

No. 41823-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JAMES MUSTARD,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY DEPUTY

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

The Honorable Leila Mills

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Daniel Mustard was charged with killing 87 year-old Ruby Andrews, one of his neighbors. At trial, Mr. Mustard did not contest the facts, but proffered a defense of insanity and/or diminished capacity, supported by the expert opinion testimony of a forensic psychologist. The State countered with the expert opinion testimony of a forensic psychiatrist. Prior to the conclusion of the trial, the court granted the State's motion to preclude the insanity defense, finding Mr. Mustard had not provided substantial evidence of insanity. The court did instruct on diminished capacity.

On appeal, Mr. Mustard submits that the court ruling utilized the wrong evidentiary standard in determining he had not presented sufficient evidence of insanity, thereby denying Mr. Mustard his constitutionally protected right to due process and the right to present a defense. In addition, Mr. Mustard submits the State failed to present sufficient evidence other than Ms. Andrew's age to support the jury's finding that she was particularly vulnerable or incapable of resistance.

B. ASSIGNMENTS OF ERROR

1. Mr. Mustard's Sixth and Fourteenth Amendment rights as well as his article I, section 22 rights to present a defense and to due process were violated when the trial court refused to instruct the jury on insanity.

2. There was insufficient evidence presented to support the jury's verdict that Ms. Andrews was a particularly vulnerable victim or was incapable of resistance.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence on his behalf and the right to due process. Here, the trial court refused to instruct the jury on insanity despite the fact this was the basis of Mr. Mustard's entire defense and was supported by expert opinion testimony. Did the trial court's refusal to instruct the jury on insanity prevent Mr. Mustard from presenting a defense and deny him due process, thus requiring reversal of his convictions?

2. The State must prove the facts supporting a sentence enhancement beyond a reasonable doubt. Here, the State was required to prove beyond a reasonable doubt that Ms. Andrews

was a particularly vulnerable victim or that she was incapable of resistance. The only evidence the State presented was Ms. Andrews' age and physical stature, but failed to prove that these were a substantial factor in Mr. Mustard committing the offense. Is Mr. Mustard entitled to reversal of the exceptional sentence and remand for resentencing to a standard range sentence because of the State's failure to prove the aggravating factor beyond a reasonable doubt?

D. STATEMENT OF THE CASE

The facts at trial were not in great dispute. Eighty-seven year old Ruby Andrews was discovered dead on the floor of the bathroom in her home she shared with her 92 year old husband and their adult son in the Manchester area of Port Orchard. Ms. Andrews had been stabbed numerous times. RP 317, 329, 466-67. Ms. Andrews' car had been taken as well as two of her husband's handguns, her wedding ring, her husband's watch, and numerous prescription pills. RP 343, 447, 1110, 1131-33.

The police investigation immediately focused on 17 year old Daniel Mustard, who lived with his parents across the street from the Andrews. RP 357-64. Mr. Mustard matched the description of the person seen around the Andrews house near the time of the

murder, and who was seen leaving the Andrews' residence in Ms. Andrews' car. RP 361. Mr. Mustard admitted to friends using a ruse to gain entry into the Andrews' house in order to rob the Andrews. RP 576-77, 1005-13. He stated that when Ms. Andrews resisted he panicked and killed her. RP 577.

Mr. Mustard was charged with first degree murder under alternative theories; premeditated intentional murder, and felony murder, committed during the course of a first degree robbery. CP 452-54. The premeditated alternative alleged aggravating circumstances: (1) the murder was committed during the course of first or second degree robbery, rape, burglary, first degree arson, or first degree burglary; and (2) the murder was committed to conceal the commission of a crime or conceal the identity of the perpetrator. CP 452-54. The felony murder alternative also alleged aggravating circumstances: (1) that Mr. Mustard was armed with a deadly weapon other than a firearm; and (2) Mr. Mustard knew or should have known Ms. Andrews was particularly vulnerable or incapable of resistance. CP 453-54. Finally, Mr. Mustard was charged with first degree robbery, which also contained the same aggravating circumstances as the first degree felony murder alternative. CP 454-55.

Mr. Mustard was evaluated by Dr. Mark Whitehill, a forensic psychologist retained by the defense, and Dr. Park Dietz, a forensic psychiatrist retained by the State. Both experts agreed that Mr. Mustard was severely mentally ill and was in the grips of a drug induced psychosis on the day of the murder possibly because of methamphetamine use. RP 1688, 1774, 1799, 2430-34. The two diverged regarding whether Mr. Mustard was legally insane at the time of the murder or was acting under diminished capacity; Dr. Whitehill testified Mr. Mustard was insane or acting under diminished capacity, Dr. Dietz disagreed. Both doctors agreed that Mr. Mustard should have been hospitalized after suffering from a severe psychotic episode several days before the murder. RP 2422-23.

Dr. Whitehill diagnosed Mr. Mustard as suffering from chronic and severe post-traumatic stress disorder (PTSD), mood disorder not otherwise specified, attention deficit hyperactivity disorder (ADHD), and polysubstance dependence in remission. RP 1729-1730. Dr. Whitehill's opinion as to insanity was focused on

the “nature and quality” prong of the *M’Naghten* test, codified at RCW 9A.12.010, not the “right from wrong” prong.¹

Dr. Dietz disagreed with Dr. Whitehall’s diagnosis of PTSD and mood disorder, but agreed Mr. Mustard suffered from polysubstance dependence, primarily marijuana, cocaine, and methamphetamine, and possibly Attention Deficit Disorder (ADD). RP 2378-93. Dr. Dietz agreed with Dr. Whitehill that Mr. Mustard knew right from wrong, but disagreed with Dr. Whitehill on whether Mr. Mustard was unable to perceive the nature and quality of his actions. RP 2475-76. Ultimately, Dr. Dietz opined that despite Mr. Mustard’s mental disease, he had the capacity to perceive the nature and quality of his actions. RP 2478. Contrary to Dr. Whitehall’s opinion, Dr. Dietz believed Mr. Mustard had the capacity to form the intent necessary for murder and robbery.

¹ RCW 9A.12.010 states in relevant part:

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

Prior to the jury being instructed, the State moved to preclude the trial court from instructing the jury on insanity, arguing that Dr. Whitehill's testimony did not meet the criteria of RCW 9A.12.010, thus Mr. Mustard did not carry his burden of production on insanity. CP 577-615. The trial court agreed and instructed the jury only on the defense of diminished capacity. CP 652; RP 3688-93. The court stated:

At this time, I must determine, without any further authorities provided by the Defense, that the *Jamison* requirements have not been met. I do not see, based upon the presentations, that there has been a showing, a substantial showing, that the Defendant was unable to appreciate the nature and quality of his actions.

And by nature and quality, I do mean the physical nature of his actions. And that, again, even if we were to allow some argument or presentation as to moral, physical must be in there, as well. And there has not been any demonstration that – there's not been any testimony that the Defendant was unable to appreciate both the nature – well, the nature and quality based upon physical actions and/or – and – excuse me. There has not been a showing that there has been substantial evidence that the physical requirements of nature and quality have been shown. Certainly, Dr. Whitehill has not presented that. His entire analysis was based upon moral appreciation. I have not heard argument as to any other basis.

...

So that's my ruling. The insanity defense cannot proceed.

RP 3691-92.

The jury found Mr. Mustard guilty of the lesser included offense of second degree intentional murder. CP 690-91. The jury did not find the two aggravating circumstances. CP 694. The jury further found Mr. Mustard guilty as charged of first degree felony murder and first degree robbery as well as the aggravating factors attached to those two counts, that Mr. Mustard was armed with a deadly weapon and that Ms. Andrews was particularly vulnerable. CP 696-98. The court rejected Mr. Mustard's request for an exceptional sentence below the standard range, instead sentencing Mr. Mustard to an exceptional sentence above the standard range of 600 months. CP 933-34; RP 4034-43.

E. ARGUMENT

1. THE COURT'S ORDER REFUSING TO INSTRUCT THE JURY ON INSANITY VIOLATED MR. MUSTARD'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE AND RIGHT TO DUE PROCESS

a. A defendant has the constitutionally protected right to present a defense and due process which encompass the right to present relevant testimony and have the jury consider the evidence. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present witnesses in one's defense is a fundamental element of due process of law. *United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir., 1986), *citing* *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord* *Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to

present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”).

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (citations omitted), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

The right to present a defense is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Holmes*, 547 U.S. at 324-25, citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The evidence sought to be admitted by the defendant need only be “of at least minimal relevance.” *State v. Jones*, 168 Wn.2d

713, 720, 230 P.3d 576 (2010), quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the State to prove “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.*

Here, this Court is not asked to decide whether Mr. Mustard *proved* his insanity defense by a preponderance of the evidence, but instead, this Court is asked to decide whether he presented sufficient evidence to allow the jury to *consider* his defense. *State v. Ginn*, 128 Wn.App. 872, 878, 117 P.3d 1155 (2005), *review denied*, 157 Wn.2d 1010 (2006).

In general, a trial court must instruct on a party's theory of the case if the law and the evidence support it; the failure to do so is reversible error. *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956 (2000), citing *State v. Birdwell*, 6 Wn.App. 284, 297, 492 P.2d 249, *review denied*, 80 Wn.2d 1009, *cert. denied*, 409 U.S. 973, 93 S.Ct. 346, 34 L.Ed.2d 237 (1972), *review denied*, 142 Wn.2d 1004 (2000). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on that defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Importantly, in evaluating whether the evidence is sufficient

to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant. *Ginn*, 128 Wn.App. at 879; *May*, 100 Wn.App. at 482. The jury, not the judge, must weigh the proof and evaluate issues of the witnesses' credibility, which are exclusively functions of the jury. *State v. Mullins*, 128 Wn.App. 633, 639, 116 P.3d 441 (2005); *May*, 100 Wn.App. at 482.

Mr. Mustard submits the court's refusal to instruct the jury on insanity violated his constitutionally protected right to due process and the right to present a defense as he proffered sufficient evidence to support the jury being instructed on the insanity defense.

b. The refusal of the trial court to instruct the jury on insanity was based upon an erroneous evidentiary standard, and denied Mr. Mustard's constitutionally protected right to present a defense and due process. Mr. Mustard's defense rested primarily on the defense of insanity. The trial court utilized an improper standard in ruling Mr. Mustard had not provided substantial evidence of insanity, an error which was not harmless, depriving him of his right to due process and the right to present a defense, and which must result in the reversal of his convictions.

The law presumes that a defendant is sane at the time an alleged offense was committed. *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). A person may plead and prove insanity as an affirmative defense to a felony. RCW 10.77.030(1).

Washington follows the *M'Naghten* rule for determining insanity. RCW 9A.12.010. See, e.g., *The Opinion of the Judges in M'Naghten's Case*, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843); *Allstate Insurance Co. v. Raynor*, 143 Wn.2d 469, 475 n.3, 21 P.3d 707 (2001) and *State v. Wheaton*, 121 Wn.2d 347, 352 n.2, 850 P.2d 507 (1993) (citing *M'Naghten*). To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

RCW 9A.12.010(1).

The insanity affirmative defense must be proven by a preponderance of the evidence. RCW 9A.12.010(2); *Box*, 109 Wn.2d at 322; *State v. Crenshaw*, 98 Wn.2d 789, 792, 659 P.2d 488 (1983). Thus, a defendant who asserts an insanity defense

has the burden of proving by a preponderance of the evidence that he was legally insane at the time of the crime. RCW 10.77.030(2); *State v. Platt*, 143 Wn.2d 242, 246, 19 P.3d 412 (2001); *State v. Wicks*, 98 Wn.2d 620, 621-22, 657 P.2d 781 (1983).

[I]nsanity entitles a defendant to an acquittal not because it establishes innocence (i.e., state has failed to prove element of criminal intent) but because the state declines to convict or punish one shown to have committed the crime while mentally impaired. . . . In other words, the mental state of "insanity" does not go to the elements of the crime but merely the ultimate culpability of the accused.

Gilcrist v. Kincheloe, 589 F. Supp. 291, 294 (E.D. Wash. 1984), *aff'd*, 774 F.2d 1173 (9th Cir. 1985) (citations omitted).

This defense requires that a defendant connect the claimed mental illness with his capacity to understand the nature and quality of the acts committed, or with his ability to tell right from wrong. *Box*, 109 Wn.2d at 322 ("In Washington . . . to prove that he is legally insane . . . the defendant must prove that at the time of the offense he or she was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong with regard to that act."). A defendant generally establishes this connection through expert testimony. *State v. Edmon*, 28 Wn.App. 98, 102-03, 621 P.2d 1310, *review denied*, 95 Wn.2d 1019 (1981).

This standard of proof for insanity is no different than the standard of proof for any other affirmative defense, such as duress or those attached to the Medical Use of Marijuana Act (MUMA) in chapter 69.51A RCW. “Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not.” *Ginn*, 128 Wn.App. at 878. The decision in *Ginn, supra*, is instructive on the quantum of evidence necessary to place an affirmative defense before the jury.

In *Ginn*, the defendant was charged with manufacturing a controlled substance and unlawful possession of a controlled substance with the intent to deliver, for growing marijuana. Prior to trial, the State moved to preclude Ms. Ginn from asserting the affirmative defense under the MUMA that she was a qualifying patient. After an evidentiary hearing where experts testified, the trial court granted the motion and barred Ms. Ginn from asserting the defense. Noting that the issue was not whether Ms. Ginn had proven her defense by a preponderance of the evidence, but rather whether she produced enough evidence to place the defense before the jury, this Court reversed the conviction:

In evaluating whether the evidence is sufficient to require a jury instruction on an affirmative defense, the trial court must view the evidence in favor of the

defendant. Dr. Walck's testimony, taken in the light most favorable to Ginn, provided sufficient evidence for a jury to reasonably believe that Ginn was suffering from intractable pain "unrelieved by standard medical treatments."

Ginn, 128 Wn.App. at 882. See also *State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009) (same).

The same analysis holds true for those asserting the affirmative defense of duress. In *State v. Harvill*, the trial court refused to instruct the jury on duress because there was no evidence of an actual threat but merely a general fear based upon the victim's past behavior. 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). The Supreme Court ruled, after noting that courts must examine the evidence in the light most favorable to the defendant, that the trial court erred because there was no authority that the threat be explicit. *Id.* at 263. See also *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (evidence of battered women's syndrome introduced to explain defendant's perceptions, which is a question of fact which should be resolved by the jury).

Here, the trial court failed to examine Dr. Whitehill's testimony on insanity in the light most favorable to Mr. Mustard. Once again, the issue as it is with any other affirmative defense, was not whether Mr. Mustard *proved* his insanity defense by a

preponderance of the evidence, but instead, whether he presented sufficient evidence to allow the jury to *consider* his defense. The trial court conflated the two questions, finding Mr. Mustard had not *proved* the defense instead of asking whether he presented enough evidence to allow the issue to go to the jury.

The trial court accepted the State's argument that the decision in *State v. Jamison*, 94 Wn.2d 663, 619 P.2d 352 (1980), precluded the trial court from instructing the jury on insanity. RP 3695-96. In *Jamison*, the defendant proffered an insanity defense to a charge of rape, assault, and promoting suicide. 94 Wn.2d at 664. The defendant presented the testimony of a clinical psychologist, who testified "that the defendant 'was significantly limited in his ability to perceive the nature and quality of the acts for which he was charged.'" *Id.* at 665. Later on cross-examination, the psychologist stated that he was unable to conclude the defendant "was completely unable to perceive the nature and quality of these acts." *Id.* The trial court refused to instruct the jury on insanity.

The Supreme Court determined this testimony did not meet the statutory elements of the defense:

We believe it unnecessary to determine whether the evidence was a scintilla or substantial. Even if it were substantial, it did not meet the statutory criteria. RCW 9A.12.010(1)(a) requires that defendant be *unable* to perceive the nature and quality of the charged act. The psychologist testified that defendant was significantly *limited* in his ability to so perceive. Being limited, even significantly, does not equate with the statutory standard of being unable to perceive. Unable means incapable, not merely possessed of limited capability.

Jamison, 94 Wn.2d at 665 (emphasis in original).

The *Jamison* decision failed to analyze the issue in the light most favorable to the defendant as courts must do when determining whether to instruct on an affirmative defense. See *e.g.*, *Ginn*, 128 Wn.App. at 882.

It is anticipated that the State will argue, as it argued to the trial court, that any mention by Dr. Whitehill of a “moral quality” is not allowed under RCW 9A.12.010. In accepting the State’s argument, which was focused solely on the in-court testimony of Dr. Whitehill, the trial court ignored the fact that the doctor’s written report was also entered into evidence. CP ____, Exhibit 200; RP 1824. In the report, Dr. Whitehill stated his observations of Mr. Mustard, his conclusions from these observations, noted the results from the psychological testing he gave to Mr. Mustard, cited RCW 9A.12.010, the statute which states the current Washington

statutory version of the *M'Naghten* rule, and opined that taking all of this into account, at the time of the murder Mr. Mustard was insane. CP ____, Exhibit 200 at 20-22. Instead of accepting the State's argument that Dr. Whitehill's testimony was insufficient to meet the threshold for insanity, the court should have looked not just to the doctor's testimony but to his written report as well, and looked at it in the light most favorable to Mr. Mustard.

In looking at all of the sources of information available, including the testimony and reports of the experts, and analyzing this evidence *in the light most favorable to Mr. Mustard*, the court erred in refusing to instruct the jury on insanity.

c. The court's error in refusing to instruct the jury on insanity was not a harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Mr. Mustard's entire defense was premised on the jury being instructed on insanity. All of the defense witnesses were either physicians who had treated Mr. Mustard and testified to either the

medications he was prescribed or the status of his mental health in the days leading up to the offense, or family members and friends who testified about the changes in Mr. Mustard's personality in the time leading up to the murder. The facts of the offense were not contested, since an insanity defense requires the defendant to admit the offense occurred but that he was insane at the time of its commission.

The State cannot prove beyond a reasonable doubt that the error in refusing to instruct the jury on insanity was a harmless error since it is now impossible to say after the verdict what the jury would have concluded had they been properly instructed on insanity. The juror letter submitted to the trial court after the verdict aptly demonstrates this fact:

I am writing to express my concerns about the Instructions provided to us, the jury, in the Mustard Trial.

The defense stated from the beginning that their defense was "not guilty due to insanity." The prosecution presented much evidence refuting the notion of diminished capacity/insanity; and the defense presented much to counter the prosecution's expert.

After weeks of testimony, presented and accepted into evidence, concerning the capacity of the defendant to intend and/or premeditate, and concerning his severe mental illness, I and others on

the jury were much surprised when we reached the end of the reading of the Instructions and nothing was provided dealing with legal insanity or diminished capacity. Based on the Instructions given, I think we, as a jury, acted appropriately.

CP 710.

Even the jury understood the importance of Mr. Mustard's proffered evidence, but was left wondering when the anticipated instructions never materialized. The error in failing to instruct the jury on insanity was not harmless and requires reversal of Mr. Mustard's convictions.

2. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO PROVE MS. ANDREWS WAS PARTICULARLY VULNERABLE OR INCAPABLE OF RESISTANCE

a. Due process requires the State prove aggravating factors beyond a reasonable doubt. The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). This Court uses the same standard of review for the sufficiency of the evidence of an aggravating factor as it does to the sufficiency of the evidence of the elements of a crime. *State v. Yarbrough*, 151 Wn.App. 66, 96, 210 P.3d 1029 (2009); *State v. Webb*, ___ Wn.App. ___, 252 P.3d 424 (2011). The standard the reviewing court uses in analyzing a claim of

insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove Ms. Andrews was a particularly vulnerable victim based solely upon evidence of her age. Under RCW 9.94A.535(3)(b), the State had to present evidence to support the jury's finding that “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” In order for the victim's vulnerability to justify an exceptional sentence, the State must prove (1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.” *State v. Suleiman*, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006). “To be a substantial factor, the victim's disability must have rendered the victim ‘more vulnerable to the particular offense than a

nondisabled victim would have been.” *State v. Mitchell*, 149 Wn.App. 716, 724, 205 P.3d 920 (2009), quoting *State v. Jackmon*, 55 Wn.App. 562, 567, 778 P.2d 1079 (1989).

The State’s evidence here established that Ms. Andrews was 87 years-old, lived on Puget Drive in Manchester with her 92 year-old husband, and cared for her adult son who was living with his parents. RP 318, 340-42. According to the testimony of the medical examiner, Ms. Andrews was five feet five inches, and weighed approximately 105 pounds. RP 466. The State did not present any other evidence other than this to establish Ms. Andrews was *particularly* vulnerable or incapable of resistance. There is nothing about an 87 year-old woman who was five feet five inches tall that is particularly vulnerable without more. There was nothing presented by the State to establish Ms. Andrews’ age was a substantial factor in the commission of the crime.

Age alone cannot be the only factor that makes one “particularly vulnerable.” Ms. Andrews lived with her husband, drove her own car, and cared for her adult son who was living with his parents at the time the offenses were committed. Without any additional evidence to establish Ms. Andrews’s age was a

substantial factor in the commission of her murder, the State failed to prove the enhancement.

It is true that decisions from the appellate courts have recognized that advanced age alone can support a finding of particular vulnerability. See, e.g., *State v. Sweet*, 138 Wn.2d 466, 482–83, 980 P.2d 1223 (1999) (52 year–old woman who was five feet two inches tall); *Jones*, 130 Wn.2d at 312 (77 year-old woman); *State v. Butler*, 75 Wn.App. 47, 53, 876 P.2d 481 (1994) (89 year-old woman); *State v. Clinton*, 48 Wn.App. 671, 676, 741 P.2d 52 (1987) (67 year-old woman). But these decisions were decided when the statute in effect at the time included advanced age as a specific factor. Former RCW 9.94A.390(2)(b) (“The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, *advanced age*, disability, or ill health.” (emphasis added)). The current version of RCW 9.94A.535 has deleted this language. Thus, there must be something more than merely the age of the victim which makes he or she “particularly vulnerable.” See *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981) (where the Legislature omits language from a statute,

intentionally or inadvertently, courts cannot read back into the statute the language that was omitted).

The State failed to present any evidence other than the age of Ms. Andrews as proof of her particularly vulnerability. But as argued, there is nothing about a person's age which makes them "particularly vulnerable." Without any additional evidence establishing why Ms. Andrews was particularly vulnerable, the enhancement cannot stand and Mr. Mustard's exceptional sentence must be reversed and remanded for resentencing to standard range sentence.

F. CONCLUSION

For the reasons stated, Mr. Mustard requests this Court reverse his convictions and remand for a new trial where the jury would be instructed on insanity. Alternatively, Mr. Mustard requests this Court reverse his exceptional sentence and remand for resentencing to a standard range sentence.

DATED this 17th day of August 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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Attorneys for Appellant

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 DANIEL MUSTARD,)
)
 Appellant.)

NO. 41823-1-II

BY
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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