

NO. 49913-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

TREVEN PERRY,

Appellant.

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

The Honorable David E. Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The jury's finding on the special verdict form does not justify an exceptional sentence, because the level of bodily harm aggravator does not apply to hit and run (injury accident).

2. The court's findings of fact do not support imposition of an exceptional sentence.

a. The court erred in finding that the jury's special verdict established the statutory aggravating factor. CP 67-68 (Finding of Fact 2).

b. The court erred in finding that the victim's injuries might have been fatal if his brother had not been present to render aid. CP 68 (Finding of Fact 3).

c. The court erred in taking appellant's criminal history into consideration in finding a substantial and compelling reason to impose an exceptional sentence. CP 68 (Finding of Fact 4).

d. The court erred in finding that the inexcusable failure to stop and render aid was a substantial and compelling reason to impose an exceptional sentence. CP 68 (Finding of Fact 5).

e. The court erred in finding that the implications of extreme recklessness or carelessness and consciousness of guilt were substantial and compelling reasons to impose an exceptional sentence. CP 68 (Finding of Fact 6).

Issues pertaining to assignments of error

1. The State charged appellant with hit and run (injury accident) and alleged that the victim's injuries substantially exceeded the level of harm necessary to satisfy the elements of the offense. Where this

statutory aggravating factor applies only if the elements of the offense include a level of bodily harm, and hit and run (injury accident) does not contain a level of harm element, must the exceptional sentence based on this aggravating factor be vacated?

2. The court made findings of fact unrelated to the statutory aggravating factor in support of its decision to impose an exceptional sentence. Where these findings are unsupported by the record and do not justify a sentence outside the standard range, must the exceptional sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On March 22, 2016, the Clark County Prosecuting Attorney charged appellant Treven Perry with one count of hit and run (injury accident). CP 1; RCW 46.52.020(4)(b). The State filed an amended information adding notice that it was seeking an exceptional sentence based on the aggravating factor that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. CP 4, 6; RCW 9.94A.535(3)(y).

The case proceeded to jury trial before the Honorable David Gregerson, and the jury returned a guilty verdict and an affirmative

finding on the aggravating factor. CP 43-44. The court imposed an exceptional sentence of 36 months and entered findings of fact and conclusions of law in support of its decision. CP 47-48, 67-69. Perry filed this timely appeal. CP 59.

2. Substantive Facts

At around 1:00 a.m. on March 20, 2016, a pickup truck driven by Treven Perry struck Ryan Moore as he was walking down a narrow, unlit stretch of road in Clark County. RP 17, 97-98, 121. Moore's brother was with him and called 911, and Moore was taken to the hospital. RP 170-71. He sustained fractures to the neck, pelvis, right arm, and left leg, as well as pulmonary contusions, a kidney laceration, and a scalp laceration. RP 76-78, 160.

Perry testified at trial that he was reaching for something he dropped when he heard his truck hit something. RP 180. He took his foot off the accelerator and sat up. As the truck slowed down Perry assessed the damage to his truck and looked back to see what he had hit. He noticed two posts where he believed there had been three and concluded he had hit the third post. RP 180-82. He did not see Moore or his brother. RP 181-82. Perry drove home, deciding to report the accident in the morning. RP 183. Perry gave the same information to investigating officers who located his damaged truck in his driveway the next morning.

RP 104-07, 150-51, 187. The officers told Perry he had hit a person, not just a post, and he was arrested for hit and run. RP 107-08, 151, 188.

- a. Defense objections to the level of bodily harm aggravating factor

The State charged Perry with hit and run (injury accident), and the jury was instructed that to convict Perry of that offense, it had to find beyond a reasonable doubt

- (1) That on or about March 20, 2016, the defendant was the driver of a vehicle;
- (2) That the defendant's vehicle was involved in an accident resulting in injury to any person;
- (3) That the defendant knew that he had been involved in an accident;
- (4) That the defendant failed to satisfy his obligation to fulfill all of the following duties:
 - (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
 - (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
 - (c) Give his name, address, insurance company, insurance policy number and vehicle license number, and exhibit his driver's license, to any person struck or injured; and
 - (d) Render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital or medical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person or on his behalf; and
- (5) That any of these acts occurred in the State of Washington.

CP 36.

The State also alleged in the information that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. CP 4, 6. It proposed instructions on the definition of bodily harm and how to decide whether the aggravating factor exists, as well as a special interrogatory for the aggravating factor. The defense objected to these proposed instructions, arguing that the aggravator did not apply because bodily harm was not an element of the charged offense. RP 203-04. Although the hit and run statute refers to injury, it does not specify the type of injury or any level of bodily harm. There was no case law supporting the proposed instructions equating bodily harm with the injury referred to in the statute. RP 214-17.

The court recognized that the hit and run statute refers to an injury, while the statutory aggravator requires a level of bodily harm. RP 226. It concluded that the term "injury" requires the existence of some bodily harm, and thus the two were not inconsistent. RP 227. It gave the following instructions:

Instruction No. 8

Bodily harm means physical pain or injury, illness, or an impairment of physical condition.

Instruction No. 9

In deciding whether the victim's injuries substantially exceeded the level of bodily harm necessary to constitute bodily harm, you

should compare the injuries suffered by the victim to the minimum injury that would satisfy the definition of bodily harm set out in instruction 8.

CP 38-39. The Special Verdict Form contained the following interrogatory: Did the victim's injuries substantially exceed the level of bodily harm necessary to constitute bodily harm, as defined in Instruction 8. CP 44.

b. The court's findings regarding the exceptional sentence

The standard range for Perry's offense, given his offender score of 1, was 6 to 12 months, with a statutory maximum sentence of five years.

CP 47. The court imposed an exceptional sentence of 36 months. CP 48.

It entered the following findings in support of its decision:

1. On January 19, 2017, the jury found the defendant, Mr. Perry, guilty of Hit and Run Injury Accident.
2. The jury found, unanimously and beyond a reasonable doubt, and by special interrogatory that the injuries in this case substantially exceeded the level necessary to prove the element of injury in the crime of Hit and Run Injury.
3. The victim in this case, Ryan Moore, may very likely have died had his brother not been walking along the road with him, which is a substantial and compelling reason to impose an exceptional sentence.
4. The Court takes Mr. Perry's criminal history into consideration in finding there is a substantial and compelling reason to impose an exceptional sentence.
5. The failure to stop and render aid in this case does not have any excuse in the view of the jury and in the view of this Court, which is a substantial and compelling reason to impose an exceptional sentence.

6. The unwillingness to stop and see if anybody had in fact been hurt gives rise to two very unflattering implications: it shows extreme recklessness or carelessness and the other shows as level of consciousness of guilt and fleeing to avoid other potential or different magnifying legal problems. These are substantial and compelling reasons to impose an exceptional sentence.

CP 67-68.

C. ARGUMENT

1. THE JURY'S FINDING ON THE SPECIAL VERDICT FORM DOES NOT JUSTIFY AN EXCEPTIONAL SENTENCE, BECAUSE THE LEVEL OF BODILY HARM AGGRAVATOR DOES NOT APPLY TO HIT AND RUN (INJURY ACCIDENT).

The legislature has set forth an exclusive list of aggravating factors which may justify an exceptional sentence above the standard range. RCW 9.94A.535. One of these statutorily identified factors is “the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” RCW 9.94A.535(3)(y). The State alleged this factor in charging Perry, and the court attempted to craft jury instructions for applying this factor to the charged offense. As defense counsel argued below, however, application of this statutory aggravating factor to a charge of hit and run injury is not statutorily authorized or supported by case law. This court reviews the legal justification for a

sentence *de novo*. *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010).

Although “bodily harm” is not an element of the offense of hit and run or a term used in the to convict instruction, the court instructed the jury on the meaning of that term. CP 38. It then instructed the jury that “In deciding whether the victim’s injuries substantially exceeded the level of bodily harm necessary to constitute bodily harm, you should compare the injuries suffered by the victim to the minimum injury that would satisfy the definition of bodily harm set out in instruction 8 [the court’s instruction defining bodily harm.]” CP 39. Finally, the special interrogatory asked the jury whether the victim’s injuries substantially exceeded the level of bodily harm “necessary to constitute bodily harm, as defined in Instruction 8.” CP 44. The statutorily authorized aggravating factor requires the jury to find, however, that the victim’s injuries substantially exceed the level of bodily harm “necessary to satisfy the elements of the offense.” RCW 9.94A.535(3)(y).

The criminal code defines specific levels of bodily harm upon which convictions may be based. RCW 9A.04.110(4)¹. Certain crimes

¹ (4)(a) “Bodily injury,” “physical injury,” or “bodily harm” means physical pain or injury, illness, or an impairment of physical condition;
(b) “Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

are defined incorporating these statutorily established levels of bodily harm as elements. *See, e.g.*, RCW 9A.36.011 (great bodily harm element of first degree assault); RCW 9A.36.021 (substantial bodily harm element of second degree assault); RCW 9A.36.031(1)(f) (bodily harm element of third degree assault; RCW 46.61.552 (substantial bodily harm element of vehicular assault). When a defendant is convicted of a crime with a specified level of bodily harm as an element of the offense but the victim's injuries substantially exceed that level of bodily harm, the level of harm aggravating factor can justify an exceptional sentence.

By its terms, the aggravating factor applies only when a level of bodily harm is necessary to satisfy the elements of the charged offense. It requires the jury to measure the victim's injuries against the minimum injury necessary to satisfy the definition of the level of harm included as an element of the offense. *Stubbs*, 170 Wn.2d at 128-29.

In *Stubbs*, the defendant was charged with first degree assault, which required the State to prove the element of "great bodily harm." The jury was instructed on the level of bodily harm aggravating factor and found that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. The trial court

(c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ[.]

imposed an exceptional sentence. *Stubbs*, 170 Wn.2d at 122. The Supreme Court reversed, holding that because the Legislature has not defined a level of harm greater than great bodily harm, and that level encompasses most injuries short of death, no injury could exceed the level of harm necessary to prove the element of the offense. *Stubbs*, 170 Wn.2d at 127-28. Although there was a range of possible injuries within each statutory level of harm, the legislative classification of injuries controlled whether the aggravating factor applied. *Stubbs*, 170 Wn.2d at 129-30. See also *State v. Pappas*, 176 Wn.2d 188, 195-96, 289 P.3d 634 (2012) (RCW 9.94A.535(3)(y) “necessarily contemplates a comparison of the injuries sustained with the level of harm the legislature determined was necessary to satisfy the elements of the offense.”).

Hit and run injury does not include a level of bodily harm as an element of the offense. CP 36-37. The statute sets out the duty imposed on the operator of a vehicle that has been involved in an accident, and it penalizes the failure to carry out those duties. RCW 46.52.020; *State v. Vela*, 100 Wn.2d 636, 638, 673 P.2d 185 (1983). The statute requires the operator of the vehicle to stop at or near the scene of the accident and remain there until he provides his name, address and vehicle license number, exhibits his vehicle operator's license, and renders any person injured reasonable aid, including arrangements for transportation of the

injured person to medical treatment if necessary and requested. RCW 46.52.020(1)-(3). The statute facilitates the investigation of accidents and punishes motorists who fail to stop and render assistance. *Vela*, 100 Wn.2d at 641. The statute classifies the crime based on whether the accident involved damage, injury, or death, but it does not include a level of bodily harm as an element of the offense. RCW 46.52.020(4).

The legislature's intent in codifying the aggravating factors which could support an exceptional sentence was to maintain the factors existing in common law, without either expanding or restricting available statutory or common law aggravating circumstances. *Stubbs*, 170 Wn.2d at 130-31 (citing Laws of 2005, ch. 68, § 1, *codified at* RCW 9.94A.535). The level of bodily harm aggravating factor has only been upheld in cases where a statutory level of harm was an element of the offense and the injuries suffered substantially exceed that level. *See State v. Duncalf*, 177 Wn.2d 289, 296, 300 P.3d 352 (2013) (level of harm aggravator supported exceptional sentence for second degree assault, where harm element of offense is substantial bodily harm); *Pappas*, 176 Wn.2d at 193-96 (level of harm aggravator applied to vehicular assault, where element of harm is substantial bodily harm); *State v. Wilson*, 96 Wn. App. 382, 980 P.2d 244 (1999) (aggravating factor applied to second degree assault); *State v. Warren*, 63 Wn. App. 477, 479, 820 P.2d 65 (1991) (seriousness of

injuries justified exceptional sentence where defendant was convicted of third degree assault but injuries were typical of attempted murder).

The State did not charge vehicular assault in this case, which would require proof of substantial bodily harm. It charged hit and run injury accident. Thus it was not required to prove a specific level of bodily harm as an element of the offense. As a result, it cannot rely on the statutory level of harm aggravating factor. Application of the aggravator in this case, where there is no level of bodily harm element in the offense, would expand the aggravating circumstances beyond what was available prior to enactment of the statute, and it is therefore not authorized.

In fact, the jury was not asked to compare the injuries in this case to the elements of the offense but to the definition of bodily harm. That is not the statutorily authorized aggravating factor. The jury's finding that the victim's injuries substantially exceeded the level of bodily harm necessary to constitute bodily harm does not justify an exceptional sentence, because it does not establish the statutory aggravating factor, which requires a finding that the injuries exceeded the level of harm necessary to establish the elements of the offense. Perry's exceptional sentence must be vacated and the case remanded for sentencing within the standard range. *See Stubbs*, 170 Wn.2d at 131.

2. NEITHER THE JURY'S FINDING IN THE SPECIAL VERDICT NOR THE COURT'S FINDINGS OF FACT SUPPORT THE EXCEPTIONAL SENTENCE.

Under RCW 9.94A.535, “[t]he court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” Unless the defendant waives a jury or stipulates to aggravating factors, findings supporting aggravated sentences, other than the fact of a prior conviction, must be determined by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.535; RCW 9.94A.537.

An exceptional sentence is subject to review as set forth in RCW 9.94A.585(4). That statute provides as follows:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The court's findings in support of the exceptional sentence are not supported by the record and do not justify a sentence outside the standard range. First, the court found, “The jury found, unanimously and beyond a

reasonable doubt, and by special interrogatory that the injuries in this case substantially exceeded the level necessary to prove the element of injury in the crime of Hit and Run Injury.” CP 68. As discussed above, the jury was not asked to compare the injuries in this case to the elements of the crime of hit and run. It was asked to compare the injuries to the definition of bodily harm, which is not an element of hit and run injury. The jury’s finding on the special verdict is not the equivalent of a finding on the alleged aggravating factor. The court’s finding is not supported by the record, and the special verdict does not justify an exceptional sentence.

Even if this aggravating factor applies to hit and run, however, the court’s findings of fact do not justify imposition of an exceptional sentence. A jury must find any facts supporting aggravating circumstances beyond a reasonable doubt and by special interrogatory. *Stubbs*, 170 Wn.2d at 123; RCW 9.94A.537(3). If the jury finds the aggravating facts alleged by the State, the court must determine whether those facts *found by the jury* are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6). The court’s determination does not involve finding additional facts to support an exceptional sentence. Its role is to determine whether the jury’s finding justifies an exceptional sentence, in light of the purposes of the Sentencing Reform Act, and if so the length of the sentence. *State v. Rowland*, 160

Wn. App. 316, 329-30, 249 P.3d 635 (2011), *aff'd*, 174 Wn.2d 150, 272 P.3d 242 (2012).

Here, the court did not limit its consideration to its statutorily authorized role. Instead, it made additional findings of fact which it determined constituted substantial and compelling reasons to impose an exceptional sentence. It found that Perry's criminal history was relevant to the exceptional sentence determination, that the failure to stop and render aid was inexcusable, and that this failure indicated either extreme recklessness or a consciousness of guilt. CP 68. These additional findings were not related to either the jury's finding or the purposes of the SRA. Imposition of an exceptional sentence based on these judicially determined facts violates Perry's constitutional right to a jury trial. *See Blakely*, 542 U.S. at 303-05.

The only finding the court made relating to the level of injuries was that Moore might have died from his injuries if his brother had not been present. CP 68. This finding is not supported by the record. At trial the State presented testimony from the physician's assistant who treated Moore while he was in the hospital following the accident. She listed Moore's injuries and the treatments he received, but she did not testify that any of these injuries was life threatening. RP 76-80.

The exceptional sentence is not justified by either the jury's special verdict or the court's additional findings of fact. Perry's exceptional sentence must be vacated.

D. CONCLUSION

For the reasons addressed above, the exceptional sentence must be vacated and the case remanded for resentencing within the standard range.

DATED August 2, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
August 2, 2017

GLINSKI LAW FIRM PLLC

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