt in the same manner that failing to include all of the elements of the crime in a "to convict" instruction could be harmless beyond a reasonable doubt.

Following entry of the decision in *Recuenco*, the Washington Supreme Court issued its opinion in *State v. Womac*, — Wn.2d —, 160 P.3d 140 (2007), which addressed, *inter alia*, the harmless error analysis for cases with *Blakely* errors. In *Womac* a jury convicted the defendant of homicide by abuse, second degree felony murder, and first degree assault against his four-month-old son. The trial court, pre-*Blakely*, imposed an exceptional sentence based upon findings of particular vulnerability and abuse of position of trust.

The defendant then appealed, arguing that sentencing him on the felony murder and first degree assault charges along with the homicide by abuse violated double jeopardy. While the appeal was pending, the United States Supreme Court issued its decision in *Blakely* and the Washington Supreme Court issued its decision in *Hughes*. Based upon these cases the Court of Appeals rejected the state's harmless error analysis and remanded for sentencing within the standard range. The court also provisionally ordered dismissal of the convictions on the felony murder and assault charges.

At this point the defendant obtained review from the Washington Supreme Court on issues concerning his conviction. The court then ordered further briefing to address whether, in light of the decision in *Recuenco*, the Court of Appeals acted properly when it remanded the case for resentencing within the standard range. The parties complied with this request, with the state arguing that given the undisputed age of the victim, the trial court's failure to submit the aggravating factors of particular vulnerability and abuse of position of trust was harmless beyond a reasonable doubt. In addressing this issue, the court first performed the following analysis on the *Recuenco* decision.

In *Recuenco*, the United States Supreme Court abrogated *Hughes*, holding failure to submit a sentencing factor to the jury is not structural error and may be subject to harmless error analysis. The Court held, “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury” may be subject to harmless

error analysis, observing, “[o]nly in rare cases has this Court held that an error is structural, and thus requires automatic reversal.” The Court concluded we erred in *State v. Recuenco* by relying on *Hughes* for the proposition that a *Blakely* error can never be harmless. In light of *Washington v. Recuenco*, we must now determine whether the Court of Appeals properly remanded for resentencing Womac within the standard range.

In *Recuenco* the United States Supreme Court opined “[i]f ... Washington law does not provide for a procedure by which [Recuenco’s] jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless.” Following this reasoning, Womac argues, “[b]ecause state law does not and did not provide for a jury to be empaneled to make the factual findings necessary to support the exceptional sentence in this case, the error cannot be said to be harmless beyond a reasonable doubt.”

State v. Womac, 160 P.3d at 49-50 (citations and footnotes omitted; brackets in original).

Based upon the court’s statement in *Recuenco* and the fact that Washington did not have a statutory scheme in place for juries to find aggravating factors at the time of the defendant’s trial, the court found that the error in failing to submit the two aggravating factors to the jury was not harmless beyond a reasonable doubt. The court held:

As explained by *Hughes*, former RCW 9.94A.535 “explicitly direct[ed] the trial court to make the necessary factual findings” to support an exceptional sentence “and d[id] not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand.” *Hughes* also declared, “no procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal.” Our recent decision in *State v. Pillatos*

confirmed “trial courts do not have inherent authority to empanel sentencing juries.”

Furthermore, the new sentencing provisions, Laws of 2005, chapter 68 (providing for a procedure whereby facts supporting aggravated circumstances are proved to a jury beyond a reasonable doubt), do not apply to *Womac*. *Pillatos* held the new sentencing provisions apply only to “pending criminal matters where trials have not begun or pleas not yet accepted.” As *Womac* correctly observes, even if the new sentencing provisions applied to him, RCW 9.94A.537(1) permits the imposition of an exceptional sentence only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range; and it is too late for the State to comply with that requirement. In addition, RCW 9.94A.537(2) requires a jury to find the existence of facts supporting aggravating circumstances, and as discussed above, state law does not authorize impaneling a new jury to make such findings.

Accordingly, we hold that because there was no legal procedure whereby *Womac*'s jury could have made the findings necessary to support his exceptional sentence, the error was not harmless.

State v. Womac, 160 P.3d at 50 (citations omitted; brackets in original).

The decision in *Womac* is directly on point with the facts from the case at bar. In both cases the jury convicted the defendant prior to *Blakely*. In both cases the *Blakely* decision was filed during the pendency of the defendants' appeals. In both cases the legislature passed RCW 9.94A.537 after the defendants' trial were completed. Thus, in the same manner that the trial court's entry of finding in *Womac* cannot be harmless beyond a reasonable doubt because neither RCW 9.94A.537 nor any other sentencing scheme could have been applied to procedurally meet the requirements of *Blakely*, so the trial court's entry of finding in the case at bar cannot be

harmless beyond a reasonable doubt because neither RCW 9.94A.537 nor any other sentencing scheme could have been applied to procedurally meet the requirements of *Blakely*. As a result, the trial court in the case at bar erred when it imposed an exceptional sentence. This court should remand the case for resentencing within the standard range.

CONCLUSION

The trial court violated RCW 9.94A.537 and the defendant's right to a jury under United States Constitution, Sixth Amendment when it imposed an exceptional sentence. As a result, this court should remand for resentencing within the standard range.

DATED this 17th day of September, 2007.

Respectfully submitted,

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Attorney for Appellant

APPENDIX

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.535

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if

it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and

the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered By A Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

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

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss

substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the

same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of

remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense 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.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

RCW 9.94A.537

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 CRAVEN ADRAIN STURGIS,)
)
 Appellant,)

CLARK CO. NO: 03-1-00881-8
APPEAL NO: 36135-3-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) vs.
 COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 19TH day of
SEPTEMBER, 2007, affiant deposited into the mails of the United States of America, a
properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

CRAVEN ADRAIN STURGIS #865424
MONROE CORRECTIONAL COMPLEX
SPECIAL OFFENDER UNIT
P.O. BOX 514
MONROE, WA 98272-0514

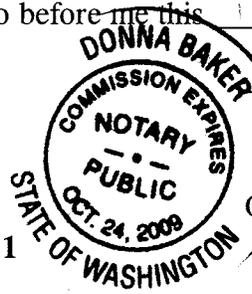
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 19TH day of SEPTEMBER, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 19th day of SEPTEMBER, 2007.



Donna Baker
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

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