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DIVISION ONE

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NO. 36740-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW S. KENNEDY,

Appellant.

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FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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ORIGINAL

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**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR**

- A. Should the defendant's conviction for homicide by abuse and consequent exceptional sentence be affirmed where the record demonstrates that defendant validly waived his right to jury trial and submitted his case to the bench?**

- B. Should the exceptional sentence be affirmed where any error was harmless in light of overwhelming evidence that the 11-month-old victim was "particularly vulnerable" and the defendant abused a position of trust to facilitate the commission of the crime?**

- C. Should the defendant's conviction for homicide by abuse be affirmed and the case remanded for jury trial on aggravating circumstances, assuming *arguendo* that the defendant did not waive his right to jury trial on aggravating circumstances and the error was not harmless, where the record is clear that the defendant validly waived his right to jury trial on the charge of homicide by abuse?**

II. STATEMENT OF CASE

A. Procedure

On September 14, 2004, the State filed an information charging appellant Andrew S. Kennedy ("defendant") with one count of murder in the first degree or, in the alternative, homicide by abuse. CP 4-5.

On February 1, 2006, the parties appeared in court after the defendant's first and second counsel were removed and a new set of counsel was appointed. 1 RP 50. The prosecutor advised the defendant in

open court that the State would provide notice of its intent to seek exceptional sentence. 1 RP 50.

On February 22, 2006, the State filed its “Omnibus Application and Notice of Exceptional Sentence.” CP 14-17. In the “Notice of Exceptional Sentence” portion of the document, the State advised the defendant:

NOTICE: The State is hereby giving notice that it intends to seek an exceptional sentence under 9.94A.535 because: the Defendant knew the victim was particularly vulnerable due to extreme youth; the Defendant’s conduct during the offense manifested deliberate cruelty to the victim; and/or the Defendant used his position of trust to facilitate the commission of the offense.

CP 14-17.

On February 5, 2007, the State filed its “Motion to Amend Information.” CP 30-73. The motion advised the defense that the State would amend the information to specifically plead the aggravating circumstances in the information. CP 30-73. A copy of the proposed amended information was attached. CP 30-73 (Appendix B).

On February 21, 2007, Defendant was charged by amended information with two separate counts. CP 74-76. Count I charged murder in the first degree. CP 74-76. Count II charged homicide by abuse. CP 74-76. Both counts included allegations that each count was committed with the following aggravating circumstances: (a) the

defendant knew or should have known that the victim of the crime was particularly vulnerable or incapable of resistance due to extreme youth;¹ and/or (b) the defendant used his position of trust or confidence to facilitate the commission of the crime;² and/or (c) the defendant displayed an egregious lack of remorse.³ CP 210-12.

Defendant was arraigned on the amended information in open court. 1 RP 76. The prosecutor clarified that notice of intent to seek exceptional sentence had already been given, but it was now being pled in the amended information. 1 RP 76. Defendant's counsel informed the court that the defense "anticipated this amendment." 1 RP 76. Defendant entered pleas of not guilty to all allegations in the amended information, which included the aggravating circumstances. 1 RP 76.

On July 2, 2007, the court heard pretrial motions. 3 RP 200. The defense moved to exclude opinion evidence related to the aggravating circumstance of egregious lack of remorse. 3 RP 200. The State stipulated to this motion and the court granted the motion. CP 213-15; 3 RP 206.

On July 23, 2007, at a pre-trial motions hearing, the defendant requested a waiver of jury trial for the trial set to commence on

¹ RCW 9.94A.535(3)(b)

² RCW 9.94A.535(3)(n)

³ RCW 9.94A.535(3)(q)

August 1, 2007. 3 RP 211. Defense counsel told the court that it was defendant's desire to have "this case" tried to the bench. 3 RP 211. Defendant submitted a written "Waiver of Jury Trial." CP 209. Defendant told the trial judge in his written waiver that he wanted "my case" tried to the bench. CP 209. The trial judge engaged both the defendant's counsel and the defendant himself in a colloquy about the right to jury trial. 3 RP 211-12. After the colloquy, the trial judge accepted the defendant's waiver of jury trial. 3 RP 211-12.

On August 1, 2007, the defendant was arraigned on a second amended information that reduced Count I from murder in the first degree to murder in the second degree (felony murder). CP 210-12; 4 RP 146. Count II, the homicide by abuse charge, remained unchanged. CP 210-12. The second amended information included the three aggravating circumstances previously alleged for each count. CP 210-12. Defendant pled "not guilty" to both counts. 4 RP 146.

The case proceeded to bench trial. 4 RP 146. During the trial the State presented evidence of each of the aggravating circumstances alleged. There were no objections from defense to testimony that had little relevance other than to prove aggravating circumstances. The defense presented its own evidence that defendant's reactions following the crime

were not due to “egregious lack of remorse,” but due to other factors. 4B RP 28, 10B RP 1153, 11 RP 1165-66, 11 RP 1181, 14 RP 1402.

During closing argument, the State asked the court to find the aggravating circumstances of particularly vulnerable victim and abuse of position of trust. 16 RP 1568-1569. When framing the question the court had to answer to return a verdict on aggravating circumstances, the prosecutor argued, “*This is the question that the jury would be asked from the WPIC if they were considering this case*, and the question to the Court, and it is a yes or no question, is did the defendant know or should he have known that Kieryn Severson was particularly vulnerable to the crime or incapable of resisting the crime due to the extreme youth?” 16 RP 1568-69 (emphasis added). Defense had no objections to this argument. 16 RP 1568-69.

On August 17, 2007, the trial judge entered a verdict of guilty on both counts. 16 RP 1641-42. The judge entered oral findings that the aggravating circumstances alleged by the State were proved beyond a reasonable doubt:

I further find and I would answer “yes” to the question of whether or not Kieryn Severson was particularly vulnerable or incapable of resistance due to extreme youth.

I would also answer “yes” to whether or not the Defendant used a position of trust to facilitate the commission of the crime.

16 RP 1641. The defense did not object to the court entering findings related to aggravating circumstances. 16 RP 1641. Sentencing was scheduled for September 6, 2007. 16 RP 1642.

The State filed a “State’s Memorandum in Support of Request for Exceptional Sentence” between verdict and sentencing. CP 223-235. The memorandum requested that the court impose an exceptional sentence based upon the court’s factual findings that the crimes were committed with aggravating circumstances. CP 223-235. Defense did not file a response and did not object to the State’s request for an exceptional sentence based upon the court’s factual finding of aggravating circumstances. 17 RP 1644-1671.

A sentencing hearing was held on September 6, 2007. 17 RP 1644-1671. The State noted that the court found the aggravating circumstances of particularly vulnerable victim and abuse of position of trust. 17 RP 1646-47. The State cited the aggravating circumstances found by the court as substantial and compelling reasons for the court to impose an exceptional sentence above the standard range. 17 RP 1647-49. Defense did not object to the State making a request for an exceptional sentence based upon the court’s factual findings. 17 RP 1647-1668.

The defense made its sentencing recommendation and specifically addressed the aggravating circumstances found by the court. 17 RP 1665. The defense asked the court to impose a standard range sentence, but never argued that the court could not impose an exceptional sentence based upon the court's factual finding of aggravating circumstances. 17 RP 1665.

The court cited its factual findings of particularly vulnerable victim and abuse of position of trust as substantial and compelling reasons to depart from the standard range. 17 RP 1668-69. The court imposed an exceptional sentence above the standard range. 17 RP 1669; CP 249-62. Defense did not object to the court's act of imposing an exceptional sentence based upon the court's factual findings made by the court at bench trial. 17 RP 1669. The court's written findings and conclusions related to the imposition of an exceptional sentence were included in Section 2.4 of the Judgment and Sentence. CP 249-262.

On September 13, 2007, the parties appeared for entry of the court's written findings of fact and conclusions of law as required by CrR 6.1(d). 17 RP 1672. Included in the State's proposed findings of fact⁴ were facts related to the aggravating circumstances, as well as the court's conclusion that the aggravating circumstances were proved beyond

⁴ The State's proposed findings and conclusions were adopted in whole by the court except for the deletion of the words "Dr. Bennett" from Finding of Fact XLI.

a reasonable doubt. CP 272-281. Included in the defendant's proposed findings of fact and conclusions of law were the court's findings that Kierny Severson was particularly vulnerable and that the defendant abused a position of trust to commit the crime. CP 264-271 (Findings of Fact 53 & 54). Included in the defendant's proposed conclusions of law were that the aggravating circumstances were proved beyond a reasonable doubt. CP 264-271 (Conclusions of Law V & VI).

The court adopted the State's findings and conclusions with one variation. 17 RP 1672-76.⁵ The defendant did not object to the court's act of entering written findings and conclusions related to aggravating circumstances. 17 RP 1673-78. Defendant timely filed Notice of Appeal. CP 263.

B. Facts

Kierny Severson was born August 4, 2003, to the defendant's cousin, Rebecca Severson. 4A RP 153. Ms. Severson expressed a desire to give Kierny up for adoption shortly after her birth. 4A RP 153. Defendant and his girlfriend, Tammy Malchert, agreed to be parents for Kierny and to raise her as their own. 4A RP 153.

On May 12, 2004, Rebecca Severson brought Kierny to the home of the defendant's parents where Defendant and Tammy Malchert were

⁵ The court declined to include a finding that the testimony of Dr. William Bennett was credible. 17 RP 1675-76; CP 272-281 (Finding of Fact XLI).

also residing. 4A RP 153. Kiernyn was 9-months-old. Rebecca Severson signed over custody of Kiernyn to the defendant on June 2, 2004. 4A RP 154. After Kiernyn arrived, the defendant quit his job so that he could be Kiernyn's full-time caregiver. 4A RP 155. Kiernyn called the defendant "dada." 4A RP 161.

During the less than three months Kiernyn was in the care of the defendant, she suffered a variety of injuries and illnesses. In June 2004, Kiernyn went to the doctor for an ear infection. 4A RP 163. Kiernyn stopped breathing on multiple occasions when she was alone with the defendant. CP 272-81. On July 11, 2004, Tammy and the defendant took Kiernyn to St. John Medical Center emergency room. 4A RP 163-64. Kiernyn was diagnosed with an acute spiral fracture of her arm, a bruise on her forehead, and she had not yet recovered from the ear infection. 4A RP 166. Later in July 2004, Kiernyn sustained a large bruise on her right arm which stretched from her shoulder to near her elbow. 4A RP 168. She also suffered another bruise on her forehead between July 11 and August 1. 4A RP 168.

On August 1, 2004, the defendant inflicted the final injuries that caused Kiernyn's death. At approximately 4:40 p.m., Tammy was holding Kiernyn on the couch in the family's living room when the defendant approached her and asked for Kiernyn. 4A RP 175. Tammy handed

Kieryn to the defendant, who took Kieryn down the hall to his bedroom. 4A RP 175. Between 15 and 30 minutes later, Tammy heard the defendant yell her name. 4A RP 175. Tammy ran down the hall, opened the bedroom door, and saw Kieryn lying on her back on the bed, turning grey and breathing in gasps. 4A RP 180-81. The defendant was also lying on the bed with his hands up in the air. 4A RP 180-81. He told Tammy, "I don't know what is wrong." 4A RP 180-81.

Tammy responded by checking Kieryn's pulse and she began CPR. 4A RP 180-81. Kieryn was not breathing when Tammy began CPR. 5A RP 182. Tammy moved Kieryn to the living room floor to continue CPR because the bed Kieryn was on was not conducive to proper CPR. 5A RP 183. Kieryn did not respond to CPR. 5A RP 184. Kieryn did not have a pulse and was not breathing or moving at all. 5A RP 184. At some point, the defendant called 911. 5A RP 184. EMTs arrived and assumed Kieryn's medical care. 5A RP 189. Kieryn was transported by ambulance to St. John's Medical Center in Longview for treatment and later life-flighted to Emanuel Children's Hospital in Portland, Oregon. 5A RP 191-92.

Kieryn was declared brain dead on August 2, 2004, at 4:16 p.m. 14 RP 1417. Dr. Lewman, the medical examiner, determined after autopsy that Kieryn Severson died from inflicted head injury. 9B RP 963.

Dr. Lewman classified the cause of death as battered child syndrome with terminal head injury. 9B RP 963. Dr. Lewman classified the death as battered child syndrome because of the presence of multiple older injuries, to include multiple hemorrhages in the membranes between the skull and brain, a bruise, and the healing spiral fracture on her arm. 9B RP 963. Kiernyn also suffered two fractured legs either during the incident that caused her death on August 1, 2004, or during the weeks prior. RP9B 783.

On March 14, 2005, approximately six months after the defendant was charged with causing Kiernyn's death, the defendant was invited to the home of his sister-in-law, Diana Ruiz, for an evening of dessert and games. 6 RP 489. While at his sister-in-law's home, the defendant demonstrated to Tammy how, on August 1, 2004, he took Kiernyn by the legs, threw her over his head, and slammed her on his back. 4A RP 202, 209. Kay Malchert, Tammy's mother, and Christy McKinney, Tammy's friend, were also present when the defendant demonstrated to Tammy his actions on August 1, 2004. 7B RP 682; 8B RP 841. The defendant told Tammy that it was not an accident and that he did not know why he did it. 4A RP 202. The defendant told Tammy that he caused the long shoulder to elbow bruise by slapping Kiernyn in the arm. 4A RP 205-06. Defendant

also admitted that he was with Kiernyn when her arm “popped” the night she suffered the spiral fracture. 4A RP 205-06.

That same evening, the defendant asked his brother-in-law, Kyle Ruiz, for forgiveness. 6 RP 491. Kyle Ruiz took this as Defendant’s request for forgiveness for killing Kiernyn. 6 RP 492.

During the same evening the defendant confided to Diana Ruiz that he began having dark thoughts in high school, and that every time he looked at Kiernyn he wanted to hurt her. 6 RP 511-12. Defendant told Diana that he made Kiernyn stop breathing. 6 RP 512. Defendant told Diana that every time he looked at Kiernyn he wanted to hurt her and when he took her into his bedroom on the night of August 1, 2004, he knew what he was going to do. 6 RP 513.

III. ARGUMENT

A. Defendant’s conviction and sentence must be affirmed because the record demonstrates that the defendant knowingly, intelligently, and voluntarily waived his right to jury trial on the entirety of the second amended information.

The right to jury trial⁶ is guaranteed by the Sixth Amendment to the United States Constitution, which provides “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

⁶ Washington’s Court Rules require jury trial for criminal offenses charged in superior court “unless the defendant files a written waiver of a jury trial, and has consent of the court.” CrR 6.1(a). Defendant does not raise a violation of the court rule in this appeal, nor is it disputed that Defendant filed a written waiver and had consent of the court.

by an impartial jury of the state and district wherein the crime shall have been committed.” U.S. Const. amend. VI. The right to jury trial is a constitutional right and the standard of review is therefore *de novo*. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff’d*, 148 Wash.2d 303, 59 P.3d 648 (2002).

The right to jury trial extends to facts that may be used to impose an exceptional sentence: “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.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 435 (2000). In Washington, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Nothing precludes a defendant from waiving the right to have sentencing facts proved to a jury and to instead submit them to the judge. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 435 (2000).

In direct response to *Blakely*, *supra*, the Washington Legislature enacted RCW 9.94A.535 and RCW 9.94A.537, the so-called “*Blakely*-

fix.”⁷ Both statutes were enacted in 2005 and applied to the trial and sentencing hearings that occurred in this case in August 2007. *State v. Pillatos*, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007) (“We hold that by its terms, Laws of 2005, ch. 68, applies to all cases where trials have not begun ...”).

RCW 9.94A.537 provides in part:

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(3) (emphasis added). The statute further provides that facts supporting aggravating circumstances set forth in RCW 9.94A.535(3)(a) – (y), which includes “particularly vulnerable victim” and “abuse of position of trust,” shall be presented during the State’s case-in-chief. RCW 9.94A.537(4). The statute finally provides that the court may impose an exceptional sentence if aggravating circumstances are found by the trier of fact and the court concludes that those facts are a substantial and compelling reason to depart from the standard range. RCW 9.94A.537(6).⁸

⁷ “The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). . . .” Laws of 2005, ch. 68.

⁸ Formerly RCW 9.94A.537(5), as cited in the second amended information.

In the present case, the defendant was charged in a single amended information with crimes and aggravating circumstances alleged together. CP 210-212. Each count specifically included an allegation that the crime was committed with aggravating circumstances. CP 210-212. Defendant and his counsel were on notice that all facts supporting the allegation of aggravating circumstances would be tried together in one proceeding, i.e., “the case.”

1. The defendant executed a valid waiver of his right to jury trial.

A defendant executes a valid waiver of the right to jury trial when he or she acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Pierce*, 134 Wn.App. 763, 771, 142 P.3d 610 (2006). The decision to waive jury trial is a strategic choice and therefore the right to jury trial is treated differently, and is easier to waive, than other constitutional rights. *Id.* at 722. “For example, when a defendant wishes to waive the right to counsel and proceed *pro se*, the trial court must usually undertake a full colloquy with the defendant on the record to establish that the defendant knows the relative advantages and disadvantages.” *Id.* at 771-72. No such in-depth colloquy is required for a valid waiver of the right to jury trial. *Id.*

When examining the record to determine whether a valid waiver of jury trial occurred in a particular case, the court considers (1) whether the defendant was informed of his constitutional right to jury trial; (2) the general facts and circumstances, including the defendant's experience and capabilities; (3) the presence of a written waiver; (4) an attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his right to jury trial; and (5) whether there was a colloquy on the record. *State v. Pierce*, 134 Wn. App. at 771. A written waiver is not required, "but is strong evidence that the defendant validly waived the jury trial right." *Id.* An extended colloquy is not required, "instead, Washington requires only a personal expression of waiver from the defendant." *Id.*

In *Pierce*, the defendant claimed that his jury trial waiver was invalid because the court did not specifically inform him of his right to participate in juror selection. *Id.* at 769. The court did not find any such requirement to inform. *Id.* at 772-73. Rather, the court found that *Pierce* validly waived his right to jury trial when he received the advice of counsel, submitted his waiver in writing, was informed by the court that he had a right to a unanimous verdict by 12 people, was informed that only the judge would decide his case, and he told the court he understood his right and was waiving it freely and voluntarily. *Id.* at 772.

All five of the *Pierce* factors discussed above weigh in favor of a valid waiver in the present case. Defendant was advised of his right to jury trial by his counsel, his written waiver, and by the court. The general facts and circumstances establish that everyone in the courtroom, including the defendant, understood that the defendant was submitting “the case” to the bench.

Defendant submitted a written waiver of jury trial. CP 209. Defendant’s counsel represented to the court that they had discussed the jury trial waiver with the defendant and Defendant understood its consequences. 3 RP 211 (“he understands what it entails”). Counsel told the court that the defendant was waiving his jury trial right and “trying *this case* to the bench.” 3 RP 211 (emphasis added). Defendant told the court in his written waiver that he wanted “my case” tried to the bench. CP 209. Defendant was informed by the written jury trial waiver and by the judge that he had a constitutional right to a unanimous verdict of 12 people, that by waiving jury trial the judge would decide his case, and that he had a right to be involved in the selection process of the jury. CP 209: 3 RP 211-212.

The court engaged the defendant in a colloquy on the record wherein the defendant told the judge that he understood his right to jury trial and was waiving it voluntarily. 3 RP 211-12. Defendant gave his

“personal expression” of waiver when he answered “yes” to the court’s question, “Is that your desire to waive your right to a jury trial, to be tried by a judge?” 3 RP 212. The record is almost identical to the record in *Pierce* and establishes a knowing, intelligent, voluntary waiver of the right to jury trial.

2. Defendant’s waiver of jury trial was to the entire case, which included aggravating circumstances.

A lawyer is presumed “competent to provide the guiding hand that the defendant needs....” *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Washington courts indulge in a strong presumption of counsel reasonableness. *State v. Garrett*, 124 Wash.2d 504, 518-19, 881 P.2d 185 (1994).

Counsel in this case were presumed to know the law related to the case, to include that that the facts supporting aggravating circumstances would be tried with the underlying charges in one case. RCW 9.94A.537(4). There is nothing presented to this court to rebut that presumption. To the contrary, as described below, review of the record as a whole makes it crystal clear that defense counsel expected and intended to have the crimes and the attached aggravators tried together.

The defendant told the court in writing that he had discussed the jury trial waiver with his counsel. CP 209. Counsel told the court that

they had discussed the jury trial waiver with the defendant for the better part of two weeks, and the defendant understood “what it entails.” 3 RP 211. Defendant himself verbally confirmed for the court that he had discussed the jury trial waiver with his lawyers. 3 RP 212. The court accepted the waiver based upon these representations. 3 RP 211-12.

Now, for the first time on appeal, defendant would have the court believe that what he really intended to do was waive his right to jury trial on the criminal offenses, but not the aggravating circumstances charged as part of the same count(s). If defendant’s claim is followed to its logical conclusion, defendant is claiming that he wanted a jury to sit through the entirety of the case without making any findings about guilt, and then, after the judge found the defendant guilty (potentially commenting on the evidence), the jury was to answer special verdicts regarding aggravating circumstances. Defendant’s argument is disingenuous in light of the records below, both what is in the record and what is not.

At the time of the submission of the defendant’s waiver of jury trial in this case, the defendant was acutely aware that the charges in his “case” included aggravating factors. The State provided written notice of the alleged aggravating circumstances on February 22, 2006, some 1½ years prior to the trial in this case. CP 14-17. The State specifically amended the information to include aggravating circumstances, on the

record and in the presence of the defendant, on February 21, 2007. CP 74-76. The case itself was tried 3+ years after *Blakely* was published.

On July 23, 2007, the defendant submitted his written waiver of right to jury trial, which he signed. 3 RP 211-12. Defendant at that time was charged with two offenses and aggravating circumstances, the facts supporting all were to be tried in one case pursuant to statute. In the written waiver, Defendant advised the court that he was aware of his right to have “my case” heard by an impartial jury; that he could take part in jury selection; that a jury trial would require the State to convince 12 people beyond a reasonable doubt; that he had consulted with his lawyer about having “my case” tried by a jury or the court; and that he freely and voluntarily gave “up my right to be tried by a jury and request trial by the Court.” CP 209. The court ensured that the waiver was valid by engaging the defendant in a colloquy. 3 RP 211-12. Defendant’s knowledgeable lawyers assured the court that they had spent “weeks” discussing the jury waiver with the defendant. 3 RP 211.

The content of the entire trial itself is circumstantial but strong evidence that the defendant knowingly and intelligently waived his right to jury trial with respect to the entire case. Both the defendant and the State presented evidence and rebuttal evidence on the issues of the aggravating factors in addition to the issue of guilt.

Throughout the trial, the State introduced evidence that Kierny Severson was particularly vulnerable and incapable of resisting the crime due to extreme youth. 4B RP 261; 16 RP 1541; 16 RP 1568. Throughout the trial the State presented evidence that the defendant used a position of trust to facilitate the murder of Kierny Severson. 4A RP 152; 4B RP 271; 5A RP 377; 5B RP 434; 6 RP 458; 10B RP 1133; 11 RP 1175; 16 RP 1568-69

Defendant introduced evidence contradicting the alleged aggravator that the defendant demonstrated an egregious lack of remorse. Defendant elicited testimony from Patricia Kennedy that he is stoic, and that his reaction to Kierny's death would be a less obvious exhibition of distress to someone who did not know him well. 4B RP 286. Defendant elicited testimony from Donald Severson that he responds to medical situations by being very serious, that this response was very evident when Kierny was at the hospital, and that it was only during breaks that one could tell that the defendant was fighting to stay on top of his emotions. 10B RP 1153. Defendant elicited testimony from Candace Scott that he reacted to his wife shouting at him by being very calm, saying something in a low voice, and driving away. 11 RP 1165-66. In response to a relevance objection to Candace Scott's testimony, defense stated that the relevance of the testimony was that it went to defendant's reaction to a

stressful situation or drama. 11 RP 1165-66. Defendant elicited testimony from Mary Kennedy that she could tell that the defendant was very down, depressed, and upset after Kieryn's death because she could read his body language from knowing him for years. 11 RP 1181.

Defendant even brought in an expert, Dr. Larsen, to testify that people react differently to grief, and to give his opinion on the defendant's grief response. 14 RP 1400. Dr. Larsen testified that distress due to death of a child can present in the form of stoic and quiet behavior, and that the defendant has affectual flatness. *Id.*, 14 RP 1402. Finally, in closing, defense counsel again referred to Dr. Larsen's testimony to refute the allegation that the defendant displayed an egregious lack of remorse. 16 RP 1581-82.

Defendant never objected to any of the State's evidence relating to aggravating circumstances. Defendant did not object to the State's closing argument asking the court to find the facts supporting the aggravating circumstances. Defendant never objected to the court's verbal finding that the facts supporting the aggravating circumstances were proved beyond a reasonable doubt. Defendant never objected to the State's request for an exceptional sentence based upon the court's factual findings. Defendant never objected to the court imposing an exceptional sentence based upon

the court's factual findings. Defendant never objected to the court's written factual findings pertaining to aggravating circumstances.

Defendant did not make any of these objections because he and his counsel knew that the defendant had executed a valid jury trial waiver to all allegations set forth in the second amended information, which included aggravating circumstances. This circumstantial evidence, combined with the defendant's written jury trial waiver and the accompanying colloquy, establish that the defendant waived his right to jury trial on the entirety of the second amended information. The record cannot be read any other way.

The defendant erroneously cites *State v. Giles*, 132 Wn. App. 738, 739, 132 P.3d 1151 (2006), *review denied*, 160 Wn.2d 1006 (2007), in support of his assertion that "there is a distinction between a waiver of the right to a jury trial on the underlying charges and the waiver of the right to a jury determination of facts that are purely for sentencing purposes." Brief of Appellant at page 14. The defendant argues that *Giles* stands for the position that the waiver of the right to jury trial contains two distinct parts: (1) right to jury determination on underlying charges, and (2) a separate and distinct right to jury determination of facts for sentencing purposes.

Giles does not stand for this rule. In *Giles*, the defendant was convicted by a jury. *State v. Giles*, 132 Wn. App. 738, 132 P.3d 1151 (2006). At sentencing, the trial court determined that Giles was on community placement at the time of the offense and therefore added one point to the offender score. *Id.* Giles argued that the fact that he was on community placement at the time of the offense was a “fact” that was being used to sentence him above the standard range and therefore had to be submitted to a jury. *Id.* The issue in *Giles* was whether calculating the offender score involved facts that were required to be proved to a jury, not whether Giles executed a valid jury trial waiver. The court affirmed the trial court’s ruling, holding that “the trial court merely determined Giles’s standard sentencing range and did not impose an exceptional sentence, so its actions do not implicate *Blakely*.” *Id.* at 742. The court in *Giles* was never called upon to determine the validity of Giles’s jury trial waiver as it may have applied to aggravating circumstances. *Giles* is inapposite.

The record here establishes a knowing, intelligent, and voluntary waiver of the defendant’s right to jury trial on all allegations in the second amended information, which included aggravating circumstances. Defendant’s arguments to the contrary are not supported by the record or the law.

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B. Defendant’s exceptional sentence must be affirmed because any error the trial court made by entering findings of fact on aggravating circumstances and imposing an exceptional sentence was harmless.

Denial of a defendant’s Sixth Amendment right to have a jury determine all facts legally essential to his sentence is an error subject to harmless-error analysis. *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546 (2006).⁹ To apply the harmless error test, the court considers whether the error had a “substantial and injurious effect” on the defendant’s sentence. *Butler v. Curry*, 528 F.3d 624, 648 (9th Cir. 2008), citing *Hoffman v. Arave*, 236 F.3d 523, 540 (9th Cir. 2001). The court may grant relief only when it is “in ‘grave doubt’ as to whether a jury would have found the relevant aggravating factors beyond a reasonable doubt.” *Id.*, citing *O’Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

As detailed above, there is no “grave doubt” as to whether or not a jury would have found that Kieryn Severson was particularly vulnerable and/or incapable of resisting the crime due to extreme youth. Kieryn was an 11-month-old baby who weighed 23 lbs., never learned to walk, and could only speak a few words, none of which were “help.” 4A RP 161.

⁹ In *State v. Womac*, 160 P.3d 643, 663, 160 P.3d 40 (2007), the Washington Supreme Court determined that failure to submit facts supporting aggravating circumstances to a jury was not subject to harmless error analysis because the “*Blakely*-fix” was not in place at the time Womac was tried. *Id.* Such is not the case here—a valid statutory procedure *was* in place for Defendant’s trial and sentencing.

Defendant was a large, adult man. No rational juror could answer “no” to the question based upon the undisputed evidence presented at trial.

There is no “grave doubt” that a jury would have found that the defendant, Kieryn’s godfather, guardian, and primary care-giver, used his position of confidence or trust to facilitate the commission of the crime. The evidence was undisputed that Defendant was Kieryn’s adoptive father, her god-father, her primary caregiver. Defendant would never have had Kieryn Severson in his care but for the positions of trust he held. Defendant used those positions of trust to facilitate the murder of Kieryn Severson. No rational juror could conclude otherwise.

Any error in this case was harmless. The facts supporting the aggravating circumstances were simple and undisputed. Defendant’s exceptional sentence must be affirmed.

C. Defendant’s conviction for homicide by abuse must be affirmed, and the case remanded for jury trial on aggravating circumstances, assuming *arguendo* that the court finds that the trial court erred in entering findings of fact related to aggravating circumstances, and that imposing an exceptional sentence was not harmless error.

Defendant concede that he waived his right to jury trial on the charge of homicide by abuse. However, he now claims that his jury trial waiver to the homicide by abuse charge cannot be separated from his claimed non-waiver of his right to jury trial on aggravating circumstances.

According to the defendant, “RCW 9.94A.537 doesn’t permit a hybrid waiver of one right but not the other.” Brief of Appellant at page 18.

Defendant’s argument makes no sense. If the defendant never waived his right to a jury trial on aggravating circumstances as he now claims on appeal, there was no “hybrid waiver,” there was simply one waiver of his right to jury trial to the homicide charges. If the defendant did intend a waiver of jury trial to everything alleged in the information, as the record supports, then the defendant waived his right to have “the case” tried to a jury, as set forth in the written jury trial waiver. Either way, the defendant waived his right to jury trial on the criminal offenses. There is no in-between.

On remand, Washington statutes specifically grant the trial court authority to impanel a jury for fact-finding on aggravating circumstances where a new sentencing hearing is required:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). Both aggravating factors at issue here are listed in RCW 9.94A.535(3): particular vulnerability at RCW 9.94A.535(3)(b), and use of position of trust or confidence at RCW 9.94A.535(3)(n).

If this court finds that an explicit waiver specific to aggravating circumstances was required, and that no such waiver can be found in the record, defendant's only remedy is vacation of the sentence and remand for jury trial on aggravating circumstances. The homicide by abuse conviction must be affirmed.

On remand, the jury would answer the following narrow questions:

- (1) Was 11-month-old Kieryn Severson particularly vulnerable or incapable of resistance due to extreme youth?
- (2) Did Defendant's position as god-father, adoptive parent, and primary caregiver place him in a position of trust which he used to facilitate the commission of the crime?

If the new jury answers "yes" and finds aggravating circumstances beyond a reasonable doubt, the judge would then determine whether those aggravating circumstances constitute substantial and compelling reasons to depart from the standard range. RCW 9.94A.535. If the conclusion is "yes," the judge may impose any sentence up to the statutory maximum of life imprisonment so long as it does not "shock the conscience." *State v. Lindahl*, 114 Wn. App. 1, 19, 56 P.3d 589 (2002). The new sentencing judge would not be bound by the previous sentence imposed.

IV. CONCLUSION

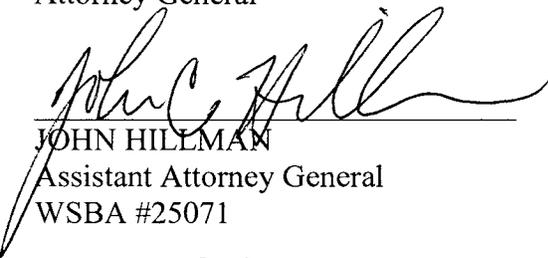
The trial court properly accepted a jury waiver from the defendant. The defendant knowingly and voluntarily waived his right to jury on the

charges set forth in the second amended information, which included aggravating circumstances. The judgment and sentence must be affirmed.

RESPECTFULLY SUBMITTED this 25TH day of September, 2008.

ROBERT M. MCKENNA
Attorney General

By:


JOHN HILLMAN
Assistant Attorney General
WSBA #25071


LARISSA CHAN
Rule 9 Legal Intern

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NO. 36740-8

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW S. KENNEDY,

Appellant.

DECLARATION OF
SERVICE

VICTORIA L. ROBBEN declares as follows:

On Thursday, September 25, 2008, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

LISA E. TABBUT
P.O. BOX 1396
LONGVIEW, WA 98632-7822

Copies of the following documents:

- 1) BRIEF OF RESPONDENT
- 2) DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 25th day of September, 2008.

Victoria L. Robben
VICTORIA L. ROBBEN

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