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December 7, 2015
Court of Appeals
Division III
State of Washington

32653-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN J. STORMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S AMENDED BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing an exceptional sentence based on an aggravating circumstance for which the evidence is insufficient.

B. ISSUES

1. Absent evidence of any permanent injury and in light of testimony that the victim's injuries were "quite common in high speed collisions," was the evidence sufficient to support finding they substantially exceeded the level of bodily harm necessary to satisfy the elements of vehicular assault?

C. STATEMENT OF THE CASE

Bryan Storms ran a stop sign and struck a truck in the middle of an intersection. (I RP 35-36, 45, 56) The driver of the truck was killed and Mr. Storms and his passengers were all injured. (RP 18, 58) The State charged Mr. Storms with one count of vehicular homicide, RCW 46.61.520, two counts of vehicular assault, RCW 46.61.522, failure to remain at the scene, RCW 46.52.020(4), and driving while license suspended, RCW 46.20.342. (CP 254-55) The State alleged Mr. Storms

committed multiple current offenses and had a high offender score, an aggravating circumstance under RCW 9.94A.535. (CP 254-55) The state also alleged that the injuries of one of the assault victims, Lynn Blumer, “substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, RCW 9.94A.535.” (CP 255)

Dr. Mark Bauer treated Ms. Blumer in the emergency room. (II RP 85) He identified her main injuries as a head injury, a broken collar bone, and a scalp laceration. (II RP 85-86) Dr. Mark Gordon treated Ms. Blumer during her rehabilitation following discharge from the hospital. (I RP 83-83) He indicated Ms. Blumer had suffered a traumatic brain injury, which commonly affects memory, concentration and problem-solving. (I RP 85) The doctor testified that she had not fully recovered at the time she was discharged from the treatment facility, and that typically a person with a severe brain injury may have “lingering deficits for at least a year and sometimes - - sometimes permanently.” (I RP 88)

Ms. Blumer was discharged from rehabilitation in April, 2013. (I RP 86) She testified about ten months later, at which time she told the jury she continued to have memory problems. (I RP 39)

The jury found Mr. Storms guilty on all counts, and returned a special verdict finding Ms. Blumer’s injuries substantially exceeded those necessary to constitute vehicular assault. (CP 301-08) Relying on the

aggravating circumstances to impose an exceptional sentence, the court sentenced Mr. Storms to the maximum standard range on all counts, with counts one, two and three to run consecutively for a total of 448 months. (CP 669-70; Sent. RP 223-25)

D. ARGUMENT

1. THE EXCEPTIONAL SENTENCE SHOULD BE REVERSED.

a. Evidence Is Insufficient To Support An Exceptional Sentence On The Basis Of Extraordinary Bodily Harm.

Generally, the sentencing court's reason for imposing an exceptional sentence must be that the jury found an aggravating circumstance by special interrogatory. *See State v. Stubbs*, 170 Wn.2d 117, 123 & n. 5, 240 P.3d 143 (2010); *State v. Suleiman*, 158 Wn.2d 280, 290–91, 143 P.3d 795 (2006). One such aggravating factor is that “[t]he 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 jury’s special interrogatory is reviewed for sufficient evidence. *See Stubbs*, 170 Wn.2d at 123; *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner . . . ; or (b) [w]hile under the influence of intoxicating liquor or any drug, . . . ; or (c)

[w]ith disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522. Under this statute, “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” RCW 9A.04.110(4)(b); RCW 46.61.522.

In *State v. Pappas*, the Court of Appeals found that the victim’s “injuries substantially exceed the benchmark of ‘substantial bodily harm:’”

[The victim] suffered a severe brain injury as a result of the collision. Consequently, she has little control over the left side of her body, she cannot eat or bathe unassisted, and she can barely talk. Due to this injury, Thielman will require care for the rest of her life.

164 Wn. App. 917, 922-23, 265 P.3d 948 (2011), *aff’d*, 176 Wn.2d 188, 289 P.3d 634 (2012). The court concluded “there is no question that these injuries constitute ‘great bodily harm,’ defined by our legislature as ‘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.’” 164 Wn. App. at 922, quoting RCW 9A.04.110(4)(c).

In *State v. Randoll*, an injury that resulted in two brain surgeries, medical expenses of \$300,000 and \$400,000, another surgery to install a permanent plate, inability to drive at the time of sentencing, and the need to postpone the victim's education and wedding, was held to constitute more serious harm than "substantial bodily harm." 111 Wn. App. 578, 45 P.3d 1137 (2002).

The evidence was not sufficient to support a jury finding that Ms. Blumer's injuries constituted great bodily harm. The State presented no evidence that any of her injuries resulted in permanent disfigurement, impairment or loss, that she would require care for the rest of her life, or that the injuries created a probability of death. Dr. Gordon testified that the brain injury she suffered is "quite common, especially with high speed collisions." (I RP 91)

b. Remand For Resentencing Is Necessary.

When an appellate court invalidates some, but not all, of the sentencing court's aggravating factors, remand for resentencing is necessary when the trial court places significant weight on an inappropriate factor, or where some factors are inappropriate and the exceptional sentence significantly deviates from the standard range. *State*

v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990). Here, the court placed significant weight on the “more serious harm” factor:

I, also, and the jury agrees, that Ms. Blumer’s injuries substantially exceeded what the vehicular assault statute anticipated. It anticipated broken bones and temporary, substantial disfigurement. She testified in trial and told us what her life is like now and what it will be and from hearing today how it’s going to continue not even just the year out.

So I do think based on the exceptional injuries to Ms. Blumer and your multiple offenses, the Court is going to impose an exceptional sentence upward.

(Sent. RP 224) The standard range sentence, with all terms run concurrently, would have been 280 months. (CP 668) The court imposed a sentence of 448 months.

E. CONCLUSION

The finding as to the bodily harm aggravating factor should be reversed. The matter should be remanded for resentencing without reliance on the bodily harm factor.

Dated this 7th day of December, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32653-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BRYAN J. STORMS,)	
)	
Appellant.)	

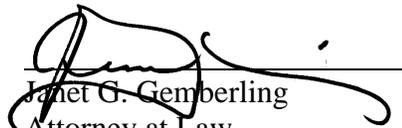
I certify under penalty of perjury under the laws of the State of Washington that on December 7, 2015, I served a copy of the Appellant's Amended Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on December 7, 2015, I mailed a copy of the Appellant's Amended Brief in this matter to:

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Signed at Spokane, Washington on December 7, 2015.


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