

**FILED**

AUG 13 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 286274-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANIEL WEBB,

Appellant.

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

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BRIEF OF APPELLANT

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ELAINE L. WINTERS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
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**A. ASSIGNMENTS OF ERROR**

1. The State did not prove beyond a reasonable doubt that Robert Daniel Webb displayed what appeared to be a firearm or other deadly weapon, an essential element of first degree robbery.

2. The State did not prove beyond a reasonable doubt that the robbery had a destructive and foreseeable impact upon Mr. Webb's daughter, a statutory aggravating factor.

3. The trial court erred in refusing to instruct the jury on voluntary intoxication.

4. RCW 9.94A.535 (3)(r), as applied to Mr. Webb, is unconstitutionally vague and violates the Fourteenth Amendment's due process clause.

5. The trial court erred by failing to provide the jury with a definition of the aggravating factor that comported with the factor's common law definition.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Robert Daniel Webb was convicted of first degree robbery based upon display of what appeared to be a firearm or other deadly weapon, but the robbery victim knew the toy gun Mr. Webb

displayed was not real. Viewing the evidence in the light most favorable to the State, must Mr. Webb's conviction for robbery in the first degree be dismissed in the absence of proof beyond a reasonable doubt that he displayed what appeared to be a deadly weapon?

2. The defendant may not be given a sentence over the standard sentence range unless a jury unanimously finds a statutory aggravating factor beyond a reasonable doubt. The jury found the robbery had a destructive and foreseeable impact on a third party, who the State alleged was Mr. Webb's daughter Meadow. Other than evidence that Meadow appeared scared and stunned, the State produced no evidence of the impact the robbery had on Meadow. Viewing the evidence in the light most favorable to the State, must the aggravating factor be dismissed and the case remanded for a standard range sentence in the absence of proof beyond a reasonable doubt that the crime had a destructive and foreseeable impact on a person other than the victim?.

3. An accused person has the Sixth Amendment right to have the jury instructed on his theory of defense where the instruction is supported by substantial evidence and accurately states the law. Mr. Webb requested a voluntary intoxication

instruction in light of evidence he was under the influence of a substantial quantity of alcohol which impacted his ability to reason. Where the instruction was supported by substantial evidence in the record and necessary to argue one of Mr. Webb's defenses, was the failure to issue the instruction reversible error?

4. The vagueness doctrine of the due process clause ensures that penal statutes provide citizens with fair notice of what conduct is illegal and that laws provide ascertainable standards of guilt so as to prevent arbitrary and subjective enforcement. RCW 9.94A.535(3)(r) permits the court to impose an exceptional sentence based upon a jury finding that the offense involved a destructive and foreseeable impact on a person other than the victim. Does this statute violate due process vagueness protections?

5. The defendant may not be given an exceptional sentence unless the jury is properly instructed to find the aggravator beyond a reasonable doubt and provided with the common law definition of the factor. The jury found the robbery in this case involved a destructive and foreseeable impact on persons other than the victim, but it was never instructed as the common law meaning of this factor, including that the destructive impact must be greater

than found in a normal robbery and must be foreseeable to the defendant. Must Mr. Webb's case be remanded for a new evidentiary hearing in light of this constitutional error?

C. STATEMENT OF THE CASE

Robert Daniel Webb was residing in Everett with his wife and 9-year-old daughter Meadow when he was unable to find work, resulting in problems in his relationship with his wife. 1RP 59-60; 2RP 9-10.<sup>1</sup> Mr. Webb, who was a long-time member of Alcoholics Anonymous (AA), relapsed. After an argument with his wife, he left their apartment with his daughter and drove to the Yakima area hoping to stay with a former AA sponsor, James Bjorklund. 1RP 59-62. Mr. Webb telephoned Mr. Bjorklund at about 2:00 a.m. on March 31, 2009, and asked for help; Mr. Webb was very upset and sounded intoxicated. 1RP 60-62; 2RP 3, 4. Mr. Bjorklund said that at times Mr. Webb sounded rational and at other times he did not. 2RP 3. Mr. Bjorklund offered to come and pick up Mr. Webb and his daughter, but Mr. Webb declined the offer. 1RP 63.

Just before 3:00 a.m., Mr. Webb stopped at an Arco AM/PM mini-mart in Thorp. 1RP 6-8; 2RP 20. Meadow got a drink from the cooler, and Mr. Webb poured himself a cup of self-service coffee, using two cups. 1RP 8. The store clerk, Eric Owens,

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<sup>1</sup> The verbatim report of proceedings for July 28 and 29, 2009 (marked Trial Volume I and II), are referred to as 1RP and 2RP respectively.

informed Mr. Webb that he should probably use a cup sleeve, because he would charge him for both cups. 1RP 8-9; Ex. 9 at 2:44.

Mr. Webb approached the cash register and gruffly told Mr. Owens to give him gasoline, the coffee, and the drink his daughter had selected or else Mr. Owens would get hot coffee in his face. Ex. 9 at 2:44; 1RP 9, 10. At the same time, Mr. Webb took a toy gun out of his jacket pocket and briefly pointed it in Mr. Owens' direction. Ex. 9 at 2:44; 1RP 10, 12. Mr. Owens calmly agreed and asked if Mr. Webb was saying he was going to rob him. Ex. 9 at 2:45; 1RP 9-10. Mr. Webb said he wanted all of the cash in the cash drawer and added he would kill the store clerk if he called the police. Ex. 9 at 2:45; 1RP 10.

Mr. Webb had the toy gun in his hand for only about five to ten seconds. Ex. 9 at 2:44; 1RP 11. Mr. Owens was quite calm, but he testified at first he thought the gun was real and was frightened. Ex. 9; 1RP 10-11, 19. Mr. Owens, however, quickly realized the gun was a toy, and he knew it was not a real gun when he gave Mr. Webb the money.<sup>2</sup> 1RP 28-29, 33, 40. The Arco company policy required Mr. Webb to do whatever a robber asked

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<sup>2</sup> Mr. Owens estimated there was between \$140 and \$160 in the cash drawer. Ex. 10 (CP 98).

even if he did not believe the robber was armed. 1RP 29-30; 2RP 21, 23.

After Mr. Owens gave Mr. Webb the money that was in the cash register, they talked about Mr. Webb's economic hard times. Ex. 9 at 2:46-47; 1RP 13-14. Mr. Webb then told his daughter to get the car and returned the coffee to Mr. Owens, stating he was not going to hurt him. Ex. 9 at 2:46-47; 1RP 14. He asked Mr. Owens not to call the police and then left the store. Ex. 9 at 2:48; 1RP 14. Mr. Webb's speech throughout the encounter was slow and slurred, showing he was intoxicated. Ex. 9; 2RP 44-45.

Mr. Owens immediately called 911 and reported the robbery. 1RP 15; Ex. 9 at 2:49; Ex. 10.<sup>2</sup> He told the 911 operator that the person who robbed him obviously had a toy gun and described it as a black toy plastic handgun. Ex. 9 at 2:50-52; Ex. 10 (CP 96, 97, 99-100). Mr. Owens also told the 911 operator that he did not want to give the robber the money, but he had to follow his manager's instructions. Ex. 9 at 2:50, 2:52; Ex. 10 (CP 97-98, 99); 1RP 31-32. He testified, however, that he was afraid Mr. Webb would

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<sup>2</sup> At the request of this Court, Mr. Webb has provided a transcript of the 911 call, Exhibit 10, which is found at CP 95-110. The transcript was prepared for this appeal and was not available for use by the jury.

return and asked for the police to remain at the store that night.

1RP 25.

After the robbery, Mr. Webb again called Mr. Bjorklund, sounding even more upset and intoxicated than during the earlier call. 1RP 64. Again, Mr. Webb alternated between making sense and being incoherent. 2RP 4. He had Meadow take the telephone to tell Mr. Bjorklund about the robbery, and he wanted Mr. Bjorklund to assure him he would not call the police, as Mr. Bjorklund had called the police on a prior occasion when Mr. Webb was suicidal. 1RP 64-65; 2RP 10-12. Mr. Bjorklund again offered to come get Mr. Webb, but Mr. Webb refused and arrived at Mr. Bjorklund's home about 30 minutes later. 1RP 65.

Mr. Webb was extremely emotionally upset. He immediately went to his knees, grabbed Mr. Bjorklund's knee and, crying uncontrollably, said he had to take care of his daughter and get out of there. 1RP 65-66; 2RP 4-5. "I have never seen anyone broke down like that in my life. I mean he was just alternately getting sick literally and trying to talk to me." 2RP 5. Mr. Bjorklund took Mr. Webb and Meadow into his home, and he settled Meadow to his daughter's room for safety. 1RP 66-67.

Mr. Bjorklund did not know if Mr. Webb was drunk or high, but he was physically sick, continued to cry uncontrollably, and went in and out of consciousness numerous times. 1RP 67-69; 2RP 5. When Mr. Webb came to, he was agitated, talkative and angry about his financial situation and his marriage. 1RP 68-69, 71. He continued to vomit all afternoon and drank wine and Red Bulls. 2RP 5. Mr. Webb was intoxicated to the point he could not even control where he was standing or throwing up. 2RP 12. "He was absolutely drunk." 2RP 6.

Mr. Webb wanted to leave, and Mr. Bjorklund tried unsuccessfully to talk Mr. Webb into leaving Meadow with him in Yakima. Eventually a police officer called Mr. Bjorklund's home, and he told the officer Mr. Webb was there and asked them to come immediately. 1RP 71-73. When Mr. Webb realized Mr. Bjorklund had been speaking to a police officer, he left with Meadow. 1RP 74, 75. Mr. Bjorklund tried to convince Mr. Webb to stay, but Mr. Webb did not respond rationally. He said delirium tremors were really bothering him, he was sick and needed time to think. 1RP 74; 2RP 8

Mr. Webb was arrested a few days later at another friend's home in Yakima. 1RP 43-44. He had left Meadow at a friend's

home in northern California and decided to turn himself in. 2RP 41-442. No weapons or toy guns were recovered from a search of Mr. Webb, his car, and his friend's home. 1RP 47; 2RP 80-81. When interviewed by the police, Mr. Webb said he had no memory of the robbery and was probably suffering from a blackout. 2RP 39. He explained he was very drunk and had been drinking Vodka with cola or Red Bull. 2RP 39-40. After viewing the surveillance tape of the robbery, Mr. Webb broke down in tears and said the gun was not real. 2RP 75, 80-81.

The Kittitas County Prosecutor charged Mr. Webb by second amended information with first degree robbery with the statutory sentencing enhancement that the offense "involved a destructive and foreseeable impact on persons other than the victim" and with reckless endangerment of his daughter. CP 10. After a jury trial before the Honorable Michael Cooper, Mr. Webb was convicted as charged. CP 61-63. He received an exceptional sentence, and appeals to this Court. CP 78-93.

#### D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WEBB DISPLAYED WHAT APPEARED TO BE A FIREARM, AN ESSENTIAL ELEMENT OF FIRST DEGREE ROBBERY

a. The State was required to prove every element of robbery in the first degree beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.<sup>3</sup> Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, § 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct.

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<sup>3</sup> The Fourteenth Amendment states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

Article I, Section 22 provides specific rights in criminal cases. “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . . .”

2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Webb was convicted of robbery in the first degree under RCW 9A.56.200(1)(a)(ii). CP 10, 61. Robbery is defined as taking personal property from another person by the use or threatened use of force:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Robbery may be elevated to first degree based upon an additional element, in this case the display of what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1) reads:

- (1) A person is guilty of robbery in the first degree if:
  - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
    - (i) Is armed with a deadly weapon; or
    - (ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200.

The elements of first degree robbery in Mr. Webb's case thus are: (1) the defendant unlawfully took personal property from another person or in his presence, (2) the defendant intended to commit theft of the property, (3) the taking was against the person's will by the defendant's use or threatened use of immediate force, (4) the force was used to obtain or retain possession of the property, and (5) the defendant displayed what appeared to be a firearm. RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii); CP 44 (Jury Instruction 7). The issue here is whether Mr. Webb displayed what appeared to be a deadly weapon when the convenience store clerk knew Mr. Webb had a toy gun.

b. The State did not prove beyond a reasonable doubt Mr. Webb displayed what appeared to be a deadly weapon. In enacting RCW 9A.56.200(1)(a)(ii), the Legislature intended to criminalize "conduct during the course of a robbery which leads the victim to believe the robber is armed with a deadly weapon, whether the weapon is actually loaded and operable or not, and

whether the weapon is real or a toy.” State v. Henderson, 34 Wn.App. 865, 868, 664 P.2d 1291 (1983) (emphasis added). Here, the evidence produced by the State proved that Mr. Owens did not believe Mr. Webb was armed with a deadly weapon. Mr. Owens knew Mr. Webb only had a toy gun, and thus Mr. Webb did not display what appeared to be a real firearm.

Immediately after Mr. Webb left the convenience store, Mr. Owen called 911 and reported he was robbed, explaining he had not wanted to give the robber the money because he only had a toy gun. Ex. 9-10; 1RP 14-15, 31-32. Three times during his seemingly nonchalant conversation with the 911 operator, Mr. Owens said the robber did not have a real gun and he only gave the robber money because of store policy.<sup>4</sup> Ex. 9; Ex. 10 (CP 96, 97, 99). He added that he was able to discern the gun was a toy due to the store’s excellent lighting. Ex. 9; Ex. 10 (CP 99-100); 1RP 32. When interviewed by the police after his arrest, Mr. Webb also said the gun he used during the robbery was not a real gun. 2RP 75.

At trial Mr. Owens testified that when he first saw the gun it looked real and he feared for his life, but he soon realized it was a

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<sup>4</sup> Mr. Owens’ demeanor is audible and visible in Exhibits 9 and 10, which were both presented to the jury without accompanying transcripts.

toy. 1RP 10-12, 28-29, 38-39. Mr. Owens understood the gun was not real when he gave Mr. Webb the cash from the cash register, but he was following company policy to act as if the toy gun was real. 1RP 21, 29-30. In fact, Mr. Owens felt Mr. Webb's threat to throw hot coffee on him was more frightening than the toy gun. 1RP 30.

In looking at whether the defendant displayed what appeared to be a firearm, the trier of fact focuses on the effect of the display on the victim. In Scherz, for example, this Court reversed a first degree robbery conviction based upon display of what appears to be a firearm where the defendant said he had a hand grenade in his pocket, but did not display a hand grenade or demonstrate he had one with any physical act. State v. Scherz, 107 Wn.App. 427, 436-37, 27 P.3d 252 (2001). This Court found words without accompanying actions did not satisfy the robbery statute, as mere words "allowed the victim to only imagine a weapon." Scherz, 107 Wn.App. at 436. Similarly the jury instruction upheld in Kennard required the jury to determine if the display of what appeared to be a deadly weapon from the point of view of the victim. State v. Kennard, 101 Wn.App. 533, 537, 6 P.3d 38, rev. denied, 142 Wn.2d 1011 (2000). The instruction read:

“To display what appears to be a firearm” means to exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words and actions the apparent presence of a firearm even though it is not actually seen by the victim.

Id. (emphasis added). Other states where first degree robbery can be committed in this manner also analyze the display element from the point of view of the crime victim. Deshields v. State, 706 A.2d 502, 507 (Del. 1998) (element must be construed “with view toward the victim’s perception”); People v. Lopez, 73 N.Y.2d 214, 220, 535 N.E.2d 1328, 538 N.Y.S.2d 788 (1989) (defendant must consciously display or manifest the presence of something that could reasonably be perceived as a firearm and the person being robbed perceived it as such).

Here, the victim of the robbery believed Mr. Webb displayed a toy gun. The State presented police officer’s testimony that the toy gun in the surveillance tapes and a replica the police later created both looked like a real weapon, but this evidence simply was not relevant to the robbery charge, which is based upon how the toy gun appeared to the victim.<sup>5</sup> 2RP 27, 55-56, 79-80. The jury was in fact confused by this, and asked the trial court “whose

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<sup>5</sup> The court overruled the defendant’s objections to some of this testimony, presumably because it was relevant to the reckless endangerment count.

judgment of the displayed weapon determines its validity as a firearm.”<sup>6</sup> CP 60. The answer is that the element is governed by the point of view of the victim.

The crime victim did not see Mr. Webb display what appeared to be a deadly weapon and his compliance with Mr. Webb’s demand for money was based upon store policy, not fear for his own life. The State did not prove beyond a reasonable doubt that Mr. Webb displayed what appeared to be a deadly weapon.

c. Mr. Webb’s conviction for first degree robbery must be reversed and dismissed. Display of what appears to be a deadly weapon is an essential element of first degree robbery as charged in this case. Mr. Webb’s conviction for first degree robbery must therefore be dismissed because the State did not prove that element of the crime.

When appropriate, this Court may reverse a conviction and remand for sentencing on a lesser-included offense. State v. Hutchins, 73 Wn.App. 211, 218, 868 P.2d 196 (1994). Second degree robbery is a lesser offense of first degree robbery, and it is committed if a person commits a robbery. RCW 9A.56.210; State

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<sup>6</sup> The court told the jury to read the instructions. CP 60.

v. Barker, 103 Wn.App. 893, 899-900, 14 P.3d 863 (2000), rev. denied, 143 Wn.2d 1021 (2001). Mr. Webb's conviction must be reversed and his case remanded for sentencing for the entry of judgment on robbery in the second degree. Scherz, 107 Wn.App. at 436-37.

2. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE ROBBERY INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM

Mr. Webb was also convicted of committing a crime that involved a destructive and foreseeable impact on persons other than the victim, a statutory aggravating factor found in the Sentencing Reform Act (SRA). CP 62; RCW 9.94A.535(3)(r). An aggravating fact must be found by a jury beyond a reasonable doubt. RCW 9.94A.537(3); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2005). This Court reviews the sufficiency of the evidence of an aggravating factor using the same standard as for the elements of a crime. State v. Yarborough, 151 Wn.App. 66, 96, 210 P.3d 1029 (2009).

The State argued the robbery had a foreseeable destructive impact upon Mr. Webb's daughter Meadow, but did not present sufficient evidence to prove this point beyond a reasonable doubt.

Neither Meadow nor her mother testified. The State did not call Meadow's counselor, teacher, or even her friends to testify as to any impact the event had on her. Nor did the State present an expert to testify as to the impact of the event on Meadow or even on a typical nine-year-old girl. Thus, there was no direct evidence that Meadow was negatively impacted by observing the robbery.

The only testimony remotely supporting the aggravating factor concerned Meadow's appearance during and after the crime. Mr. Owens, who had never seen Meadow before, said that Meadow looked "stunned" when Mr. Webb displayed the toy gun and he noticed "fear on her face." 1RP 39, 41; Ex. 9. Mr. Bjorklund had seen Meadow a couple of times before the incident and saw her when her father came to his house after the robbery. 2RP 7. Mr. Bjorklund said Meadow was polite, measured in her speech, and he described Meadow as "stunned." 1RP 70. Meadow was, however, able to participate in a normal conversation, eat a meal, and use the computer. 1RP 69-70. Thus, the State did not present any evidence that the robbery had a destructive impact on Meadow.

Any person who views a robbery is likely to look afraid or stunned during or afterward. An exceptional sentence, however, is appropriate "only when the circumstances of the crime distinguish it

from other crimes of the same statutory category.”<sup>7</sup> State v. Murray, 128 Wn.App. 718, 722, 16 P.3d 1072 (2005) (quoting State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)).

Moreover, “destructive” is an adjective meaning “having the capability, property, or effect of destroying: causing destruction.” Webster’s Third New International Dictionary at 615 (1993). There is no evidence of destruction.

Appellate cases decided before Blakely are instructive to show the kind of evidence that may support this aggravating factor, even though the sentences were based upon facts found by the court using a lower standard of proof. The Supreme Court upheld an exceptional sentence based upon the impact of the crime on the community in a case where a father murdered his daughter and told the police she was missing. State v. Jackson, 150 Wn.2d 215, 76 P.3d 217 (2003). There the victim’s teacher, school principal, and school counselor testified that, because of the defendant’s false abduction story, children from the victim’s elementary school had

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<sup>7</sup> The SRA is designed to ensure that sentences throughout the state are proportionate to the seriousness of the crime and the defendant’s prior criminal history RCW 9.94A.010; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The presumptive sentence range represents the Legislature’s judgment as how to best accommodate the various interests of the SRA. Murray, 128 Wn.App. at 724 (citing State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987)).

nightmares, their homework suffered, and they were afraid to walk to school alone. 150 Wn.2d at 275-76. In Cuevas-Diaz, the defendant broke into a woman's home, attempted to rape her, and her children saw the stranger chase their screaming mother into their bedroom. State v. Cuevas-Diaz, 61 Wn.App. 902, 906, 812 P.2d 883 (1991). The sentencing court found the children were "severely traumatized" by the incident and that at the time of sentence they 'still suffer extreme anxiety and fear for their safety,'" and the appellate court noted the finding was supported by the record. Id. at 906.

Here, the only testimony at trial was that Meadow appeared stunned and afraid, as would any witness to a robbery. The State did not prove beyond a reasonable doubt that the robbery had a destructive and foreseeable impact on Meadow. The enhancement must be reversed and dismissed, and Mr. Webb's case remanded for the imposition of a standard range sentence. State v. Way, 88 Wn.App. 830, 835-36, 946 P.2d 1209 (1997), rev. denied, 135 Wn.2d 1002 (1998).

3. MR. WEBB'S SIXTH AMENDMENT RIGHT TO A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION

At trial, the jury heard testimony that Mr. Webb had been drinking before the robbery, viewed and heard the surveillance video in which Mr. Webb's rambling speech was slurred, and learned that he was so intoxicated shortly after the robbery that he was crying uncontrollably, vomiting, slipping in and out of consciousness, and not making sense. The trial court, however, refused to instruct the jury on voluntary intoxication. Mr. Webb's conviction must be reversed because the failure to instruct the jury on voluntary intoxication violated his constitutional right to present a defense.

a. Mr. Webb had the Sixth Amendment right to have the jury instructed on his theory of defense. The federal and state constitutions provide the accused the right to present a defense.<sup>8</sup> U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d

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<sup>8</sup> The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

503 (2006). “Whether rooted 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.’” Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). As part of this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the trial court’s failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1062 (1997); State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). .

If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his theory of the case. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw reasonable inferences in the light most favorable to the requesting party. State v. Hanson, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

A “voluntary intoxication” instruction allows the jury to consider evidence of intoxication in deciding whether the State

proved that the defendant acted with the requisite intent. State v. Thomas, 123 Wn.App. 771, 781, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026 (2005); RCW 9A.16.090. Unlike diminished capacity, a voluntary intoxication defense does not necessitate expert testimony because the effects of alcohol are commonly known and the jurors can draw reasonable inferences from the evidence presented. Id. at 781-82; State v. Kruger, 116 Wn.App. 685, 692-93, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003). Thus, where the crime the State must prove contains a mens rea element and the defendant has offered evidence that he was intoxicated at the time of the crime's commission, the defendant is entitled to have the court instruct the jury on voluntary intoxication. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

b. Substantial evidence supported a voluntary intoxication instruction. At the conclusion of the case, Mr. Webb requested the jury be instructed on the defense of voluntary intoxication, citing the substantial evidence that Mr. Webb was under the influence of alcohol at the time of the robbery and that the alcohol was impacting his ability make decisions and form the required mental state. 2RP 85-87, 91-92.

The trial court utilized the three-part test from State v. Gallegos, 65 Wn.App. 230, 237, 828 P.2d 37, rev. denied, 119 Wn.2d 1024 (1992), which requires the court to provide a voluntary intoxication instruction when (1) the charged offense has a particular mental state as an element, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) evidence the drinking or drug use affected the defendant's ability to acquire the required mental state. The court found that both robbery and reckless endangerment include mental states that could be negated by intoxication. 2RP 95. The court found there was substantial evidence that Mr. Webb had been drinking, but less than substantial evidence that he had been drinking prior to the robbery. 2RP 95-96. The court believed there not enough evidence that Mr. Webb's consumption of alcohol and/or drug affected his ability to form the necessary mental states. 2RP 96-97. Citing his historical reluctance to give voluntary intoxication instructions, the court decided not to give one in this case. 2RP 88-89, 96-97. The trial court's ruling was incorrect.

First, there was direct evidence from which the jury could conclude Mr. Webb was under the influence of alcohol at the time of the robbery. The surveillance tape, for example, includes a

recording of Mr. Webb in which he shows signs of intoxication, including slurred speech and the misuse of words. Ex. 9. Mr. Bjorklund also talked to Mr. Webb on the telephone prior to the robbery.<sup>9</sup> Mr. Bjorklund knew Mr. Webb and could tell he was intoxicated by both the manner of his speech and what he was saying, including switches from making sense to ranting. 2RP 3, 12.

There was also evidence Mr. Webb was highly intoxicated shortly after the robbery. Jurors are familiar enough with alcohol consumption to know that a person could not become that intoxicated in the short time it took Mr. Webb to drive to Mr. Bjorklund's home. Mr. Bjorklund also spoke to Mr. Webb on the telephone shortly after the robbery, and again knew he was intoxicated. 2RP 3-4. "He was searching for thoughts and basically would go from being angry and somewhat clear minded into almost incoherent." 2RP 4.

Mr. Bjorklund also reported Mr. Webb's highly intoxicated state when he arrived at Mr. Bjorklund's home after the robbery, immediately falling to his knees and grabbing Mr. Bjorklund's leg

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<sup>9</sup> Mr. Bjorklund estimated the first telephone call was at about 2:00 am, and the surveillance camera shows the robbery beginning less than 45 minutes later. 1RP 60-61; Ex. 9.

while crying uncontrollably. 2RP 4-5. Mr. Webb was so intoxicated Mr. Bjorklund found it hard to believe Mr. Webb had really driven a car there. 1RP 67.

[H]e can barely stand up. He is getting sick literally physically getting sick and his eyes where [sic] from crying so much I didn't even think he could see through his tears. . . . As he sat down, he started to come in and out of consciousness.

1RP 67. Mr. Bjorklund told the jury that Mr. Webb was "absolutely drunk." 2RP 6. Thus, the jury could easily have concluded that Mr. Webb was highly intoxicated at the time of the robbery.

The court's conclusion that there was no evidence Mr. Webb's intoxication impacted his ability to form the requisite mental states was also in error. Mr. Bjorklund said that Mr. Webb was not in his right mind and was showing uncharacteristically poor judgment. 2RP 6, 13-14. He described Mr. Webb's inability to express coherent thoughts or carry on a conversation even though Mr. Webb is intelligent. 2RP 4, 8, 13. It was thus the jury's decision whether there was sufficient evidence to show Mr. Webb's intoxication affected his ability to form the mental states at issue, not the trial court's.

In like circumstances, appellate courts in Washington have found the failure to issue or request a voluntary intoxication

instruction to be reversible error. For example, in Kruger, this Court found counsel's failure to request a voluntary intoxication instruction was deficient performance requiring reversal because the jurors could have reasonably concluded the defendant's intoxication prevented him from forming the intent to "head butt" a police officer. Kruger, 116 Wn.App. at 693-95. Similarly, in State v. Hackett, 64 Wn.App. 780, 827 P.2d 1013 (1992), where the defendant was prosecuted for shooting a police officer, the court found evidence that he was intoxicated on cocaine at the time of the shooting warranted the issuance of a voluntary intoxication instruction, and reversed the conviction. 64 Wn.App. at 786-87.

c. Mr. Webb's convictions must be reversed and remanded for a new trial. Mr. Webb could not argue one of his theories of the case without a voluntary intoxication instruction. If properly instructed, however, the jury could have concluded that Mr. Webb's ability to form one or both of the requisite mental intent to commit theft was impaired by his intoxication. The jury may also have taken his intoxication into account in determining if any destructive impact on Meadow was foreseeable to Mr. Webb. The trial court's failure to instruct the jury on voluntary intoxication was reversible error, and Mr. Webb's convictions for first degree robbery and

reckless endangerment must be reversed and remanded for a new trial.

4. RCW 9.94A.535(3)(r) PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF “THE OFFENSE INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM” VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09. A “statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most

concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

a. The void-for-vagueness doctrine applies to statutes that authorize increased punishment based on factual findings by juries. Before Blakely, in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), the Supreme Court held ‘the void for vagueness doctrine should have application only to laws that “proscribe or prescribe conduct” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.’ Baldwin, 150 Wn.2d at 458 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). The court concluded the vagueness doctrine did not apply to statutory aggravating factors, reasoning, “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138,

144, 866 P.2d 8 (1994)). Relying on this premise, the Baldwin Court concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

In light of Blakely and its progeny, however, the opposite is true. If “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot,” Baldwin, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on factual findings by juries. Blakely plainly held that an aggravating factors which warrant an exceptional sentence under the SRA alters the statutory maximum for the offense. 542 U.S. at 306-07. It is for that reason that the Sixth and Fourteenth Amendments require the State plead the aggravators and prove them beyond a reasonable doubt to a jury. Thus, even under Baldwin’s flawed understanding of the application of the vagueness doctrine, the doctrine must apply here as the aggravator increases the maximum penalty for the offense.

Indeed, after Blakely, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges' discretion – not the other way around. Blakely, 542 U.S. at 304-05. This rule is closely tied to the other foundational premise of Blakely, Apprendi, and the many decisions applying Apprendi's rule: because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating circumstances are elements. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 476-77. If a fact “increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.” Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

Whether it is because it is an element of a new offense or merely because the aggravating factor in this case increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply. See Baldwin, 150 Wn.2d at 459; see also,

State v. Schmidt, 208 P.3d 214 (Ariz. 2009) (concluding aggravating factor unconstitutionally vague).

b. RCW 9.94A.535(3)(r) as applied in this case by the special verdict requiring the jury decide whether “the offense involved a destructive and foreseeable impact on persons other than the victim” violates the vagueness prohibitions. Citing Baldwin, this Court recently concluded “the void for vagueness doctrine does not apply to a sentencing scheme.” State v. Stubbs, 144 Wn.App. 644, 650, 184 P.3d 660 (2008), review granted, 203 P.3d 380 (2009). This Court alternately concluded RCW 9.94A.535 (3)(y) was not vague “because it appraises the individuals that inflicting serious bodily injury upon another would subject them to a higher sentence” and provided ascertainable standards. Id. at 651. This Court concluded the special verdict had a “commonsense meaning that juries could understand.” Id. at 650-51 (citing Tuilaepa v. California, 512 U.S. 967, 976, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)).

The opposite is true with the aggravating factor at issues here, RCW 9.94A.535(3)(r), whether the crime involved a “destructive and foreseeable impact on persons other than the victim.” This aggravating factor does not provide the jury with any

guidance as to what kind of impact is at issue or how destructive the impact must be. While the destructive impact must be “foreseeable,” the jury is not told who is supposed to foresee the impact – the defendant, a reasonable person or a reasonable person in his shoes.

The United States Supreme Court has cautioned that when juries are asked to decide sentencing factors, they must be carefully instructed:

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part by Ring, 536 U.S. at 609.

After California’s determinate sentencing scheme was struck down in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2006), the California Supreme Court addressed the problems with submitting factors typically decided by judges to juries:

[T]o the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had

the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to “provid[e] criteria for the consideration of the trial judge.” ... It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are “framed more broadly than” criminal statutes and necessarily “partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.” ... Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether “[t]he victim was “ particularly vulnerable,” whether the crime “involved ... a taking or damage of great monetary value,” or whether the “quantity of contraband” involved was “ large.”

People v. Sandoval, 41 Cal. 4<sup>th</sup> 825, 161 P.3d 1146, 1155-56

(2007) (emphasis in original). Here, the jury was similarly asked if the impact on third persons was “destructive,” but was given no context for evaluating that subjective term.

In the Eighth Amendment context the Supreme Court has explained:

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the

sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Those concerns are mitigated when a factor does not require a yes or no answer to a specific question, but only points the sentencer to a subject matter.

Tuilaepa, 512 U.S. 974-75. The risk of randomness which flows from an inherently subjective factor and gives rise to an Eighth Amendment violation is the same arbitrariness with which the Due Process vagueness doctrine is concerned.

c. Mr. Webb's exceptional sentence must be reversed because it is based upon an unconstitutionally vague aggravating factor. Here, the jury was given no guidance in what a destructive and foreseeable impact of a crime might be and was never instructed the impact must be greater than would be expected in any robbery. It is hardly surprising the jury answered "yes" to the special verdict form even though there was no evidence that Meadow suffered any long-term destructive impact from her presence at the mini-mart. Neither RCW 9.94A.535(3)(r) nor the special verdict form provided the jury objective guidance in its application of the aggravator to Mr. Webb and the facts of this case.

The vagueness doctrine was violated here because the statute and jury instruction provide no assurance that any jury would understand what is meant by a destructive and foreseeable impact on third persons. Because RCW 9.94A.535(3)(r) does not guard against this arbitrary and inherently subjective application it is void for vagueness. Mr. Webb's sentence which is predicated on this unconstitutionally vague aggravator must be reversed.

5. THE JURY WAS NOT INSTRUCTED ON THE  
LEGAL STANDARD DEFINING THE AGGRAVATING  
FACTOR THAT THE CRIME INVOLVED A  
DESTRUCTIVE AND FORESEEABLE IMPACT ON  
PERSONS OTHER THAN THE VICTIM

a. The jury was not given an instruction defining the aggravating factor that the crime involved a destructive and foreseeable impact on persons other than the victim. The jury was instructed that its answer to the special verdict form concerning the aggravating factor had to be a unanimous decision beyond a reasonable doubt. CP 52 (Instruction 15). But the court did not provide any instruction defining the aggravating factor for the jury. CP 36-59. Instead, the jury was simply given a special verdict form that asked if the robbery involved a destructive and foreseeable impact on persons other than the victim. CP 62. The special verdict form reads:

We, the jury, having found the defendant guilty of either ROBBERY IN THE FIRST DEGREE or the lesser included crime of ROBBERY IN THE SECOND DEGREE, return a special verdict by answering as follows:

Did the crime involve a destructive and foreseeable impact on persons other than the victim?

Answer Yes

Id. (Special Verdict Form).

b. The jury must be provided with an instruction defining an aggravating factor. It is well settled that the State must prove every element of the charge offense beyond a reasonable doubt, and the jury must therefore be instructed that it must find every element of the charged offense in order to convict the defendant. State v. Mills, 154 Wn.2d 1, 7-8, 10, 109 P.3d 415 (2005); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Aggravating factors are elements of an aggravated crime to be determined by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 303-05; Apprendi, 530 U.S. at 494 n.19. Thus, the jury must be instructed concerning an aggravating factor. State v. Gordon, 153 Wn.App. 516, 534, 223 P.3d 519 (2009).

In addition to instructing the jury as to the elements of the charged offense, the court should define any technical words or

expressions. State v. Scott, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988) (referring to the “long-recognized” technical term rule). A term is technical if its meaning differs from common usage. State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). When an appellate court has defined the legal standard for a statutory aggravating factor, that definition must be provided to the jury in an instruction. Gordon, 153 Wn.App. at 534.

c. Mr. Webb may raise this constitutional issue on appeal.

Mr. Webb did not object to the court’s failure to instruct the jury on the aggravating factor or request a definitional instruction himself. CP 13-35; 2RP 84-85, 90-97. Normally appellate courts will not review issues not brought to the attention of the trial court, but the appellate rules provide an exception for constitutional issues because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007); Scott, 110 Wn.2d at 686.

In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless

error standard. Kirkpatrick, 160 Wn.2d at 879-80; Scott, 110 Wn.2d at 688. Put another way, an error is manifest if it has “practical and identifiable consequences in the trial of the case.” Kirkpatrick, 160 Wn.2d at 879 (quoting Stein, 144 Wn.2d at 240).

The failure to adequately instruct the jury on the elements of an aggravating factor for an exceptional sentence is a manifest error affecting a constitutional right and may therefore be raised for the first time on appeal. Gordon, 153 Wn.App. at 534-35. The Gordon Court addressed a second degree felony murder case where the jury found the aggravating factors of deliberate cruelty and victim vulnerability. The defendants objected to one of the special verdict questions and did not propose jury instructions articulating the specific meaning of the aggravating factors. Id. at 523.

Both deliberate cruelty and victim vulnerability have specific legal definitions provided by the Washington Supreme Court. Gordon, 153 Wn.App. at 530 (citing State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) and State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006)). These definitions, however, are not found in the statutory language or in a commonsense interpretation of the words of the statute. Id. The failure to provide this legal

definition to the jury was thus a constitutional issue that could be raised for the first time on appeal. Id. at 534. Moreover, it had practical and identifiable consequences in the trial, because the jury was left to deliberate with a misleading and incomplete statement of the law. Id. at 535.

The jury in Mr. Webb's case was given even less guidance than the jury in Gordon, as here there was no instruction defining the aggravating circumstance, whereas in Gordon the jury was at least given the statutory definition. Compare Gordon, 153 Wn.App. at 530 ("the State must prove beyond a reasonable doubt that the defendant's conduct in the commission of the offense manifested deliberate cruelty); CP 15 (referring only to "the aggravating factor").

As in Gordon, the aggravating factor at issue here has been given a definition by Washington appellate courts. The factor of destructive and foreseeable impact on a third party was added to RCW 9.94A.535 in 2005, and the Legislative statement explains the statute was designed to codify existing common law aggravating factors. Laws of 2005, ch. 68 §§ 1, 3. The prior common law included two Washington Supreme Court cases upholding exceptional sentences based upon the crime's unusual impact on

third parties in the community. Jackson, 150 Wn.2d at 274-76; State v. Johnson, 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994). These cases require that the destructive impact on the third party be greater than that in a typical offense. “The impact on others must be of a destructive nature not normally associated with the commission of the offense in general.” Jackson, 150 Wn.2d at 274 (citing Johnson, 124 Wn.2d at 74-75; Pennington, 112 Wn.2d at 610). In addition, the impact must be foreseeable to the defendant. Way, 88 Wn.App. at 834 (an exceptional sentence based upon the impact of the crime on the community “requires that defendant’s actions impact others in a distinctive manner not usually associated with the commission of the offense in general, and that this impact be foreseeable to the defendant.”).

Here, however, the jury was never instructed that it had to find the crime’s destructive and foreseeable impact on a third person was of a nature not normally associated with the crime of robbery. Nor was the jury instructed the destructive impact must be foreseeable to the defendant and not to a reasonable person. There was thus no way for the jury to consider the definition of the aggravating factor in its deliberations and answer to the special

verdict form. The error in Mr. Webb's case is thus a manifest constitution issue me may raise in this appeal.

d. The failure to define the aggravating factor is not harmless beyond a reasonable doubt, and Mr. Webb's exceptional sentence must be reversed. The failure to define an element of a crime is a constitutional issue. Constitutional errors are presumed prejudicial and are only harmless when the State demonstrates beyond a reasonable doubt the error did not contribute to the jury verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Gordon, 153 Wn.App. at 535.

Here, the jury was asked if the robbery involved "a destructive and foreseeable impact on persons other than the victim?" CP 62. The jury may well have been capable of understanding the normal dictionary meaning of these words, but it was never told it needed to determine if the impact on the third person(s) was "of a destructive nature not normally associated with the commission of the offense in question" as required by Washington cases. Jackson, 150 Wn.2d at 274; accord Johnson, 124 Wn.2d at 74-75; Way, 88 Wn.App. at 834; State v. Crutchfield, 53 Wn.App. 916, 928, 771 P.2d 746 (1989), overruled on other grounds, State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481

(1992). This Court therefore cannot conclude beyond a reasonable doubt that the failure to instruct the jury on the correct legal definition of the statutory aggravating factor was harmless. Gordon, 153 Wn.App. at 538-39.

The jury finding of the aggravating factor must be vacated, and Mr. Webb's exceptional sentence must be reversed and his case remanded for a jury trial on the aggravating factor. Brown, 147 Wn.2d at 344; Gordon, 153 Wn.App. at 539.

#### E. CONCLUSION

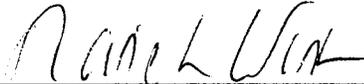
The State did not prove beyond a reasonable doubt that Mr. Webb displayed what appeared to be a deadly weapon or that the crime had a destructive and foreseeable impact on a third person. The conviction and aggravating factor must be reversed and dismissed and his case remanded for the entry of judgment and a standard range sentence for second degree robbery.

In the alternative, Mr. Webb's convictions for first degree robbery and reckless endangerment must be reversed and remanded for a new trial due to the trial court's failure to instruct the jury on voluntary intoxication or define the aggravating factor. Additionally, Mr. Webb's case should be remanded for a standard

range sentence because RCW 9.944A.535(3)(r) unconstitutionally  
vague.

DATED this 10<sup>th</sup> day of August 2010.

Respectfully submitted,



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Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 28627-4-III
v.	)	
	)	
ROBERT WEBB,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LAURA HOOPER, DPA KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5 <sup>TH</sup> AVE, STE 213 ELLENSBURG, WA 98926	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT WEBB 334662 COYOTE RIDGE CC PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF AUGUST, 2011.

X \_\_\_\_\_ 

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