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NO. 35297-8-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

CHAD GERRIT BENNETT, APPELLANT

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

Superior Court Cause No. 14-1-00778-0

The Honorable John D. Knodell
The Honorable David Estudillo

SUPPLEMENTAL BRIEF OF RESPONDENT

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GR 14.17

III. SUPPLEMENTAL ARGUMENT

D. THE TRIAL COURT’S DECISION TO IMPOSE AN EXCEPTIONAL 660 MONTH SENTENCE WAS WELL GROUNDED IN PRECEDENT, NOT EXERCISED ON UNTENABLE GROUNDS OR FOR UNTENABLE REASONS, AND NOT CLEARLY EXCESSIVE.

5.¹ *The aggravating factors of deliberate cruelty and particularly vulnerable victim are not subject to a constitutional due process vagueness challenge and neither aggravator is otherwise unconstitutionally vague.*

a. Standard of review

Whether a statute is constitutional is an issue of law reviewed de novo. *State v. Watson*, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). When, as here, a statute challenged for vagueness does not involve First Amendment rights, the reviewing court evaluates the challenge in light of the particular facts of the case. *Id.* at 6.

b. Due process concerns in a vagueness analysis.

“A vagueness analysis encompasses two due process concerns. First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution.” *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003)

¹ This subsection should have been included in the State’s Brief of Respondent at subsection (D)(4), to mirror Bennett’s argument structure.

(citations omitted). *See, also, Watson*, 160 Wn.2d at 6. (citations and internal quotations omitted).

- c. Sentencing aggravators are not subject to a due process vagueness challenge; *Baldwin* remains good law.

Bennett incorrectly concludes (Br. of Appellant at 61–62) that subsequent United States Supreme Court cases have abrogated *Baldwin*'s holding that aggravating circumstances are not subject to due process vagueness challenges. 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). Nothing in *Blakely v. Washington*,² or *Johnson v. United States*,³ nullify *Baldwin*'s conclusion that aggravating circumstances “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” *Baldwin*, 150 Wn.2d at 459.

Under the doctrine of stare decisis, courts must to adhere to a prior ruling absent a clear showing the ruling is “incorrect and harmful.” *In re Stranqer Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Precedent is not “lightly set aside.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). Mr. Bennett fails to show *Baldwin*'s rule to be either incorrect or harmful. Instead, he argues *Blakely*, then *Johnson*, resurrected the viability

² 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

³ _ U.S. _, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)

of vagueness challenges to the sentencing aggravators of RCW 9.94A.535(3) eliminated by *Baldwin*. Br. of Appellant at 62–64.

Johnson's facts are inapposite. _ U.S. _, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569. In *Johnson*, the United States Supreme Court struck down as unconstitutionally vague a provision of the Armed Career Criminal Act requiring imposition of a mandatory minimum 15 year sentence. See 18 U.S.C. §924(e)(1) (conviction of being a felon in possession of a firearm with three prior violent felony convictions mandated imprisonment of not less than 15 years). This provision was subject to a due process vagueness challenge because it required imposition of a specific aggravated sentence.

The aggravating circumstances listed in RCW 9.94A.535 do not require imposition of an exceptional sentence at all, much less a sentence of specified duration. Instead, the statute recites circumstances that “may” justify a sentence outside the standard range. RCW 9.94A.535. The trial court retains discretion to decide whether the jury’s finding of an aggravating circumstance is a substantial and compelling reason to impose a higher sentence. RCW 9.94A.537(6).

Neither has Mr. Bennett provided any cogent legal argument identifying how *Baldwin's* due process vagueness analysis is nullified by *Blakely*, a decision anchored in the Sixth Amendment right to trial by jury.

Blakely did not refer in any way to the due process vagueness doctrine. A more recent United States Supreme Court case rejected a vagueness challenge to a provision of the federal sentencing guidelines because, like Washington’s Sentencing Reform Act, the provision did not require an aggravated sentence, but instead “advise[d] sentencing courts how to exercise their discretion within the bounds established by Congress.” *Beckles v. United States*, 137 S. Ct. 886, 895, 197 L. Ed. 2d 145 (2017). Although *Beckles* addressed the purely advisory federal sentencing guidelines and is thus distinguishable from Washington’s mandatory standard sentencing ranges, the ruling is entirely consistent with *Baldwin*’s holding that “ ‘laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.’ ” 150 Wn.2d at 460 (quoting *In re Pers. Restraint of Stranquer*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). As Justice Kennedy wrote in his concurring *Beckles* opinion:⁴

As sentencing laws and standards continue to evolve, cases may arise in which the formulation of a sentencing provision leads to a sentence, or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns. In that instance, a litigant might use the word vague in a general sense—that is to say, imprecise or unclear—in trying to establish that the sentencing decision was flawed. *That something is vague as a general matter, however, does not necessarily mean that it is vague within*

⁴ The quoted text recites Justice Kennedy’s concurring opinion in its entirety.

the well-established legal meaning of that term. And it seems most unlikely that the definitional structure used to explain vagueness in the context of fair warning to a transgressor, or of preventing arbitrary enforcement, is, by automatic transference, applicable to the subject of sentencing where judicial discretion is involved as distinct from a statutory command.

The existing principles for defining vagueness cannot be transported uncritically to the realm of judicial discretion in sentencing. Some other explication of the constitutional limitations likely would be required.

Beckles, 137 S. Ct. at 897, 197 L. Ed. 2d 145 (2017) (Kennedy, J. concurring) (citing *Johnson*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569) (emphasis added).

Citizens of ordinary intelligence are not required to guess at the possible consequences of engaging in criminal acts because Washington's sentencing guidelines do not set penalties, rendering due process concerns inapplicable. *Baldwin*, 150 Wn.2d at 460. Because the guidelines do not require imposition of a specific sentence, they do not create a "constitutionally protectable liberty interest." *Id.* at 461.

Mr. Bennett further argues that the Washington Supreme Court's recent decision in *State v. Murray*,⁵ and the earlier *State v. Duncalf*,⁶ are evidence the Court tacitly reversed itself by deciding vagueness challenges on their merits. Br. of Appellant at 65. A closer reading reveals this

⁵ 190 Wn.2d 727, 416 P.3d 1225 (2018).

⁶ 177 Wn.2d 289, 298, 300 P.3d 352 (2013).

conclusion to be inaccurate. In *Murray*, the Court recognized in a footnote the “broader question of whether aggravators listed in RCW 9.94A.535 are subject to void for vagueness challenges[,]” stating:

We need not resolve this question because *even if we assume that Murray can bring a void for vagueness challenge*, the rapid recidivism aggravator was not void as applied to him. As a result, we do not reach the broader question of whether aggravators listed in RCW 9.94A.535 are subject to void for vagueness challenges generally.

Murray, 190 Wn.2d at 732 n.1 (emphasis added). In the earlier *Duncalf* decision, the Court, foreshadowing *Murray*, also stated it was unnecessary to address whether *Baldwin* survived *Blakely*: “Even assuming the vagueness doctrine applies in this case, *Duncalf*’s challenge to RCW 9.94A.535(3)(y) is unavailing.” “Even if we assume” and “Even assuming” do not convey the level of confidence in such an assumption Mr. Bennett urges upon this Court.

That the Supreme Court does *not* assume *Blakely* and *Johnson* abrogated *Baldwin* may be gleaned from it’s repeated disinterest in reviewing recent cases addressing that specific question from all three divisions of the Court of Appeals.

This Court rejected a due process vagueness challenge to a sentencing aggravator in *State v. DeVore*, 413 P.3d 58 (2018)

(unpublished),⁷ *review denied*, 191 Wn.2d 1005, 424 P.3d 1216 (2018).

The opinion relied heavily on *Baldwin* and discussed the effect of both *Blakely* and *Johnson* on that decision. *DeVore*, 413 P.3d at 64. Rejecting DeVore’s contention that *Blakely* and *Johnson* support consideration of his vagueness challenge, this Court found, instead, that *Beckles* applied because Washington’s guidelines, like the federal guidelines, “merely guided the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range. Therefore, the guidelines were not subject to a vagueness challenge under the due process clause.” *Id.* at 65.

Also in 2018, Division One refused an argument identical to Bennett’s: “Contrary to [the appellant’s] assertion that *Baldwin* has been overruled, the United States Supreme Court recently reaffirmed that the sentencing guidelines are not subject to a vagueness challenge because ‘they merely guide the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range.’ ” *State v. Lloyd*, 75111-5-I, 2018 WL 8642839, at *26 (2018) (unpublished), *review denied sub nom. State v. Sefton*, 191 Wn.2d 1016, 426 P.3d 746 (2018) (citing *Beckles*

⁷ The State cites to these three unpublished cases, not as legal authority, but to point out relevant holdings contrary to Bennett’s argument on which the Washington Supreme Court has denied review. GR 14.1.

v. United States, — U.S. —, 137 S.Ct. 886, 892, 197 L.Ed. 2d 145 (2017)).

Division Two of this Court likewise concluded “ ‘the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of the sentencing guidelines.’ ” *State v. Brush*, 425 P.3d 545, 556 (2018), *review denied*, 192 Wn.2d 1012, 432 P.3d 792 (2019) (unpublished) (quoting *Baldwin*, 150 Wn.2d at 459). The *Brush* Court specifically addressed the viability of *Baldwin* after *Blakely* and *Johnson*, flatly rejecting the argument Bennett makes here and holding “the aggravating factors in RCW 9.94A.535(3) do not fix sentences or the ranges of sentences for any crime and do not vary any statutory minimum or maximum sentence.” *Brush*, 425 P.3d at 557. The Court held RCW 9.94A.535(3) does not limit the trial court’s sentencing discretion or require the trial court to impose a standard range sentence when a jury finds an aggravator applies. *Id.* The Court further found its conclusion was consistent with *Beckles*, “which, though not directly on point, provides a useful comparison.” *Id.* at 558. The *Brush* opinion cited this Court’s ruling in *DeVore*: “RCW 9.94A.535(3)’s aggravating factors are not subject to a vagueness challenge because they do not specify the sentence that must be imposed nor limit the trial court’s discretion during sentencing.” *Id.* (citing *DeVore*, 2 Wn. App. 2d at 664–65). The Court held: “*Baldwin* remains

good law. Accordingly, we apply *Baldwin* and hold that cannot assert a vagueness challenge to [a sentencing aggravator].” *Id.*

That the Washington Supreme Court has denied review on all three cases, cases in which the appellant made arguments indistinguishable from the arguments Bennett now advances, supports a substantial presumption that it, too, rejects abrogation of *Baldwin*. This Court should do likewise and hold that because aggravating circumstances guide the trial court’s discretion to impose an exceptional sentence without requiring its imposition, the aggravating circumstances of deliberate cruelty, RCW 9.94A.535(3)(a), and particularly vulnerable victim, RCW 9.94A.535(3)(b), found by the jury in Bennett’s case are not subject to his constitutional vagueness challenge.

- d. “The “deliberate cruelty” and “vulnerable victim” do not invite arbitrary application and are not subject to the predilections of prosecutors and jurors.

Legislative enactments are presumed constitutional and reviewing courts “make every presumption in favor of constitutionality where the statute’s purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose.” *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *City of Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). Bennett bears the heavy burden of

proving beyond a reasonable doubt that the statute does not make plain the conduct that is proscribed. *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

As explored more fully in the Brief of Respondent, Moore was not “killed quickly” as Bennett now asserts, nor with only the amount of injury necessary to accomplish the homicide. Br. of Appellant at 66. The pathologist’s evidence at trial was that she had been brutally beaten about the head, shaken, repeatedly stabbed and incised, and that she was conscious and fighting back during part of the prolonged attack.⁸

“Deliberate cruelty under the SRA means “ ‘gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself.’” *State v. Ross*, 71 Wn. App. 556, 562, 861 P.2d 473, 477–78 (1993), *amended*, 71 Wn. App. 556, 883 P.2d 329 (1994) (quoting *State v. Kidd*, 57 Wash.App. 95, 106, 786 P.2d 847, *review denied*, 115 Wash.2d 1010, 797 P.2d 511 (1990)).

“ ‘Deliberate cruelty’ requires a showing ‘of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.... [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the

⁸ These facts are recited in the Br. of Respondent at 26–27.

offense.’ ” *State v. Gordon*, 172 Wn.2d 671, 680–81, 260 P.3d 884 (2011) (quoting *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)). The “deliberate cruelty” aggravator requires acts not usually associated with the commission of the charged offense. *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986). Aggravating circumstances are designed to ensure greater punishment where a defendant’s conduct is proportionately more culpable than that inherent in the crime for which they are convicted. *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992); RCW 9.94A.010(1). The pathologist’s evidence in this case amply establishes Bennett’s attack far exceeded the violence necessary to kill Moore with his bare hands and a small knife.

Bennett also argues *Tili* catalogues deliberate cruelty cases where similar facts led to disparate outcomes. He is wrong. *Tili* discusses *State v. Delarosa-Flores*,⁹ in which this Court reversed the trial court’s finding of deliberate cruelty. *Tili* notes this Court distinguished the *Delarosa* facts from *State v. Falling*,¹⁰ a Division One case upholding a deliberate cruelty aggravator where the defendant repeatedly called his victim “bitch” while raping her over a 20-30 minute time period, threatened to kill her during and after the rape, and penetrated her twice. *Tili*, 148 Wn.2d at 370. The

⁹ 59 Wn. App. 514, 518–19, 799 P.2d 736 (1990)

¹⁰ 50 Wash.App. 47, 49, 747 P.2d 1119 (1987)

Tili court then found the facts in *Tili*'s case more analogous to *Falling* than *Delarosa*. *Id.* No fair reading can conclude it found the facts similar in all three cases.

In *State v. Serrano*,¹¹ this Court discussed a series of cases upholding exceptional deliberate cruelty sentences “on the basis of the number of wounds inflicted.” 95 Wn. App. at 712.

See, e.g., Ross, 71 Wash.App. 556, 861 P.2d 473 (over 100 wounds); *State v. Drummer*, 54 Wash.App. 751, 775 P.2d 981 (1989) (stabbing 20 times); *State v. Harmon*, 50 Wash.App. 755, 750 P.2d 664 (stabbing/slicing 64 times), *review denied*, 110 Wash.2d 1033 (1988). In each of those cases, however, *the sheer number of wounds demonstrated a cruelty not usually associated with the offenses*. Mr. Serrano shot Mr. Gutierrez five times. This fact itself does not suggest he gratuitously inflicted pain as an end in itself. The sentencing court's reliance on this factor was clearly erroneous.

Id. 712–13 (emphasis added). None of the cited cases recite sentencing disparities brought about by “predelictions of prosecutors and jurors.” Br. of Appellant at 66. Bennett's enraged attack on Moore bears strong resemblance to the murders in *Ross*, *Drummer*, and *Harmon*, but none at all to the shooting at issue in *Serrano*.

Neither are disparities in sentences for similar facts evidenced in the cited “vulnerable victim” cases. “The focus is on the victim; with the

¹¹ 95 Wn. App. 700, 713, 977 P.2d 47 (1999)

court determining whether the victim was more vulnerable than other victims and if the defendant knew of the particular vulnerability.” *State v. Barnett*, 104 Wn. App. 191, 205, 16 P.3d 74 (2001) (citation omitted). The particular vulnerability of healthy woman in her 80s is easily distinguishable from that of the healthy 17-year-old the *Barnett* court found not to be particularly vulnerable, her youth specifically found not to be detrimental: “She did not suffer because of age, disability, or ill health. Further, [the victim] was not incapacitated by the attack and thereby rendered vulnerable. She was able to avoid [Barnett’s] attempts to stab her and eventually escaped.” *Id.*

Both aggravating factors are specific enough that people of reasonable understanding need not guess at their meaning, nor do they invite arbitrary application and enforcement.

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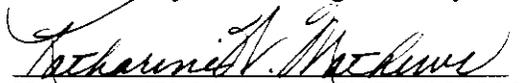
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This Court should reject Bennett's assertion that the aggravating factors of deliberate cruelty and particularly vulnerable victim are subject to a vagueness challenge.

DATED this 17th day of March, 2020.

Respectfully submitted,

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