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Court of Appeals
Division II
State of Washington
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NO. 49913-4-II

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

STATE OF WASHINGTON, Respondent

v.

TREVEN ALAN PERRY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00670-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The aggravating fact found by the jury that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense justified an exceptional sentence. This aggravator is applicable to the crime of hit and run injury accident.**
- II. **The trial judge properly determined that the aggravating fact found by the jury constituted a substantial and compelling reason for an exceptional sentence.**

STATEMENT OF THE CASE

On March 22, 2016 the State charged Treven Alan Perry (hereafter 'Perry') with hit and run injury accident for his actions on March 20, 2016. CP 1. On January 12, 2017 the State amended the information to include notice to Perry that it would be seeking a sentence above the standard range. CP 4 – 5, RP 4. The State alleged the aggravating circumstance that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of hit and run injury accident. *Id.* A second amended information was entered during trial to clarify the language of hit and run injury accident. CP 6 – 7, RP 140.

Perry went to trial on the charge on January 17, 2017. RP 6. A stipulation was entered for trial that “[o]n March 20th, 2016, Ryan Moore was struck by a vehicle driven by Treven Perry, a 1995 Dodge Dakota

truck. Mr. Perry is not stipulating to knowledge that he struck Ryan Moore.” RP 17. The State presented testimony from five witnesses. RP 72 – 175.

Testimony established that on March 20, 2016 Ryan Moore and his brother, 17 year old Trevor Moore, were out for a walk around 1:00 in the morning on 131st Street. RP 159, 165 – 67. They were walking on the correct side of the street for pedestrians with Ryan walking next to the shoulder and Trevor walking closer to the ditch on the side of the road. RP 167. Trevor heard a car coming up behind them. RP 168. He looked behind him and noted that the car was travelling in the same direction they were walking and was driving straight on the other side of the road so he turned back around to face forward. *Id.* The vehicle then struck Ryan from behind, missing Trevor by a foot. *Id.* The vehicle kept driving and never slowed down or stopped; Trevor never saw any brake lights. RP 168, 173 – 75. Trevor testified that the vehicle was a small truck with a rack on the back that was possibly dark green. RP 171 – 72.

Trevor saw Ryan’s body fly between two reflective signs, hit the ground, and roll to a stop on the pavement. RP 168 – 69. Ryan was not conscious. RP 169. After making sure that Ryan was still alive and

moving him out of the road, Trevor ran home to wake up his parents because he could not find Ryan's cell phone. RP 169 – 70.

When Trevor returned, he saw that Ryan's head was lying in a pool of blood. RP 170. Trevor took off his jacket to prop up Ryan's head. *Id.* Their parents arrived about two minutes later. *Id.* Trevor had to explain to the emergency dispatcher what had happened and where they were because his mom could not compose herself. *Id.* An ambulance arrived five minutes later. RP 170 – 71.

Ryan was not discharged from the hospital until March 26th, 2016. RP 75, 160. He sustained multiple injuries including a neck fracture requiring him to wear a rigid collar for three to four months, various pelvic fractures, arm fractures, a leg fracture, pulmonary contusions, acute blood loss anemia, a scalp laceration that required staples, and a kidney laceration. RP 76 – 78, 160. On a scale from one to five, the kidney laceration was a grade four, meaning that the tear on Ryan's kidney extended completely through the kidney and into the collecting system. RP 77. Ryan went through two orthopedic surgeries for his left leg fracture and will now have a rod in that leg for the rest of his life. RP 77, 160.

Ryan remembers being with his brother, Trevor, at about midnight before the collision. RP 159. The next memory he has is waking up in a hospital bed two or three days later. RP 159. He was hooked to an IV machine, and was wearing an arm cast, a leg cast, and a neck brace. *Id.* After he was discharged from the hospital, his parents stayed home to take care of him. RP 161. Ryan needed help going up stairs, going to the bathroom, showering, getting dressed, getting in and out of bed, and even sitting up by himself. RP 161, 163, 172.

Ryan testified that his dad had to take at least one month off of work, his mom took a couple of months off, and he took many months off from work to recover. RP 161. Defense counsel objected to this testimony and requested that the testimony about injuries be limited to “what normal injuries are, and that’s bodily injury.” RP 161 – 63. Defense counsel requested that the court limit testimony about economic loss and lost wages. RP 162. The court overruled the objection. RP 163.

On March 20th, 2016, Clark County Sheriff’s Detective Todd Young was called out to investigate a hit and run collision between a vehicle and a pedestrian. RP 88 – 90. He responded to the scene on Northeast 131st Street in Clark County, Washington. RP 90 – 91. Detective Young then met with the deputies already on scene and took a

video to document the conditions, the roadway, the evidence, and the lighting. RP 91. He discovered evidence indicating where Ryan was when he was struck by the vehicle and where his body came to rest. RP 92 – 94, 101. Detective Young noted that the particular part of road where Ryan was hit was 27 feet, was not divided, and had black and yellow warning signs indicating that the road narrowed. RP 96 – 98. He noted no damage to these two posts and no indication that they had been impacted by either Ryan or a vehicle. RP 103. Detective Young also found pieces of vehicle debris including orange lenses, black plastic pieces, a metal bracket from a headlight assembly, lightbulbs, dark green paint chips, and a lot of glass. RP 93 – 95, 97, 101, 103.

Based on the vehicle debris found at the scene, Detective Young determined that the vehicle that struck Ryan was a dark green truck or SUV and would have damage to the left, front portion. RP 97, 103. He requested that deputies canvas the neighborhoods to look for a vehicle that fit this description. RP 103, 144 - 45.

Around 8:00 in the morning, Deputy Luque located a vehicle matching the description parked in the driveway of 4813 NE 128th Street and called Detective Young. RP 103 – 04, 123 145 - 46, 151. While waiting for Detective Young to arrive, Deputy Luque spoke with Perry's

parents as they were leaving the residence. RP 148. Perry's parents indicated that the vehicle was registered to them but it was Perry's and that Perry had returned either late the night before or early in the morning. RP 149.

After Detective Young arrived, he and Deputy Luque contacted Perry. RP 104, 149 – 50. Perry indicated he knew why the officers were there and, without hesitation or pause, said that he had been driving home the night before and had hit a pole. RP 105, 136, 150. Perry explained that he had dropped something in the vehicle and when he reached to retrieve it the vehicle had traveled across the roadway. RP 106 – 07, 125, 150. Perry told the officers that he slowed and then “looked back to ensure that he didn't hit a person or anything like that.” RP 107, 150. He stated that he left the scene with the intent to sleep and intended to report the collision the next day. RP 107, 151. Perry was then placed under arrest for felony hit and run injury accident. RP 107 – 08, 126, 151.

Detective Young then processed the evidence and noted that the vehicle debris found at the scene matched Perry's vehicle. RP 108, 112 – 116, 135.

Based on Detective Young's analysis, Ryan and his brother were walking eastbound on the correct side of the roadway when Ryan was

struck from behind. RP 99, 101 - 02. Ryan's body wrapped onto the front of the vehicle, over the fender, struck the truck near the A pillar, and then hit the side mirror. RP 99. His body then went between the two warning signs and came to rest in the roadway. RP 100. Detective Young testified that a pole could not have caused the damage seen on the vehicle and that Ryan's body would have created multiple thudding noises as it was hitting the vehicle. RP 118 – 19, 136.

Perry testified in his defense. He stated that on March 20th, 2016 he had been on a date with a girl and that it was a new relationship. RP 178. As he was driving his parents' truck home around 12:30 in the morning he had pulled out a flosser to pick his teeth. RP 178 – 79. Perry testified that he dropped the flosser, reached down to pick it up, and then heard a big crashing sound coming from the left. RP 180, 191. Perry testified that he did not hear multiple thuds and did not see anyone. RP 180 – 83, 192. Perry pulled his foot off of the gas but couldn't "comfortably or efficiently" push the brake pedal because of the angle of his body and couldn't sit up quickly. RP 180 – 81, 192. When he did sit up, he assessed the damage to his vehicle. RP 181, 192. It was obvious that he had hit something but "in [his] head" the damage was in a straight line so he thought it was a pole. RP 181, 192. As he sat up, he gently pushed the brake. RP 181 – 82. He looked to the left, saw two reflective

signs, and thought that he must have just hit a third so he went home to bed and decided to take care of it in the morning. RP 182 – 83.

When he got home, Perry sent his girlfriend some text messages. RP 183. They said “Okay...I’m home, but it turns out I was wrong and I was not okay to drive. Fucking passed out for a second and hit a small steel pole. Not good.” RP 184. “I’m okay. Scared the fuck out of me and busted up the left side of the front end, left headlight, bent the hood, busted the left side mirror and broke the lower driver’s side windshield. My dad’s going to be pissed.” RP 184. “Not your fault. I’m the only one who can be blamed for this and I don’t have a good excuse.” RP 184. Perry testified that he lied about passing out because his girlfriend had sent him home that night and he had wanted to make her feel guilty so that he could stay with her in the future. RP 193, 197. Perry testified that he did not know he had hit a person until he was talking to the police officers the next day. RP 177, 186, 189. Perry said knew he was involved in a collision, but only slowed down and did not stop because he had presumed it was a pole. RP 189 – 90. He joked that his first thought after seeing two officers at his door was “Wow. They really care about that pole.” RP 186.

The court instructed the jury using the standard WPIC “to convict” instruction for hit and run injury. CP 36 – 37, RP 249. This instruction

indicated that the State had to prove beyond a reasonable doubt that Perry's vehicle was involved in an accident resulting in injury to any person. CP 36, RP 249. The court also gave the jury instructions relating to the aggravator. Instruction 8 stated

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

CP 38, RP 250. Instruction 9 stated

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 39, RP 250. These instructions were presented to the jury over Perry's objection. RP 202 – 05, 213 – 31, 239.

On January 19, 2017 the jury found Perry guilty of hit and run injury accident. CP 43, RP 296. It also found, by special verdict, that the victim's injuries substantially exceeded the level of bodily harm necessary to constitute bodily harm. CP 44, RP 296 – 97.

The court sentenced Perry to an exceptional sentence of 36 months due to the aggravating factor. CP 45 – 54. The standard range was 6 to 12 months. CP 47. Perry subsequently filed a notice of appeal on January 24, 2017. CP 59. On February 1, 2017 the court entered written findings of

facts and conclusions of law regarding the imposition of the exceptional sentence. CP 67 – 69. The following findings of fact were entered:

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 a level of consciousness of guilt and fleeing to avoid other potential different or magnifying legal problems. These are substantial and compelling reasons to impose an exceptional sentence.

CP 67 – 68. Based on these findings, the court entered the following conclusions of law:

1. There are substantial and compelling reasons justifying an exceptional sentence above Mr. Perry's standard range of six to twelve months.
2. Under the circumstances in this case, a thirty-six month sentence is appropriate.

CP 68.

ARGUMENT

- I. **The aggravating fact found by the jury that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense justified an exceptional sentence. This aggravator is applicable to the crime of hit and run injury accident.**

In 2005, to conform with *Blakely v. Washington*, the legislature codified several aggravating factors that can be used to justify the imposition of an exceptional sentence. Laws of 2005, ch. 68, § 1. One of these factors is if 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); *State v. Pappas*, 176 Wn.2d 188, 192, 289 P.3d 634 (2012). If found by a jury, this factor can be used to justify an exceptional sentence where the trial court is satisfied that there is a substantial and compelling reason to do so. RCW 9.94A.537(6).

Perry argues that an exceptional sentence under RCW 9.94A.535(3)(y) cannot be imposed for a hit and run injury accident conviction as a matter of law. He is incorrect. Under *State v. Pappas* and

the plain language of the statutes, a jury can find that a victim's injuries substantially exceed the level necessary to prove the injury element in hit and run injury accident.

Appellate courts review the legal sufficiency of a sentence de novo. *Pappas*, 176 Wn.2d at 192. To reverse Perry's sentence, this Court must find 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 that "the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4); *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010).

"Bodily harm" and "injury" are interchangeable terms. To support a finding of the "substantially exceed" aggravator under State v. Pappas, the State must prove that the injury sustained by the victim of a hit and run "substantially exceeds" any minimal injury.

To prove hit and run injury accident, the State must prove beyond a reasonable doubt that a driver of any vehicle was involved in an accident resulting in injury to any person and that that driver knew he had been involved in an accident. RCW 46.52.020; *State v. Vela*, 100 Wn.2d 636, 673 P.2d 185 (1983) (holding the State is required to prove that the defendant knew the accident occurred, but not that the accident resulted in injury to a person). In comparison, to prove the "substantially exceed"

aggravator, the State must prove beyond a reasonable doubt 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). When considering whether the aggravator applies, this statute “requires comparison of the victim’s injuries against the minimum injury necessary to satisfy the offense.” *Pappas*, 176 Wn.2d at 192 (citing *Stubbs*, 170 Wn.2d at 128 – 29). As an example of the meaning of “substantially exceed” the Washington Supreme Court stated in *State v. Stubbs* that it is “a leap ...best understood as the jump from ‘bodily harm’ to ‘substantial bodily harm,’ or from ‘substantial bodily harm’ to ‘great bodily harm.’” *Stubbs*, 170 Wn.2d at 130. However, while the “substantially exceed” test is necessarily met with jumps between the statutory levels of harm, an injury can still meet this test while remaining within the same category of harm and not reaching the severity of the next level. *Pappas*, 176 Wn.2d at 192. “This is supported by the language of RCW 9.94A.535(3)(y), which only requires that the injuries ‘substantially exceed,’ rather than a requirement to meet a higher category of harm.” *Id.* at 192 – 93.

Perry argues that because hit and run injury accident requires proof of “injury” and not proof of a level of harm as defined in RCW 9A.04.110(4) such as “bodily harm” or “substantial bodily harm”, and because the “substantially exceed” aggravator mentions “bodily harm”,

the aggravator is inapplicable. He seems to suggest, relying on *State v. Stubbs*, that an injury cannot “substantially exceed” that required to prove the crime of hit and run injury accident because there are no levels of injury comparable to the levels set out in RCW 9A.04.110(4). This argument misunderstands the ruling of the *Pappas* Court.

The defendant in *Pappas*, was convicted of vehicular assault after he drove his motorcycle at a high rate of speed and hit a pole when he failed to negotiate a curve, throwing the victim (who had been riding with him) from the motorcycle. *Pappas*, 176 Wn.2d at 190 - 91. The victim suffered several injuries, including bruising, fractures, and a severe brain injury that was likely permanent. *Id* at 190. Based on these injuries, the jury found the “substantially exceed” aggravator. *Id.* at 191. On appeal, the defendant argued that any element of harm in the statute necessarily shows that all levels of harm were contemplated by the legislature and therefore a jury cannot determine that injuries “substantially exceed” those contemplated when the legislature set the sentencing range for the offense. *Id.* at 193, 195. He argued that an exceptional sentence for vehicular assault can never be based on the severity of injuries. *Id.* at 195.

As part of determining that the cases that the defendant relied upon discussed an old version of the vehicular assault statute, the Court ruled that the victim’s injuries were “substantially more severe than the

minimum temporary injuries required for “substantial bodily harm” (the injury level required to prove vehicular assault) and were also severe enough to jump to the next category of “great bodily harm.” *Id.* at 193. The Court noted that RCW 9.94A.535(3)(y) “necessarily contemplates a comparison of the injuries sustained with the level of the harm the legislature determined was necessary to satisfy the elements of the offense.” *Id.* at 195 – 96. The Court additionally rejected the defendant’s argument that the legislature necessarily accounted for potential variances in conduct because it did not create harsher penalties based on the severity of the harm within the vehicular assault statute itself. *Id.* at 197. The Court determined that where the injury is not inherent in a vehicular assault conviction, an exceptional sentence is justified if that injury is sufficiently severe. *Id.*

Similar to those sustained by the victim in *Pappas*, the victim in this case sustained severe and permanent injuries including a neck fracture requiring him to wear a rigid collar for three to four months, various pelvic fractures, arm fractures, a leg fracture, pulmonary contusions, acute blood loss anemia, a scalp laceration that required staples, and a severe kidney laceration. RP 76 – 78, 160. He endured multiple surgeries and has a permanent rod in his left leg. RP 77, 160. After being discharged from the hospital, he needed help with basic functions such as going up stairs,

showering, going to the bathroom, getting in and out of bed, and sitting up. RP 161, 163, 172. These injuries “substantially exceed” the injury required to prove hit and run injury accident. By the plain language of the statute, the element is satisfied if the State proves any injury beyond a reasonable doubt – the severity level is not specified indicating that even the smallest injury will suffice. Such injury could be a scratch or a headache. Clearly, the injuries sustained by the victim here “substantially exceed” this required minimum.

Further, the statutory levels of harm present in RCW 9A.04.110(4) support this analysis. The statute sets forth three levels of harm: “bodily harm,” “substantial bodily harm,” and “great bodily harm.” RCW 9A.04.110(4)(a), (b), (c). By their definitions, “bodily harm” encompasses the lowest levels of harm and “great bodily harm” the highest. See *Stubbs*, 170 Wn.2d. “Bodily harm” is defined as “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). Therefore, contrary to Perry’s argument, “bodily harm” (the lowest level of statutory harm) means “injury” by its very definition within the statute. The terms “bodily harm” and “injury” are thus used interchangeably by the legislature.^{1,2}

¹ Another example of the legislature’s use of the terms “bodily harm” and “injury” interchangeably is found within the aggravator itself. RCW 9.94A.535(3)(y).

Perry’s argument that the aggravator cannot be applied to hit and run injury accident because they have different standards of harm fails. Under *Pappas*, any injury that “substantially exceeds” the minimum requirement of injury (which here is potentially a headache), can thus be used to support the jury’s findings that the aggravator exists regardless of whether the aggravator states the words “bodily harm” or “injury” because in this context these words have the same meaning.

A statutory construction analysis additionally shows that the “substantially exceed” aggravator applies to the crime of hit and run injury accident.

When interpreting a statute, appellate courts strive to “ascertain and give effect to the legislature’s intent.” *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000) (citations omitted). “If the language in the statute is unambiguous, [this Court] rel[ies] solely on the statutory language.” *Id.* “A statute’s failure to define one of its terms does not make the statute ambiguous, absent any contrary legislative intent, [the Court] give[s] words their plain and ordinary meaning. *Id.* “A single word in a statute should not be read in isolation.” *Wright v. Jeckie*, 158 Wn.2d 375, 381, 144 P.3d 301 (2006). Courts avoid reading a statute in a way that produces a strained or absurd result. *Id.* at 380.

² This Court should also note that at trial, defense counsel requested evidence of the injury be limited to “what normal injuries are, and that’s bodily injury.” RP 161 – 63.

As discussed above, when read in conjunction, the statutes defining hit and run injury accident (RCW 46.52.020), the “substantially exceed” aggravator (RCW 9.94A.535(3)(y)), and the definition that bodily harm equals injury (RCW 9A.04.100(4)(a)) are internally consistent. Because “bodily harm” equals “injury,” the aggravator is applicable to the crime of hit and run injury accident. These statutes are not ambiguous. Reading them in a way that would bar adding the aggravator to the crime of hit and run injury accident would produce an absurd result – an act of hit and run resulting only in a minor bruise would incur the same amount of punishment as an act resulting in significant and permanent injury, similar to the injuries that the victim has suffered here. This result would contradict the legislature’s stated purpose in codifying the aggravator that there is a “need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.” *Pappas*, 176 Wn.2d at 192; Laws of 2005, ch. 68, § 1.

Perry states that the “substantially exceeds” aggravator has only been upheld where “a statutory level of harm was an element of the offense and the injuries suffered substantially exceed that level.” Br. Of Appellant, p.11. This is simply not true. In fact, case law indicates that the “substantially exceed” aggravator can apply even when the legislature

does not require any harm to the victim at all. In *State v. Cowen*,³ Division One upheld an application of the aggravator to the crime of attempted murder in the first degree. 87 Wn. App. 45, 55, 939 P.2d 1249 (1997). The Court notes that attempted murder in the first degree can be committed where the defendant intends to take a life and takes a substantial step toward doing so. *Id.* Thus, the crime can be completed where there is no injury at all. *Id.* at 56. Similarly, Washington appellate courts have ruled that the aggravating factor of multiple injuries is applicable to crimes of murder and malicious harassment. See *State v. Scott*, 72 Wn. App. 207, 866 P.2d 1258 (1993); *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996). It should be noted that, similar to the hit and run injury accident statute, the statute defining malicious harassment requires only the element of “injury.” RCW 9A.36.080. Perry is thus incorrect that the “substantially exceed” aggravator cannot be applied to crimes whose definition contains the word “injury” instead of the words “bodily harm.” If the legislature had intended to make an aggravator based on the severity of injuries inapplicable to such cases, it could have done so after the decisions of *Scott*, *Worl*, or *Cowen*. See *State v. Mann*, 146 Wn. App. 349,

³ This case was decided before the codification of RCW 9.94A.535(3)(y). Because the legislature is presumed to know case law when it codifies new laws and its express intent in codifying this law was to maintain the common law without expanding or restricting it, cases decided before 2005 are relevant here. *State v. Fenter*, 89 Wn.2d 57, 62, 569 P.2d 67 (1977); *Stubbs*, 170 Wn.2d at 130 – 31 (citing Laws of 2005, ch. 68, § 1).

360, 189 P.3d 843 (2008). That it has not done so, indicates that it approves of this interpretation. See *id.*

The aggravator charged in this case, that the victim's injuries substantially exceed the bodily harm necessary to prove the element of the crime, is applicable to charges of hit and run injury accident. Here, the word "injury" and the words "bodily harm" are interchangeable. This Court should therefore uphold Perry's exceptional sentence based on the jury's finding of this aggravator.

I. The trial judge properly determined that the aggravating fact found by the jury constituted a substantial and compelling reason for an exceptional sentence.

Aggravating circumstances justifying an exceptional sentence must be proved to a jury beyond a reasonable doubt. RCW 9.94A. 537; *Blakely v. Washington*, 542 U.S. 296, 301, 124, S.Ct. 2531, 159 L.Ed.2d 403 (2004). Here, the jury unanimously found beyond a reasonable doubt that the victim's injuries in this case substantially exceeded the level of bodily harm necessary to prove hit and run injury accident. CP 44.

Once a jury has made its finding, a judge may impose a sentence up to the maximum term allowed under RCW 9A.20.021, if the court finds, considering the purposes of the Sentencing Reform Act, that the

aggravating circumstances are substantial and compelling reasons that justify an exceptional sentence. RCW 9.94A.537(6).

This statute places trial judges in a difficult position. When a jury finds the existence of an aggravating circumstance by special interrogatory, the jury does not then go on to explain the specific facts it found supporting the aggravator. Because RCW 9.94A.537 requires judges to also find that the facts found are “substantial and compelling reasons” to justify an exceptional sentence, courts necessarily explain their reasoning using facts presented at trial. This Court should note that a similar issue went to oral argument in front of Division One on October 31, 2017 in *State v. Sage*, No. 75279-1-I. The outcome of that case may very likely affect any ruling on this case.

In this case, the trial court very clearly based its determination that there were substantial and compelling reasons to sentence Perry above the standard range based on facts present in the record. The trial included extensive testimony regarding the seriousness of the victim’s injuries. Further, the fact that the jury found Perry guilty of hit and run injury accident shows that the jury found no excuse for his failure to stop and render aid, or even to stop to see if anyone was hurt. The trial court properly found that these are substantial and compelling reasons to justify an exceptional sentence based on the jury’s finding that the victim’s

injuries substantially exceed those necessary to prove the crime.

Therefore, the State requests that this Court affirm the written findings of fact and conclusions of law entered in this case supporting an exceptional sentence.

CONCLUSION

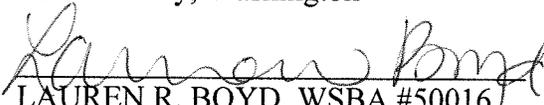
For the reasons stated above, the State respectfully asks this Court to affirm Perry's sentence.

DATED this 3rd day of November, 2017.

Respectfully submitted:

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