

NO. 81650-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, which may significantly impact the law governing exceptional sentences. This brief is submitted at the request of the Court.

B. ISSUES

1. Whether the aggravating circumstance in RCW 9.94A.535(3)(y), that the victim's injuries exceeded the level of bodily injury necessary to satisfy the elements of the offense, applies to the crime of first-degree assault.

2. Whether the defendant has failed to show that this Court's holding that exceptional sentence aggravating circumstances are not subject to due process vagueness challenges is incorrect and harmful.

3. Whether the defendant waived a vagueness challenge to the jury instruction on the aggravating circumstance because he did not object to the instruction or request a clarifying instruction.

4. Whether the defendant has failed to establish that the aggravating circumstance in RCW 9.94A.535(3)(y) is unconstitutionally vague.

C. FACTS

On October 4, 2005, defendant Troy Stubbs stabbed Ryan Goodwin in the back of the neck with a knife. The knife went through two vertebrae and completely severed Goodwin's spinal cord. RP 149.

As a consequence of the stabbing, Goodwin is completely paralyzed from the waist down and partially paralyzed in his arms and chest. RP 153-55, 160-61, 174-75. His rib cage muscles, used for breathing, are also permanently paralyzed. RP 155. He has no control over his bladder and must manually stimulate bowel movements. RP 161-63.

Due to these injuries, Goodwin has a much higher risk for contracting pneumonia or suffering from a seizure or stroke. RP 155-59. The average life expectancy for a person with

Goodwin's injuries is 17 years less than a person without the injuries. RP 165-66. There is no chance that Goodwin will ever recover from these injuries. RP 153.

The State charged Mr. Stubbs with first-degree assault, alleging two alternative means: (1) the assault was committed with a deadly weapon, and (2) the assault resulted in the infliction of great bodily harm. The State further alleged an exceptional sentence aggravating circumstance in RCW 9.94A.535(3)(y): that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of Assault in the First Degree." CP 12.

Stubbs unsuccessfully moved to dismiss the aggravating circumstance, arguing it did not apply to the crime of first-degree assault. RP 12-26. The jury found Stubbs guilty as charged and found the aggravating circumstance beyond a reasonable doubt.

At sentencing, the trial court imposed an exceptional sentence, finding that "this is a case that cries out for an exceptional sentence" and that Stubbs "has rendered the victim of his crime to... a fate worse than death." RP(9/17/06) 55.

On appeal, Stubbs challenged the aggravating circumstance supporting his exceptional sentence. The Court of Appeals

affirmed the sentence. State v. Stubbs, 144 Wn. App. 644, 647-48, 184 P.3d 660 (2008), rev. granted, 165 Wn.2d 1035 (2009).

D. ARGUMENT

1. THE AGGRAVATING CIRCUMSTANCE IN RCW 9.94A.535(3)(y) APPLIES TO FIRST-DEGREE ASSAULT.

Stubbs claims that the aggravating circumstance in RCW 9.94A.535(3)(y) cannot apply to the crime of first-degree assault as a matter of law because the legislature considered the possibility that severe injuries would result when it set the standard range for the crime. In fact, the legislature clearly contemplated that even an assault with no injuries may result in a first-degree assault conviction; the infliction of great bodily harm is an element for only one alternative means, and the remaining two alternative means require no evidence of injury. Moreover, the element of great bodily harm requires only that the injuries be, at one point, life-threatening, or that there be a significant permanent loss or impairment of *any* bodily part or organ. RCW 9A.04.110(4)(c). The permanent debilitating injuries suffered by Goodwin in this case go far beyond that required to establish great bodily harm. Because a victim's injuries can substantially exceed the element of great bodily harm,

this Court should hold that RCW 9.94A.535(3)(y) is a valid aggravating circumstance for the crime of first-degree assault.

The first-degree assault statute contains three alternative means and provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011. In this case, the State charged Stubbs with committing first-degree assault under the alternative means in subsections (a) and (c).

The State also charged Stubbs with the aggravating circumstance 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 obvious purpose of this aggravating circumstance is to permit greater punishment when the

defendant causes injuries to the victim that substantially exceed the level of injury required to establish the crime.

Stubbs claims that this aggravating circumstance cannot, as a matter of law, apply to the crime of first-degree assault because the element of great bodily harm indicates that the legislature already anticipated that the victim in a first-degree assault case would suffer severe injuries. However, it is clear that the legislature actually anticipated that in many cases the victim of first-degree assault may suffer no physical injuries. Two of the three alternative means of first-degree assault do not require evidence of *any* injury. For example, a person commits first-degree assault when, acting with intent to inflict great bodily harm, he or she assaults another with a firearm or any deadly weapon. The crime occurs even if the victim suffers no injury; the defendant may shoot at the victim and miss.¹

Only RCW 9A.36.011(c) requires that the victim suffer injury, and it is readily apparent that the victim's actual injuries can substantially exceed the requirement of great bodily harm. "Great

¹ See State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009) (multiple counts of first-degree assault affirmed where defendant shot at, but missed, victims); State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009) (first-degree assault conviction affirmed where defendant shot at victim, though caused no injuries).

bodily harm" is defined 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." RCW 9A.04.110(4)(c). Accordingly, great bodily harm can occur if the victim fully recovers from the injuries so long as the injuries were, at one point, life-threatening. Great bodily harm is established if the victim suffers loss or impairment of the function of any bodily part or organ, regardless of the significance or importance of that bodily part or organ.

Here, if Goodwin had fully recovered from the stab wound, Stubbs still would be guilty of first-degree assault.² Had Goodwin only lost a finger or toe, Stubbs would have committed first-degree assault. However, the injuries that Stubbs caused went much further. Goodwin is completely paralyzed from the waist down and partially paralyzed in his arms and chest. His life expectancy is

² See, e.g., State v. Rodriguez, 121 Wn. App. 180, 188, 87 P.3d 1201 (2004) (holding there was sufficient evidence for "great bodily harm" where stab wound was life threatening, though successfully treated at hospital).

significantly reduced; he has a much higher risk for contracting pneumonia or suffering from a seizure or stroke. These injuries are permanent and they substantially exceed the type of injuries required to establish great bodily harm.

Stubbs cites a number of cases where the appellate courts have held that the severity of the victim's injuries did not justify an exceptional sentence, yet none of these decisions stands for the proposition that, as a matter of law, an exceptional sentence for the crime of first-degree assault cannot be based upon the aggravating circumstance at issue here. In State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57, 58 (1996), this Court recognized that "particularly severe injuries may be used to justify an exceptional sentence," but held that the victim's injuries were the type of injuries contemplated under the definition of "serious bodily injury." In Cardenas, the victim lost part of her leg; she also suffered loss of memory and cognitive functions, though it was apparently uncertain whether this injury was permanent. Id. at 4.

Here, the injuries suffered by Goodwin exceed those described in any of the cases cited by Stubbs.³ It is note worthy that Stubbs has never challenged the sufficiency of the evidence that Goodwin's injuries substantially exceeded the element of great bodily harm required for first-degree assault. In challenges to the sufficiency of the evidence supporting an aggravating circumstance, the court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). Here, the evidence clearly supported the jury's finding of this aggravating circumstance.

This Court should hold that the aggravating circumstance in RCW 9.94A.535(3)(y) may apply to a first-degree assault charge. It

³ In State v. Armstrong, 106 Wn.2d 547, 723 P.2d 1111 (1986), the trial court did not find that the injuries, first- and second-degree burns, substantially exceeded the type of injuries required to establish the crime, and this Court held that the injuries fell squarely under the definition of "grievous bodily harm." Id. at 550-51. In State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), the victim was in a coma for several days, suffered several broken bones, and there was the *possibility* of permanent injury. The court held that the seriousness of the victim's injuries did not justify an exceptional sentence given that the crime required "serious bodily injury." Id. at 519. In State v. Bourgeois, 72 Wn. App. 650, 866 P.2d 43 (1994), the court concluded that "it cannot be said that the injuries inflicted were 'far greater than necessary' to establish the crime of first degree assault. The gunshot wounds were not atypical of injuries inflicted by firearms...." Id. at 663.

is readily apparent from the plain wording of the relevant statutes that a defendant can cause injuries to a victim that substantially exceed the "great bodily harm" necessary to satisfy the elements of first-degree assault.

2. THE COURT SHOULD REJECT STUBBS'S VAGUENESS CHALLENGE TO THE AGGRAVATING CIRCUMSTANCE.

Stubbs argues that the aggravating circumstance in RCW 9.94A.535(3)(y) is unconstitutionally vague under the Due Process Clause. He also claims that the jury instruction, patterned on this statute, was unconstitutionally vague. However, this Court has held that aggravating circumstances are not subject to due process vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. Stubbs fails to show why the Court's analysis is now wrong simply because a jury, rather than judge, makes the factual finding concerning the aggravating circumstance. Under Washington law, the sentencing judge still decides whether an aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence.

In addition, under settled law, Stubbs's challenge to the jury instruction is waived because he did not object to the instruction or request any clarifying instruction.

Finally, even if Stubbs can make a due process vagueness challenge to the statute and instruction, his claims should be rejected. The terms used in the statute defining the aggravating circumstance are ones of common understanding. Under the particular facts of this case, Stubbs was on notice that his criminal conduct was aggravated when he stabbed his victim in the neck, severed the spinal cord and caused permanent paralysis.

- a. This Court Has Held That Exceptional Sentence Aggravating Circumstances Are Not Subject To Due Process Vagueness Challenges.

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that

prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

This Court has previously held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. at 459. The court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

Stubbs argues that, in light of Blakely,⁴ this Court's decision in Baldwin is incorrect. However, the fact that a jury, rather than judge, now makes the finding of whether an aggravating

⁴ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

circumstance accompanied the commission of the crime does not compel this Court to overrule its decision.

The Court's analysis in Baldwin remains valid after Blakely. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. Instead, they list accompanying circumstances that may justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating circumstance does not mandate an exceptional sentence. Even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. RCW 9.94A.535. Because Stubbs fails to show that this Court's decision in Baldwin was incorrect and harmful,⁵ this Court should adhere to its holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.

⁵ See generally State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the Court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.").

b. Stubbs Has Waived A Vagueness Challenge To The Jury Instruction Because He Did Not Object Or Request A Clarifying Instruction.

Stubbs also claims that the trial court's jury instruction was unconstitutionally vague. However, Stubbs never proposed any additional or clarifying instructions. This Court has repeatedly held that a criminal defendant who believes a jury instruction is unconstitutionally vague or unclear has a ready remedy -- proposal of a clarifying instruction -- and that the failure to propose further definitions precludes review of this claim of error. In State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991), the defendant attempted to challenge the term "unlawful force" in the jury instructions as unconstitutionally vague. This Court held the claim was waived:

Although Fowler did take exception to the assault instruction proposed by the court, his exception did not involve the potential vagueness or overbreadth of the court's definition of the term "unlawful force". His objection cannot be raised for the first time on appeal.

114 Wn.2d at 69; see also State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946) (holding that defendant, who did not take exception to jury instructions, waived claim that they were vague and confusing).

The Court of Appeals has explained the reasons for this waiver rule:

Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed and to protect against arbitrary enforcement of law. See City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). *This rationale applies to statutes and official policies, not to jury instructions.* Unlike citizens who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction.

State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006) (emphasis added); see also State v. Releford, 148 Wn. App. 478, 493-94, 200 P.3d 729 (2009) (holding that the defendant waived vagueness challenge to a jury instruction when he did not object to the instruction at trial).

This Court should re-affirm this waiver rule. A defendant who believes an instruction is vague should request a clarifying instruction so that the trial court can cure any possible error. To hold otherwise would encourage defendants to delay raising such issues until they receive an adverse verdict. Because Stubbs did not propose any further instructions with respect to the aggravating circumstance, he has waived any claim that the instruction was vague.

c. The Statute And Instruction Are Not Unconstitutionally Vague.

Even if the aggravating circumstance is subject to a due process vagueness challenge, Stubbs's claim would fail. The party challenging a statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality, i.e., "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990).

A statute fails to provide the required notice if it forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). However, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Id. at 7.

Because Stubbs's challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to his conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693

(1990). The challenged statute “is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance’s scope.” Id. at 182-83. Stubbs does not acknowledge or engage in this analysis. The aggravating circumstance is not unconstitutionally vague when considered in the context of Stubbs's actions.

The aggravating circumstance at issue required that the jury find that Goodwin’s injuries substantially exceeded the level of bodily harm necessary to satisfy the element of great bodily harm. The facts of this case are on the far end of the spectrum of possible injuries that could be inflicted in a first-degree assault case. Stubbs caused Goodwin to become permanently paralyzed from the waist down and partially paralyzed in his arms and chest. Goodwin's life expectancy has decreased by 17 years. A man of common intelligence would not have to guess that causing such severe injuries could expose him to a possible exceptional sentence under RCW 9.94A.535(3)(y).

Stubbs claims that the term "substantially exceeds" is so imprecise as to have no commonsense meaning. However, as this Court has explained:

We have noted, however, that "[s]ome measure of vagueness is inherent in the use of language." Because of this, we do not require "impossible standards of specificity or absolute agreement." "[V]agueness in the constitutional sense is not mere uncertainty." Thus, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct." Instead, a statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement."

Watson, 160 Wn.2d at 7 (internal citations omitted).

The term "substantial" is used in a variety of criminal statutes and vagueness challenges have been rejected. State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) (rejecting claim that phrase "interferes substantially with his liberty" was unconstitutionally vague); State v. Saunders, 132 Wn. App. 592, 599, 132 P.3d 743 (2006) (rejecting vagueness challenge to the element of "substantial pain" in third-degree assault); State v. Billups, 62 Wn. App. 122, 129, 813 P.2d 149 (1991) (holding that the term "substantial step" was not unconstitutionally vague). The

statute's use of the term "substantially exceeds" does not render it unconstitutionally vague.

E. CONCLUSION

WAPA respectfully asks this Court to affirm the exceptional sentence in this case and reject Stubbs's vagueness challenge to the aggravating circumstance and the jury instruction.

DATED this 24th day of September, 2009.

Respectfully submitted,

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Certificate of Service by Mail

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containing a copy of the Brief of Amicus Curiae WAPA, in STATE V. STUBBS, Cause No. 81650-6, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

9/25/09

Date