

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS,

Appellant.

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STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Because appellant did not receive an exceptional sentence at his first trial, the State was not authorized to seek an exceptional sentence following remand from his successful appeal.

2. Appellant was denied his constitutional right to the assistance of counsel at the sentencing phase of his trial.

3. The jury instructions addressing the aggravating circumstances did not contain every element of proof, thereby relieving the State of its constitutional obligation to prove the circumstances beyond a reasonable doubt.

4. Appellant's exceptional sentence for arson could not be based on deliberate cruelty to the victims.

5. Appellant's convictions for arson and violation of a domestic violence court order involve the same criminal conduct and should have been scored as a single offense.

Issues Pertaining to Assignments of Error

1. The trial court's authority to impose an exceptional sentence is controlled by statute. Where there is no statutory authority for an exceptional sentence under the circumstances of appellant's case, must his exceptional sentences be vacated and his case remanded for imposition of standard range sentences?

2. Criminal defendants have a constitutional right to the assistance of counsel at trial. Appellant waived his right to counsel for the jury's determination of guilt on the charges, but then requested the assistance of counsel for the sentencing phase of his trial, where jurors would determine whether aggravating circumstances justified an exceptional sentence. Did the trial court erroneously deny appellant's request?

3. Due process requires the State to prove every element of criminal liability beyond a reasonable doubt, including the elements of aggravating circumstances supporting an exceptional sentence. Was appellant denied due process where the jury instructions failed to include all elements of the State's proof?

4. Deliberate cruelty is inherent in the crime of Arson in the First Degree and therefore cannot justify an exceptional sentence unless the level of cruelty significantly exceeds that usually associated with the crime. Where the arson in this case does not meet that exceptional standard, did the court err when it relied on deliberate cruelty to impose an exceptional sentence?

5. Appellant's convictions for arson and violation of a court order involve the same criminal conduct for sentencing purposes. Did the trial court err by treating these crimes as

separate offenses when calculating appellant's offender scores?

B. STATEMENT OF THE CASE

1. Procedural Facts

In May 2005, the Pierce County Prosecutor's Office charged James Douglas with (count 1) Arson in the First Degree, (count 2) Residential Burglary, and (count 3) Domestic Violence Court Order Violation. CP 263-266, 812. For counts 1 and 2, the State alleged three aggravating circumstances:

this 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 AND/OR the offense involved an invasion of the victim's privacy AND/OR the offense was committed shortly after the defendant was released from incarceration, against the peace and dignity of the State of Washington.

CP 263-264, 812.

Although the State included these aggravating circumstances in the information, jurors were never asked to

consider them. 2RP¹ 4; 7RP 138-139, 33RP 1185-1186; CP 812-813. The arson, burglary, and violation of court order charges were joined for trial with two counts of assault and one count of bail jumping filed in a separate information. CP 38, 55-57, 812. Jurors convicted Douglas on all six charges, and the trial court imposed a total sentence of 61 months. CP 7, 11, 38.

Douglas appealed. In September 2008, this Court reversed his arson, residential burglary, and violation of domestic violence court order convictions based on ineffective assistance of counsel. At trial, counsel had failed to object to the admission of irrelevant and highly prejudicial firearms evidence. CP 48-52. The assault and bail jumping convictions were affirmed, however, based on a

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 11/21/08; 2RP – 12/1/08; 3RP – 12/8 and 12/16/08; 4RP – 1/12/09; 5RP – 2/6, 2/13, 2/19, 3/13, 4/15, 4/22, 5/4, 5/13, 5/29, 6/3, 6/17, and 6/22/09; 6RP – 6/12/09; 7RP – 6/30, 7/1, and 7/2/09; 8RP – 7/13, 7/14, 7/17, and 7/20/09; 9RP – 8/4/09; 10RP – 8/24 and 8/27/09; 11RP – 9/1/09; 12RP – 9/2/09 (Judge Van Doorninck); 13RP – 9/2/09; 14RP – 9/16, 9/22, 9/23, 9/24, 9/28, 9/29, and 10/8/09; 15RP – 11/9/09; 16RP – 12/28/09; 17RP – 12/29/09; 18RP – 2/19/10; 19RP – 5/4, 5/19, and 6/9/10; 20RP – 5/26/10; 21RP – 6/10, 6/11, and 6/15/10; 22RP – 6/14/10; 23RP – 6/16, 6/21, 6/29, and 6/30/10; 24RP – 6/17/10; 25RP – 6/28/10; 26RP – 7/1/10; 27RP – 7/6/10; 28RP – 7/7/10; 29RP – 7/8/10; 30RP – 7/12-13/10; 31RP – 7/14/10; 32RP – 7/15/10; 33RP – 7/19/10; 34RP – 7/20/10; 35RP – 7/21-23/10; 36RP – 8/10/10; 37RP – 8/11-12/10; 38RP – 8/13, 8/16, and 8/17/10; 39RP – 8/17/10 (a.m.); 40RP – 8/18, 8/19, 8/20, 8/23, and 8/27/10; 41RP –

failure to demonstrate the outcome on those charges would have been different absent the firearms evidence. CP 50.

On remand, not only did the State choose to retry Douglas for arson, residential burglary, and violation of a court order, it chose to pursue an exceptional sentence based on the aggravating circumstances included in the 2005 information. 2RP 4; 7RP 139-141, 33RP 1176-1178. Jurors convicted Douglas and found the aggravating circumstances proved. CP 698-702, 738-742. The court imposed a total sentence of 480 months – 419 months more than he received for the same crimes after his first trial. 41RP 2377; CP 804, 815-816. Douglas timely filed his Notice of Appeal. CP 791.

2. Substantive Facts

This Court is already familiar with the circumstances of this case based on the prior appeal. See CP 38-45. In summary, James and Debra Douglas were married in 2002. 30RP 806. In 2003, the couple had a child, Alyssa. 26RP 11. Within weeks of the birth, Debra took Alyssa and moved in with her parents – Carroll and Pauline Pederson – in their Sumner home. 27RP 344-349, 400; 30RP 830.

8/27, 8/30, and 10/22/10.

James was given visitation with Alyssa, and Debra had her parents handle these visits. 26RP 14; 27RP 349-350. On more than one occasion, there was tension between James and the Pedersons. In February 2004, an incident occurred at church, where James and Carroll Pederson were standing very close and James directed profanity toward Mr. Pederson. 27RP 350. At another incident, while exchanging Alyssa in a Safeway parking lot, James became angry, got close to Carroll Pederson's face, and again used profanity while making threatening gestures with his hands. 27RP 351. Several visitation exchanges involved traded verbal barbs. 26RP 67.

In July 2004, during another exchange, Carroll Pederson refused to give Alyssa to James when he asked for her. 26RP 63-66; 27RP 388. Tensions escalated and James ended up punching and kicking Carroll Pederson. When Pauline Pederson grabbed James, he also struck her once. 26RP 15-17; 27RP 352-355. James was charged with two counts of assault, and the Pedersons subsequently obtained a restraining order prohibiting him from having contact with them or their home. 26RP 17-18; 31RP 997-998; exhibit 48.

The Pedersons routinely attended church on Sunday mornings. On the morning of October 10, 2004, the Pedersons, Debra Douglas, Alyssa, and two of Debra's daughters from a previous marriage – who were visiting for the weekend – left the Pederson home by car and attended the 9:30 a.m. service. 26RP 18-22. The Pedersons returned at around 11:15 a.m. to find fire trucks at their home, which had been set on fire in their absence. 26RP 22-23; 27RP 362.

Gasoline has been poured throughout the interior of the home, several gasoline cans and a can of model airplane fuel had been placed inside, and a crude timing device – consisting of cardboard and matches – was used to start the fire in the laundry room. Vapors within the home had caused an explosion that blew out a front window and caused other structural damage. 28RP 467-513. The Pedersons' pickup truck was parked in the driveway. The fuel filler cap was open and a stick had been placed in the opening. 26RP 26-27; 28RP 468, 504-505. The fire marshal ruled the incident "an intentionally set arson fire." 28RP 510.

The Pedersons had a German Shepherd named Pepper, who was at home at the time of the fire. 26RP 29-30. When leaving for church, the Pedersons left a garage door partially open so that Pepper could come and go in the garage, where she had a bed. 26RP 78. Pepper was found outside the residence and unharmed. A neighbor placed Pepper in her back yard. 30RP 714-715.

Several neighbors reported seeing a white or light colored truck leaving the scene right around the time of the explosion and fire. 25RP 15-16; 29RP 669-670; 30RP 713-714, 733; 31RP 926-927. One of these individuals "thought [he] saw some of the numbers" on the truck's license plate, which he identified at the time as an "A" or "2" or "4". 29RP 670, 679. At the time, Douglas drove a white 2001 Ford Explorer Sport Trac pickup with license plate number A25206P. 26RP 12; 30RP 807; 36RP 1605-1607.

Department of Licensing records showed that as of October 10, 2004, there were 3,577 white pickup style vehicles registered in Pierce and King Counties and having "A2" in their license plates. 33RP 1162; 37RP 1850, 1858. There were 305 Ford trucks, including 23 Ford Explorers, meeting these same criteria for color, county of registration, and license plate. 37RP 1851-1853, 1877-1878. There were four Explorer pickups registered in Pierce County

that met these search criteria. 33RP 1158.

No one testified to seeing Douglas at the Pederson home at the time of the arson. There were no usable prints found anywhere in or around the home. 28RP 520-521; 29RP 599-600; 33RP 1119-1141. No one was injured in the fire, and the Pedersons' insurer covered their financial losses. 26RP 135-136; 32RP 1049.

C. ARGUMENT

1. THERE IS NO STATUTORY AUTHORITY FOR DOUGLAS' EXCEPTIONAL SENTENCES.

Douglas repeatedly objected to the State's decision to seek exceptional sentences following his successful appeal. CP 62-66, 254, 256-258; 7RP 135-138; 33RP 1176-1178, 1190-1191; 40RP 2122-2130, 2139, 2153, 2331-2332; 41RP 2360-2362. All of his objections were overruled. CP 811-816; 33RP 1192.

In addition to several constitutional challenges, Douglas argued there was no statutory authority to seek an exceptional sentence under RCW 9.94A.537 because the State had not obtained an exceptional sentence at his first trial. 40RP 2124-2125, 2128, 2139. Douglas was correct.

Statutory interpretation is a purely legal question subject to de novo review. Stuckey v. Dep't of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996). The Legislature's intent, particularly in criminal sentencing proceedings, must be derived from the plain language of the statute in question. State v. Delgado, 148 Wn.2d 723, 730, 63 P.3d 792 (2003).

In 2005, the Washington Legislature enacted RCW 9.94A.537 – often referred to as the “Blakely fix” legislation – in response to the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296, 313, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).² In Blakely, the Supreme Court held that the State must prove to the trier of fact, beyond a reasonable doubt, any facts supporting an exceptional sentence above the standard range. The effective date of the legislation is April 15, 2005. See Laws of 2005, ch. 68.

At the time, RCW 9.94A.537 provided, in pertinent part:

(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

² The Blakely fix legislation also included changes to RCW 9.94A.530 and 9.94A.535.

circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating circumstances 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.

Former RCW 9.94A.537 (2005).

Two years later, in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), based on the language in subsection (1) – “at any time prior to trial or entry of the guilty plea” – the Washington Supreme Court held that RCW 9.94A.537 did not apply to cases where trials had already begun or guilty pleas had already been entered prior to April 15, 2005. Pillatos, 159 Wn.2d at 470. The Court also reaffirmed earlier decisions in which it held that trial courts have no inherent authority to empanel sentencing juries: Their authority is exclusively statutory. Id. at 469-470 (citing State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed.2d 466 (2006), and State v. Martin, 94 Wn.2d 1, 614, P.2d 164 (1980)).

Following Pillatos, the Legislature amended RCW 9.94A.537 by inserting a new subsection (2) that provides:

(2) 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.

Laws of 2007, ch. 205.

By its express terms, RCW 9.4A.537(2) addresses resentencings where there has been a prior Blakely violation. As a condition precedent, it requires that the defendant previously received an exceptional sentence in the case. It also limits consideration of aggravating circumstances to those relied upon in imposing the previous sentence.

Both this Court and the Washington Supreme Court have recognized the limited circumstances in which RCW 9.94A.537(2) authorizes an exceptional sentence. It “applies in cases . . . where the defendant’s trial began prior to the 2005 amendment and there has been a remand for a new sentencing hearing.” State v. Powell, 167 Wn.2d 672, 679, 223 P.3d 493 (2009). “Resentencing under RCW 9.94A.537(2) is not ‘for the purpose of increasing a valid sentence, but rather . . . for the correction of an erroneous and invalid sentence.’” Id. at 688 (quoting State v. Pringle, 83 Wn.2d 188, 194, 517 P.2d 192 (1973)); see also State v. Mann, 146 Wn. App.

349, 360-361, 189 P.3d 843 (2008) (“the 2007 legislation effectively extends the original ‘Blakely-fix’ to all exceptional sentence cases that were remanded for resentencing based on the Blakely decision.”), review denied, 168 Wn.2d 1040 (2010).

Based on the plain language of RCW 9.94A.537(2), and interpretive case law, the statute does not apply to Douglas. Douglas did not receive an exceptional sentence at his first trial, his case was not remanded for resentencing based on Blakely, and his trial began *after* the April 15, 2005 effective date for the 2005 Blakely fix legislation. See CP 263-266 (amended information alleging aggravating circumstances filed May 11, 2005).

That Douglas does not fall under RCW 9.94A.537(2) is important because it is the only provision within RCW 9.94A.537 expressly aimed at resentencings. In other words, subsection (2) defines the lone circumstance in which a defendant who has been previously sentenced can go back for a jury determination on an exceptional sentence. And because Douglas falls outside the statute's reach, there simply was no authority to impose an exceptional sentence following remand from his successful appeal.

Washington courts abide by the rule of *expressio unius est exclusio alterius*, which means “[w]here a statute specifically

designates the things upon which it operates, there is an inference that the Legislature intended all omissions.” In re Personal Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (quoting Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)). Thus, the Legislature’s failure to authorize an exceptional sentence in any situation involving a resentencing other than that described in RCW 9.94A.537(2) – including Douglas’ situation – is presumed intentional.

This Court should vacate Douglas’ exceptional sentences and remand for sentences within the standard ranges.

2. DOUGLAS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL.

“The state and federal constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation.” State v. Modica, 136 Wn. App. 434, 440-441, 149 P.3d 446 (2006) (citing U.S. Const. amends. VI and XIV; Wash. Const. art. 1, sec. 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995)), aff’d, 164 Wn.2d 83 (2008).

Once a defendant has validly waived his right to the assistance of counsel at trial, the trial court’s decision to reappoint

counsel turns on the timing of the request:

If the request is made well before trial, the right exists as a matter of law. If the request is made shortly before trial, the existence of the right depends on the facts of the case with a measure of discretion reposing in the trial court. If made during trial, the right rests largely in the informed discretion of the trial court. . . .

Modica, 136 Wn. App. at 443. In exercising its informed discretion, “the trial court may consider all of the circumstances that exist when a request for reappointment is made,” including resulting burdens on the court, jurors, witnesses, and the integrity of the criminal justice system. Id. at 443-444.

Moreover, “[s]everal courts have stated that it is error not to appoint counsel for a sentencing hearing where a defendant expressly withdraws a waiver of counsel submitted during the guilty phase of a trial.” United States v. Fazzini, 871 F.2d 635, 643 (7th Cir.) (citing Davis v. United States, 226 F.2d 834, 840 (8th Cir. 1955), cert. denied, 351 U.S. 912, 76 S. Ct. 702, 100 L. Ed. 1446 (1956); United States v. Holmen, 586 F.2d 322, 324 (4th Cir. 1978)), cert. denied 493 U.S. 982 (1989).

Some additional procedural history is necessary to address this issue. Attorney John Jensen represented Douglas at his 2005 trial. 2RP 5. In fact, it was Jensen’s deficient performance that led

to reversal of Douglas' convictions for arson, burglary, and violation of a court order. See CP 47-52; 2RP 5. On remand, attorney Jack McNeish from the Department of Assigned Counsel (DAC) was initially appointed to represent Douglas. 1RP 3.

On December 1, 2008, at the second hearing following remand, Douglas cited prior counsel's incompetence, waived his right to the assistance of counsel, and was granted permission to proceed pro se. 2RP 5-16. At Douglas' request, the court appointed standby counsel to assist him. 2RP 13, 16. DAC attorney Melanie MacDonald initially served in that capacity. 4RP 3.

On March 18, 2009, Douglas filed a motion asking that MacDonald be removed from the case. CP 110-113. Ultimately, however, he did not pursue that motion when given a chance. 5RP 98-99, 112-113.

Trial began on June 30, 2009, before Judge Lisa Worswick. 7RP 3. While the parties were still in the process of selecting a jury, Douglas was attacked in the jail and suffered physical injuries. 8RP 230-234. Based on the necessity of a delay, Judge Worswick declared a mistrial. 8RP 258.

Thereafter, the case was assigned to Judge Brian Tollefson.

9RP 1. At Douglas' next appearance, on August 4, 2009, he reaffirmed his desire to represent himself. 9RP 14-24. Standby counsel MacDonald asked to be released from the case, but Judge Tollefson deferred a decision on the matter. 9RP 25-28, 34. He also deferred a decision on Douglas' request to represent himself pending an evaluation at Western State Mental Hospital. 9RP 34-39.

Douglas was found competent and permitted to represent himself. 10RP 1-2. On August 27, 2009, Judge Tollefson allowed MacDonald to withdraw as standby counsel, but DAC was required to continue to assist Douglas with subpoenas, investigation, and administrative tasks such as copying documents. 10RP 17-26.

By September 29, 2009, the case still had not gone to trial and Douglas was frustrated with the lack of progress and DAC's efforts on his behalf. 14RP 39. Douglas indicated he wanted an attorney. 14RP 54. Shane Silverthorn was appointed and immediately moved to continue trial over Douglas' objection. Trial was continued to November. 14RP 60-63. On November 9, Silverthorn once again moved for a continuance, again over Douglas' objection, and trial was rescheduled for December 28. 15RP 10-11.

On December 28, Silverthorn informed the court he had taken a new job and requested that new counsel be appointed to represent Douglas. 16RP 3-6. Attorney Jim Oliver was appointed to take over the case. 17RP 2. Oliver moved to continue trial to February 23, 2010. As before, the motion was granted over Douglas' objection. 17RP 3-4. On February 19, 2010, the court granted another extension over Douglas' objection, setting trial for May 4, 2010. 18RP 3-8. On May 4, however, Oliver asked the court to order Douglas sent to Western State Mental Hospital for another mental evaluation. 19RP 3-4. That motion was granted, and Douglas moved to fire Oliver. 19RP 9-10.

As before, Western found Douglas competent to stand trial. 19RP 12. On May 19, the court set trial for June 9, and Douglas again made it clear that he wished to fire Oliver. 19RP 16-17. On May 26, the court granted Douglas' request to fire Oliver and permitted him to once again proceed pro se. It denied Douglas' request for standby counsel. 20RP 5-21.

Trial began on June 10, 2010. 21RP 28. Another motion for the assistance of standby counsel was denied. 21RP 70-72, 79. On June 16, Douglas indicated a desire to plead guilty. 23RP 249-250. Oliver was reappointed to assist with the plea hearing. 23RP

261-262. Douglas decided not to plead guilty, Oliver was discharged again, and Douglas continued pro se. 24RP 18-20.

For the next two months, Douglas represented himself during the trial's guilt phase. See generally 23RP-39RP. On August 17, jurors found him guilty as charged. 38RP 2110-2113. The following day, as the court and parties discussed jury instructions and other matters pertaining to the sentencing phase of the trial, Douglas requested representation. 40RP 2119, 2140-2141.

The trial deputy responded:

[Mr. Douglas] has been given a wealth of resources to assist him. What Mr. Douglas wants to do is have it both ways. He wants to control this litigation from a tactical standpoint, which is the exclusive province of the appointed attorney, and he wants an attorney at his elbow, and that he doesn't get to get. And if he thinks he has to have an attorney for the sentencing phase, then he has to understand that if that happens, that attorney gets to call the shots; Mr. Douglas does not. And that attorney steps in as the attorney of record.

40RP 2143-2144. The prosecutor pointed out that Douglas had previously asked for counsel but then changed his mind. Moreover, the jury had been on the case since June 30 and the court needed to be sensitive to them and the use of court resources. 40RP 2144.

The prosecutor continued:

The best thing – the most thing that makes the most sense, that's the fairest to Mr. Douglas, is that we proceed. Unless, you know – and I don't know what his position is, whether he's willing to give up control of this case or not. If he's not willing to do that, then we need to get going.

40RP 2145.

Judge Tollefson then asked Douglas if he was willing to give up control of the case:

Mr. Douglas, are you willing to give up all of your control in this case and have a lawyer, if appointed for you, during the –

DOUGLAS: Well –

THE COURT: Wait, let me finish – during the sentencing hearing make all the strategical [sic] and tactical decisions about what evidence will be presented and not presented and will make all the strategic and tactical decisions about what objections will be made and won't be made and all the other decisions that a lawyer makes on behalf of a client?

That's my question.

40RP 2146.

Douglas responded that so long as the attorney was not with DÀC, with which he believed he had a conflict, and so long as the attorney would represent him effectively, he would permit the representation. 40RP 2147. Judge Tollefson responded that it

sounded like Douglas was not willing to hand over control because he was worried that whomever was appointed would not be effective. 40RP 2149. Douglas disagreed and made it clear that he was willing to give up his right to self-representation so long as appointed counsel was effective. 40RP 2149. Judge Tollefson responded, "So you want to -- you want to reserve the right to second-guess this lawyer," to which Douglas replied that he reserved the right to fire any attorney who tries to "railroad" him and does not protect his rights. 40RP 2149-2150.

Judge Tollefson continued, "So, the answer is no, you're not willing to give up control, right, Mr. Douglas? Because you only want an attorney who will effectively represent you, which means you want the right to second-guess the attorney. So you're not willing give up control, right, Mr. Douglas?" 40RP 2150-2151. Douglas again reiterated that he was willing to hand over control to an attorney who would represent him in an efficient and effective manner. 40RP 2151. Douglas then complained about his inability to adequately represent himself, the absence of a legal or factual basis for an exceptional sentence, the violation of his speedy trial rights, and the absence of adequate resources to represent himself pro se. 40RP 2151-2154.

Judge Tollefson denied the request for counsel, finding that – based on their dialogue – Douglas was unwilling to turn over control of the case. 40RP 2154-2155. Douglas refused to come to court thereafter and the sentencing phase of trial was conducted in his absence. 40RP 2156, 2160-2166, 2223-2224, 2238. Jurors were instructed that he had chosen not to participate. 40RP 2175.

Judge Tollefson's denial of Douglas' request for the assistance of counsel at the sentencing phase of trial was error. As noted above, courts have recognized it is error not to appoint counsel for a sentencing hearing where a defendant expressly withdraws a waiver of counsel submitted during the guilt phase of trial. Fazzini, 871 F.2d at 643. By requesting counsel for sentencing, Douglas expressly withdrew his earlier waiver.

Moreover, even if this Court does not follow this per se rule, under established case law, when evaluating whether to grant a request for the reappointment of counsel, the trial court is to evaluate all of the circumstances. Modica, 136 Wn. App. at 443-444. Here, Judge Tollefson focused on one – whether Douglas was willing to turn over tactical control to his attorney.

Douglas indicated he was willing to do so but refused to forfeit his right to the effective assistance of counsel. If his attorney was

ineffective, he would fire that attorney. Douglas' remarks in this regard are hardly surprising. His original convictions were reversed based on ineffective assistance of counsel. It was improper for Judge Tollefson to make Douglas' insistence on competent representation the litmus test for whether he would appoint counsel. Douglas should not have had to jettison his right to demand competence in order to obtain the assistance of an attorney. A court abuses its discretion when it denies a motion on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Judge Tollefson abused his discretion here.

The next issue is remedy. "A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." State v. Heddrick, 166 Wn.2d 898, 909-910, 215 P.3d 201 (2009) (citing United States v. Cronin, 466 U.S. 648, 658-659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'" Heddrick, 166 Wn.2d at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)). Sentencing is a critical stage. Gardner v. Florida, 430 U.S.

349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Because Douglas was erroneously and completely denied counsel at sentencing, his exceptional sentences must be vacated.

3. JURY INSTRUCTIONS ON THE AGGRAVATING CIRCUMSTANCES WERE NOT CONSTITUTIONALLY SUFFICIENT.

Due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Roberts, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977). Instructions that relieve the State of its burden to prove an element present an issue of manifest constitutional error under RAP 2.5(a)(3) and may be challenged for the first time on appeal. See State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

For the arson conviction, jurors were asked to determine whether the State had proved two aggravating circumstances: (1) whether the crime was an aggravated domestic violence offense and (2) whether the crime involved an invasion of the victims' privacy.

CP 731. For residential burglary, jurors were only asked to determine whether the State had proved the crime was an aggravated domestic violence offense. CP 732.

Regarding the “aggravated domestic violence offense” circumstance, jurors were instructed:

To find a crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

(1) That the victim and the defendant were family or household members³; and

(2) (a) That 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. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks; or

(b) That the defendant’s conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim.

If you find from the evidence that element (1), and either alternative element (2)(a) or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form as to that count in the appropriate blank. To return a verdict of “yes,” the jury must be unanimous that the alternative [(2)(a) or (2)(b)] has been proved beyond a reasonable doubt.

³ In a separate instruction, “family or household members” was defined as “spouses, or former spouses, or adult persons related by blood or marriage.” CP 735.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to fill in the blank on the verdict form, "intentionally left blank."

CP 734.

The jury's special verdict forms indicate they found subsection (1) and both (2)(a) and (2)(b) proved, and identified Carroll Pederson, Pauline Pederson, and Debra Douglas as the victims. CP 738-739, 741-742.

Douglas was not present when the court and prosecutor prepared jury instructions for the sentencing phase of trial. He had already absented himself following Judge Tollefson's refusal to appoint counsel to represent him during that phase of trial. See 40RP 2155, 2160, 2218-2225. Following entry of the jury's special verdicts, Douglas pointed out that jurors had never been instructed on the elements of "deliberate cruelty," part of the State's proof for the "aggravated domestic violence offense" circumstance. He argued this relieved the State from its burden to prove all elements of the aggravating circumstance beyond a reasonable doubt. 40RP 2269, 2349-2351.

Douglas was correct. This issue is controlled by State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), review granted in

part, 169 Wn.2d 1011, 236 P.3d 896 (2010). In Gordon, two co-defendants were charged with felony murder. In addition, the State alleged two aggravating circumstances: deliberate cruelty and particular victim vulnerability. Id. at 521. While jurors were instructed that the State bore the burden to prove the circumstances beyond a reasonable doubt, they were never instructed on the precise elements of proof for each circumstance. Id. at 523, 529.

On appeal, Division One noted that both aggravating circumstances had specific definitions “that are not concomitant with either a statutory definition or a commonsense meaning of the terms.” Gordon, 153 Wn. App. at 530. “Deliberate cruelty,” for example, means “gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense.” Id. (quoting State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)). This articulation of the elements is found in WPIC 300.10.⁴ See Washington Pattern Jury Instructions, WPIC 300.10,

⁴ WPIC 300.10 provides:

“Deliberate cruelty” means gratuitous violence or other conduct which inflicts physical, psychological,

at 704 (West 2008).

The Gordon court held that the failure to instruct jurors on the precise legal elements for deliberate cruelty and victim vulnerability was a violation of due process because it relieved the State of its burden to prove all elements of an aggravated offense. Gordon, 153 Wn. App. at 531-534. Although the defense did not object to the court's failure to define these elements, Division One found the error properly raised for the first time on appeal under RAP 2.5(a) because it involved a manifest error affecting a constitutional right. Id. at 534-535.

The Gordon court rejected the State's argument that the error was harmless beyond a reasonable doubt. As to deliberate cruelty, the court reasoned that without an instruction defining the precise elements of proof, jurors were never required to consider whether the conduct was inflicted as an end to itself or whether the cruelty went beyond that normally associated with the offense or inherent in the offense. Therefore, it was simply impossible to conclude jurors would have reached the same conclusion if properly instructed.

or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime [or is normally associated with the commission of the crime].

Gordon, 153 Wn. App. at 535-537, 539.

As discussed above, at Douglas' trial, jurors were instructed that the State bore the burden to prove the "aggravated domestic violence offense" circumstance beyond a reasonable doubt. And, as part of that proof under subsection (2)(b), they were instructed that the State must prove "the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim." CP 734 (emphasis added). As in Gordon, however, they were never provided the elements of proof for deliberate cruelty. This was a manifest constitutional error that can be raised without a timely objection below and cannot be deemed harmless beyond a reasonable doubt. Gordon, 153 Wn. App. at 534-537.

In response, the State may point out that subsection (2)(b) required jurors to find deliberate cruelty or intimidation of the victim. This does not help the State, however, because the special verdict forms did not ask jurors to identify which of these theories they found proved. See CP 739, 742. For ambiguous jury verdicts, the defendant receives the benefit of any doubt. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008).

The State will also point out that even if the jury's findings in

subsection (2)(b) are ignored, for both the arson and burglary jurors also found the “aggravated domestic violence” circumstance proved under alternative (2)(a), i.e., that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. See CP 738, 741. Jurors also found a separate aggravating circumstance – whether the crime invaded the victims’ zone of privacy – for the arson. See CP 740.

Generally, remand is necessary unless it is apparent the sentencing court would simply impose the same sentence again. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Judge Tollefson indicated he would impose the same exceptional sentences absent the jury’s verdicts involving deliberate cruelty. CP 816; 41RP 2377-2378. Even where there is an explicit indication, however, remand for reconsideration of the sentence is appropriate where there is a very large disparity between the standard range and the exceptional sentence imposed. See State v. Smith, 123 Wn.2d 51, 54, 58, 864 P.2d 1371 (1993) (despite explicit indication each reason justified sentence, remanded where half of factors invalidated and exceptional sentence exceeded standard range by almost six times), overruled in part on other grounds by State v.

Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). Douglas' exceptional sentence exceeds his standard range by a factor of almost eight. See CP 801, 804. Remand is therefore appropriate here.

This should court should vacate the exceptional sentences for burglary and arson.

4. DOUGLAS' EXCEPTIONAL SENTENCE FOR ARSON COULD NOT BE BASED ON DELIBERATE CRUELTY BECAUSE CRUELTY IS INHERENT IN THE CRIME.

Citing State v. Pockert, 53 Wn. App. 491, 768 P.2d 504 (1989), Douglas argued that his exceptional sentence for first-degree arson could not be based on deliberate cruelty. 41RP 2348-2349. Douglas was correct.

Pockert was convicted of first-degree arson after he intentionally burned the home of his former girlfriend, Cheryl McClelland. Pockert, 53 Wn. App. at 493. The trial court imposed an exceptional sentence based on several aggravating circumstances, including deliberate cruelty stemming from the fact Pockert "was extremely agitated because of the breakup of the relationship and was 'getting even' with Ms. McClelland." Id. at 496-497.

On appeal, Division Three noted that first-degree arson requires a person to act with malice when causing a fire or explosion, meaning “an evil intent, wish, or design to vex, annoy, or injure another person.” *Id.* at 496-497 (quoting RCW 9A.04.110(12)). The Court concluded deliberate cruelty was not a valid basis for an exceptional sentence because such cruelty already falls within the definition of the crime’s malice element. *Id.* at 497.

Pockert has been distinguished where circumstances surrounding a first-degree arson were significantly more serious or egregious than typical for the crime.

In State v. Tierney, 74 Wn. App. 346, 872 P.2d 1145 (1994), cert. denied, 513 U.S. 1172, 115 S. Ct. 1149, 130 L. Ed. 2d 1107 (1995), the defendant’s conduct before and after the arson was so outrageous, Division One compared it to the movie *Fatal Attraction*. *Id.* at 348. Tierney relentlessly stalked the victim – who had spurned his romantic advances – over the course of four years, repeatedly threatened to kill the victim and her parents, made the victim believe her father had been involved in an accident, hired an investigator to find the victim after she went into hiding, stole personal items from the victim’s apartment before burning it,

inscribed a derogatory phrase on the apartment wall, and continued to harass the victim and her family even after the arson. *Id.* at 347-349, 355. Division One found this harassing conduct went well beyond the malice element of first-degree arson (and well beyond the conduct in Pockett) and therefore justified an exceptional sentence based on deliberate cruelty. *Id.* at 355-356.

In State v. Goodman, 108 Wn. App. 355, 362-364, 30 P.3d 516 (2001), review denied, 145 Wn.2d 1036 (2002), this Court similarly found that the defendant's conduct went beyond the malice usually associated with arson and justified a finding of deliberate cruelty. Not only had Goodman assaulted and threatened to kill his wife and her parents shortly before the arson, he set fire to his wife's house knowing that her dog was inside. He intentionally killed the dog to harm his wife emotionally. *Id.* at 364.

Douglas' case is similar to Pockett and unlike Tierney or Goodman. It is certainly not the *Fatal Attraction* scenario involved in Tierney, where the defendant incessantly harassed the victim and her family before, during, and after the arson. Nor is it like Goodman, where the defendant intentionally killed the victim's dog in order to impose the maximum emotional pain.

Rather, in Douglas' case – taking the State's evidence as

true – Douglas knew the Pederson's Sunday schedule and specifically picked a time when no one was home. 26RP 20. Not even Pepper, the Pedersons' dog, was injured. 30RP 714-715. Despite the opportunity, Douglas did not use the arson to inflict cruelty beyond that inherent in a first-degree arson. Therefore, deliberate cruelty was not a proper basis on which to base an exceptional sentence for arson.

On this additional ground, Douglas' exceptional sentence for arson must be vacated.

5. THE CONVICTIONS FOR ARSON AND VIOLATION OF A COURT ORDER ARE THE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF DOUGLAS' OFFENDER SCORES.

Following remand from this Court, Douglas alleged that his three offenses involved the same criminal conduct under RCW 9.94A.589(1)(a). 41RP 2359-2360; CP 258-259; see also 40RP 2268-2269 (Douglas disputes prosecutor's calculation of offender scores). Judge Tollefson rejected this argument when he adopted the State's calculations, which set the offender scores for arson, burglary, and violation of a court order at 5, 4, and 4, respectively. 40RP 2317-2318; 41RP 2376; CP 801. This was error. Counts 1

and 3 satisfy the requirements of RCW 9.94A.589(1).⁵

“[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a).

“Same criminal conduct” means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id. The test is an objective one that:

takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Count 1 of the amended information (arson) charged that

⁵ Judge Tollefson was authorized not to treat the residential burglary in count 2 as same criminal conduct – even if it satisfied RCW 9.94A.589(1) – under the burglary anti-merger statute. See RCW 9A.52.050; State v. Lessley, 118 Wn.2d 773, 779-782, 827 P.2d 996 (1992) (whether to punish burglary is within sentencing court’s discretion).

Douglas, "on or about the 10th day of October, 2004, did unlawfully, feloniously, knowingly, and maliciously cause a fire or explosion, which fire or explosion [w]as manifestly dangerous to any human life, contrary to RCW 9A.48.020(1)(a), a domestic violence incident as defined in RCW 10.99.020" CP 263.

Count 3 of the amended information (violation of a court order) charged that Douglas, "on or about the 10th day of October, 2004, did unlawfully and feloniously violate the terms of a court order . . . by willfully having contact with Carroll and/or Pauline Pederson or their residence when such contact was prohibited by court order, and that further, the conduct which constituted said violation of the court order was reckless and did create a substantial risk of death or serious injury to another person" CP 264-265.

The jury instructions for these two crimes are consistent with language of the amended information. CP 682, 693, 697, 702.

Both crimes involved the same victims. The arson involved the burning of the Pedersons' home. The violation of a court order involved unlawful contact with the Pedersons' home.

The two crimes also involved the same time and place. Our Supreme Court has recognized that "the same time and place

analysis applies . . . when there is a continuing sequence of criminal conduct.” State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); accord State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (looking for “continuing, uninterrupted sequence of conduct” and rejecting “simultaneity” requirement); State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (“separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.”).

There is no evidence of a significant intervening event. Indeed, the information makes it clear both crimes were based on the same act. Referring to the arson, the information and special verdict form for count 3 allege that the violation of the court order was “reckless and did create a substantial risk of death or serious injury to another person.” CP 264, 702. During closing argument, the prosecutor expressly argued that Douglas violated the protection order to commit the arson and that the fire created the “substantial risk of death or serious injury” necessary for the special verdict form on count 3. 38RP 239. In light of the State’s evidence, its arguments to the jury, and the jury verdicts, jurors necessarily found that while violating the court order, Douglas

committed arson and vice versa. Therefore, the crimes involve the same time and place.

Finally, the two crimes involved the same intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Also relevant is whether one crime furthered the other. Burns, 114 Wn.2d at 318. Again, both crimes were part of the same episode. Moreover, violation of the court order most certainly furthered the arson. Douglas could not commit the arson at the Pederson home without also violating the court order.

Because Douglas' convictions for the charges in counts 1 and 3 involved the same victims, the same time and place, and the same intent, they should have been scored as one offense at sentencing. His offender scores for each offense should be reduced by one point, resulting in the following scores and ranges: arson (offender score 4, standard range 41-54 months); residential burglary (offender score 3, standard range 13-17 months); violation of a court order (offender score 3, standard range 15-20 months).

3

See CP 801; former RCW 9.94A.510 (2004); former RCW 9.94A.525 (2004).

For this additional reason, Douglas' exceptional sentences on counts 1 and 2 must be vacated. See State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (remand necessary unless it is apparent proper standard ranges irrelevant to length of exceptional sentence). Moreover, the standard range sentence on count 3 also must be vacated, since it exceeds the proper range.

D. CONCLUSION

There is no statutory authority for Douglas' exceptional sentences. They should be vacated and his case remanded for imposition of sentences within the standard ranges.

Douglas was denied his right to counsel at the sentencing phase of trial. He is entitled to a new sentencing trial.

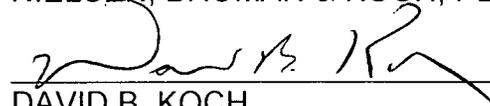
Instructional error regarding deliberate cruelty also requires that the exceptional sentences for arson and burglary be vacated. Moreover, deliberate cruelty is inherent in the arson offense and cannot justify an exceptional sentence for that crime.

Finally, two of Douglas' crimes involve the same criminal conduct. His exceptional sentences should be vacated and his offender scores and standard ranges corrected.

DATED this 30th day of August, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH

WSBA No. 23789

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Attorneys for Appellant

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

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.)
)
 JAMES DOUGLAS,)
)
 Appellant.)

COA NO. 41133-4

COURT OF APPEALS
DIVISION TWO
11 AUG 31 PM 12:45
STATE OF WASHINGTON
BY DEPUTY

DECLARATION OF SERVICE

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

THAT ON THE 30TH DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

- [X] JAMES DOUGLAS
DOC NO. 891542
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF AUGUST 2011.

x Patrick Mayovsky