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No.
Court of Appeals No. 62237-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Richard Duncalf requests this Court accept review of the published opinion in State v. Duncalf, Wn.App. ___, 2011 WL 5830453.

B. OPINION BELOW

After a jury acquitted him of first degree assault but convicted him of second degree assault, Mr. Duncalf received an exceptional sentence based upon the degree of injury inflicted. Mr. Duncalf contended that sentence was not legally available as under this Court's decision in State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010) and the Sixth Amendment, the aggravating factor could only apply if the jury found Mr. Duncalf inflicted "great bodily injury." Here, the jury did not make that finding. On facts nearly identical to Stubbs, however, the Court of Appeals affirmed Mr. Duncalf's sentence concluding he cannot challenge the jury's failure to make such a finding. That opinion is plainly contrary to Stubbs and the Sixth Amendment guarantee of a jury trial.

C. ISSUES PRESENTED

1. Facts contemplated by the Legislature in setting the standard range for the charged offense cannot support an exceptional sentence. A jury acquitted Mr. Duncalf of first degree assault and convicted him of second degree assault. Without the benefit of a legal standard to guide

their determination, the jury concluded Mr. Duncalf inflicted injuries which substantially exceed those necessary to prove second degree assault. In crafting the standard range for second degree assault, did the Legislature contemplate injuries which do not rise to the level of first degree assault?

Note: This issue is also presented in the petition for review filed in State v. Pappas, Court of Appeals 65348-2-I, __ P.3d __, 2011 WL 5830459

2. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. RCW 9.94A.535(3)(y), setting forth the aggravating factor of injuries which substantially exceed those necessary to prove a crime does not provide any standard to govern the determination of what injuries are minimally necessary or when injuries "substantially exceed" this undefined base. By leaving it to the jury in Mr. Duncalf's case to define this element, was Mr. Duncalf deprived of due process?

D. SUMMARY OF THE CASE

Mr. Duncalf returned to the apartment which he shared with his girlfriend, Tasha Deptula, and James Ketchum, but did not find Ms. Deptula home. Mr. Ketchum, however, was home in his bedroom with his sometime girlfriend, Stacey Worthington, engaged in sexual intercourse.

6/17/08 RP 15. Mr. Duncalf opened the door of the darkened room and immediately left closing the door behind him. Id. at 16. Shortly, Mr. Duncalf entered the room pushed Mr. Ketchum off the bed and punched him numerous times. Id. at 16-17. Mr. Duncalf stopped, looked at Ms. Worthington and left. Id. at 18. Mr. Duncalf returned and said “I thought you were my girlfriend” and asked Ms. Worthington to help him wash Mr. Ketchum’s face Id.

Mr. Ketchum was unconscious, suffered several fractures to his jaw, had two broken ribs, and a small pneumothorax (pocket of air in the chest cavity). 6/18/08 53-55, 66. Mr. Ketchum underwent facial surgery which his surgeon described as “quite successful.” 6/23/08 RP 152. In addition to other charges not relevant to this appeal, the State charged Mr. Duncalf with both first-degree assault and in the alternative second-degree assault with the allegation that the injuries Mr. Ketchum suffered substantially exceeded those necessary to establish substantial bodily injury. CP 12-15.

A jury acquitted Mr. Duncalf of first degree assault, CP 396, and instead convicted him of second degree assault with a special verdict that the injuries inflicted exceeded those necessary to prove second degree assault. CP 397-98. Judge Canova imposed an exceptional sentence of 100 months. CP 649.

E. ARGUMENT

1. **The opinion of the Court of Appeals is contrary to this Court's opinion in Stubbs.**

“An element of the charged offense may not be used to justify an exceptional sentence.” State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001). The rationale for this rule is that some factors are

inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type.

Id. (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (alterations in original)). Thus, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” State v. Gore, 143 Wn.2d 288, 316, 21 P.3d 362 (2001) (reversed on other grounds, State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)).

The Legislature has defined the spectrum of injuries which may result from an assault. That spectrum lying between no harm and death is divided in three; “bodily harm,” “substantial bodily harm,” and “great bodily”. RCW 9A.04.110(4). The Legislature did not leave gaps within this hierarchy. In Stubbs, this Court concluded injures that lie within one

level of harm, even at the extreme edge, as a matter of law do not “substantially exceed” that level of harm but instead are merely “different in degrees, not kind.” 170 Wn.2d at 130. This Court framed the necessary question as

. . . whether the injures . . . are greater than those contemplated by the legislature in establishing the standard range. In other words, do they fall within the statutory definition of “great bodily harm” or outside it?

Id. Addressing a conviction of first degree assault Stubbs said:

One case of “great bodily harm,” then, is not qualitatively different than another case. Such a leap is best understood as the jump from “bodily harm” to “substantial bodily harm” or from “substantial bodily harm” to “great bodily harm.” That is what is meant by *substantially* exceeds.

Id.

Thus, so long as the injuries inflicted by Mr. Duncalf fit within the definition of “substantial bodily injury” they cannot as a matter of law substantially exceed that level of injury.

But rather than apply this straightforward analysis, the Court of Appeals instead recast the argument as one requiring it to “harmonize” the jury’s acquittal of first degree assault with its special verdict that the second degree assault. Thus the court opines the jury “could have” found Mr. Duncalf not guilty of the first degree assault and yet still have made

the necessary finding that the pain inflicted amounted to great bodily injury. Opinion at 11-12.

Even if one does not accept the acquittal as a finding that the State did not prove great bodily injury, there still remains no other finding by the jury of that fact. Because the jury was required to make that finding beyond a reasonable doubt, the Sixth Amendment does not permit the imposition of an exceptional sentence. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Because there is not a jury finding that Mr. Duncalf imposed great bodily harm, and in fact one that acquits him of the only crime that required that degree of harm, the exceptional sentence is erroneous as a matter of law. The analysis employed by the Court of Appeals amounts to an effort to skirt the straightforward conclusion of Stubbs.

Pursuant to RAP 13.4 this Court should accept review of this case.

2. Because they directly affect the maximum sentence which a court can impose, aggravating factors are subject to vagueness challenges.

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).

Before Blakely, this 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.’ State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003) (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 reasoned “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, this 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. I.e., 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. must be applied to statutory aggravating circumstances.

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 v. New Jersey, 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 v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). 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).

It is clear that aggravating factors are subject to vagueness challenges

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

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

Nonetheless, here the Court of Appeal blindly relied upon Baldwin to brush aside Mr. Duncalf's vagueness challenge. Opinion at 12-13, n.2. The court opined that because Mr. Duncalf does not have a right to be sentence below the maximum authorized by the jury's finding of the aggravating circumstance, no right has been violated." Id. The court's

statement reverses the question. Mr. Duncalf plainly does have a right, his Sixth Amendment right to a jury trial, to be sentenced below the maximum sentence but for the jury's finding of an aggravating fact. Because it is that jury finding which triggers the increase in punishment, that finding is subject to the vagueness doctrine. Baldwin must be reexamined.

Because Baldwin is not longer analytically sound, this Court should accept review of this case under RAP 13.4.

F. CONCLUSION

Based upon the arguments set forth above, and those in Mr. Duncalf's previous briefs, this Court must reverse Mr. Duncalf's sentence.

Respectfully submitted this 21st day of December, 2011.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	DIVISION ONE
)	
Respondent,)	No. 62237-4-I
)	
v.)	
)	
RICHARD TREVOR DUNCALF,)	PUBLISHED OPINION
)	
Appellant.)	FILED: November 21, 2011
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Dwyer, C.J. — We must harmonize a jury’s general verdict and special verdict where such harmonization is possible. Here, the jury’s special verdict—a finding of an aggravating circumstance that authorized the imposition of an exceptional sentence—can be harmonized with the jury’s general verdict convicting Richard Duncalf of a crime inferior in degree to the highest charged offense. Moreover, the absence of a jury instruction defining that aggravating circumstance is not a constitutional error that may be raised for the first time on appeal. Accordingly, we affirm.

|

Richard Duncalf inflicted serious injuries upon his roommate, Earl James Ketchum, while in a jealous rage triggered by Duncalf’s mistaken belief that he had caught Ketchum engaged in sexual intercourse with Duncalf’s girlfriend. At

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the time, Ketchum and Stacy Worthington were involved in an intimate dating relationship. On the day in question, Ketchum and Worthington were having sex in Ketchum's bedroom when Duncalf barged into the room. Rather than exit sheepishly, Duncalf violently attacked Ketchum. Eventually, Duncalf looked over at Worthington. Realizing his mistake, Duncalf stated, "I thought you were my girlfriend." Report of Proceedings (RP) (June 17, 2008) at 19.

Ketchum sustained severe injuries as a result of Duncalf's attack. Duncalf had repeatedly punched Ketchum in the face with closed fists, landing at least ten punches. Ketchum was knocked unconscious by the first few blows. The first police officer on the scene testified that he had "never seen a fist do damage like this" and likened the "severe trauma" inflicted upon Ketchum to the trauma caused in an automobile collision. RP (June 17, 2008) at 144, 141. Upon arriving at the scene, the officer observed blood splattered on the walls and pooling on the floor. He described Ketchum as having difficulty breathing, with his eyes swollen shut and a softball-sized knot on his face.

Ketchum suffered at least eight fractures; the exact number of fractures is uncertain because some of his orbital bones were shattered. This facial trauma required surgery whereby Ketchum's jaw was realigned, titanium plates were inserted, and his jaw was wired shut for over five weeks. In addition to severe facial injuries, Ketchum sustained a fractured rib that punctured his lung, creating a pneumothorax—a potentially life-threatening condition in which air

escapes from and then compresses the lung. He further sustained a fracture to the base of his skull, an injury that can lead to cranial bleeding. Over a year after the assault, Ketchum still suffered from nerve damage, which caused him to “dribble” and “drool” when he ate or slept. RP (June 17, 2008) at 92. This damage is likely permanent.

The State charged Duncalf with assault in the first degree, alleging that “with intent to inflict great bodily harm, [Duncalf] did assault another and inflict great bodily harm upon [Ketchum].” Clerk’s Papers (CP) at 12; see RCW 9A.36.011(1)(c). The State additionally charged Duncalf, in the alternative, with assault in the second degree, alleging that Duncalf had intentionally assaulted Ketchum, thereby recklessly inflicting “substantial bodily harm” upon him. CP at 13-14; see RCW 9A.36.021(1)(a). In connection with the charge of assault in the second degree, the State alleged an aggravating circumstance—that the “victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of [that] offense.” RCW 9.94A.535(3)(y).

The jury was instructed as to the statutory definitions of both “great bodily harm” and “substantial bodily harm.” See RCW 9A.04.110(4)(c), (4)(b). In addition, the jury was asked, by special verdict, whether Ketchum’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of assault in the second degree. Despite the fact that the trial court noted the absence of an instruction defining “substantially exceed,” neither Duncalf nor the

State proposed such an instruction. Duncalf neither objected to the trial court's instructions pertaining to the alleged aggravating circumstance nor himself proposed any related jury instruction. When asked whether he objected to the trial court's decision not to provide any of the defense's proposed instructions, Duncalf's counsel replied in the negative.

After commencing deliberations, the jury inquired regarding the meaning of "substantially exceeded." The trial court responded that "[t]here is no specific, legal definition of that term. Apply the commonly held meaning to the words." CP at 392-93.

The jury acquitted Duncalf on the charge of assault in the first degree. However, the jury convicted Duncalf of assault in the second degree and found, by special verdict, that the injuries sustained by Ketchum substantially exceed the level of bodily harm necessary to satisfy the elements of that crime. Based upon the jury's finding that the State had proved the charged aggravating circumstance, the trial court imposed a sentence beyond the standard sentence range.

It is from this exceptional sentence that Duncalf appeals.

II

Duncalf contends that the trial court erred as a matter of law by imposing the exceptional sentence. He first asserts that injuries which do not rise to the level of "great bodily harm" cannot be the basis for an exceptional sentence

where the crime of conviction is assault in the second degree. He then asserts that because, to convict a defendant of assault in the first degree, the jury must find that the victim sustained "great bodily harm," and because, here, the jury acquitted him of that crime, the jury necessarily found that Ketchum's injuries did not constitute "great bodily harm." However, this assumption is unfounded. The verdicts here can be harmonized. Thus, Duncalf's claim fails.

A trial court "may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Pursuant to the 2005 amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the severity of a victim's injuries can provide the basis for an exceptional sentence where "[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).

Our Supreme Court recently explained the meaning of the term "substantially exceed," as set forth in RCW 9.94A.535(3)(y). In State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010), the defendant was convicted of assault in the first degree and received an exceptional sentence based upon the severity of the victim's injuries. In order to convict Stubbs, the jury was required to find that he had inflicted "great bodily harm" upon the victim of the assault. Stubbs, 170 Wn.2d at 119. By special verdict, the jury also found that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the

elements of the crime. Stubbs, 170 Wn.2d at 122. Based upon this jury finding, the trial court imposed an exceptional sentence. Stubbs, 170 Wn.2d at 122.

Our Supreme Court reversed Stubbs's exceptional sentence, holding that, pursuant to the SRA's statutory sentencing scheme, "no injury can 'substantially exceed' the level of bodily harm necessary to satisfy the element of 'great bodily harm.'" Stubbs, 170 Wn.2d at 131. Rather, the court determined, one case of "great bodily harm" "is not qualitatively different than another case. Such a leap is best understood as the jump from 'bodily harm' to 'substantial bodily harm,' or from 'substantial bodily harm' to 'great bodily harm.' That is what is meant by '*substantially exceeds*.'" Stubbs, 170 Wn.2d at 130. Thus, because "great bodily harm" is the highest level of bodily harm defined by our legislature, a jury finding regarding the severity of the victim's injuries cannot support an exceptional sentence where "great bodily harm" is an element of the underlying offense. Stubbs, 170 Wn.2d at 130-31.

Here, the trial court imposed an exceptional sentence based upon the jury's factual finding that Ketchum's "injuries substantially exceed the level of bodily harm necessary to satisfy the elements of [assault in the second degree]." RCW 9.94A.535(3)(y). In order to convict Duncalf of assault in the second degree, the jury was required to find that Ketchum's injuries constitute "substantial bodily harm." See RCW 9A.36.021(1)(a). Thus, pursuant to the decision in Stubbs, the extent of Ketchum's injuries is a proper basis for an

exceptional sentence only if those injuries constitute “great bodily harm”—the level of bodily harm greater than that which is required to satisfy the elements of assault in the second degree. 170 Wn.2d at 130-31. However, the jury acquitted Duncalf on the charge of assault in the first degree, an element of which is that the defendant inflicts “great bodily harm” on another. See RCW 9A.36.011(1)(c). This verdict, Duncalf asserts, establishes that the jury found Ketchum’s injuries to be insufficient to constitute “great bodily harm.” This is not so.

Rather, the crimes of assault in the first degree and assault in the second degree differ not just in the severity of the bodily harm inflicted upon the victim, but also in the requisite mental state of the accused. “A person is guilty of assault in the first degree if he or she, *with intent to inflict great bodily harm* . . . [a]ssaults another and inflicts great bodily harm.” RCW 9A.36.011(1)(c) (emphasis added). Assault in the second degree, however, requires only that the assault itself, not the resulting bodily harm, be intentional: “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree[,] . . . [i]ntentionally assaults another and thereby *recklessly inflicts* substantial bodily harm.” RCW 9A.36.021(1)(a) (emphasis added).

Thus, the jury’s verdicts here—both the general verdicts convicting Duncalf of assault in the second degree and acquitting him of assault in the first

degree and the special verdict finding that Ketchum's injuries substantially exceed those necessary for a conviction of assault in the second degree—can be viewed as being consistent. The jury could find that Duncalf did not *intend to* inflict great bodily harm upon Ketchum, as necessary for a conviction of assault in the first degree, but that Duncalf *did inflict* such harm recklessly, thus supporting both the jury's guilty verdict and its special verdict. In other words, the jury's acquittal on the charge of assault in the first degree does not foreclose the jury's special verdict finding that Ketchum's injuries "substantially exceed" the level of bodily harm necessary to establish substantial bodily harm, as required for a conviction of assault in the second degree.

"Where the general verdict and the special finding can be harmonized by considering the entire record of the case, including the evidence and the instructions, it is the duty of the court to harmonize them." State v. Burke, 90 Wn. App. 378, 386, 952 P.2d 619 (1998) (quoting State v. Eker, 40 Wn. App. 134, 140, 697 P.2d 273 (1985)). The evidence presented at trial supports a jury finding that Duncalf inflicted the necessary bodily harm for a conviction of assault in the first degree but that he did not possess the requisite mens rea for such a conviction.¹ Thus, the general verdicts and the special verdict can be harmonized.

Moreover, the severe injuries sustained by Ketchum are sufficient to

¹ It is entirely possible that, in viewing the infliction of harm as having been the result of recklessness, the jury was influenced by Duncalf's mistaken perception that Ketchum was having sex with Duncalf's girlfriend, rather than with Worthington.

constitute “great bodily harm,” as required to support the exceptional sentence imposed by the trial court. In any event, Duncalf does not challenge the sufficiency of the evidence supporting the jury’s special verdict finding—rather, he contends that the jury’s acquittal on the charge of assault in the first degree necessarily precludes the special verdict finding altogether. To the contrary, it is the sole province of the jury to consider and weigh the evidence, and it is not the role of this court to second-guess the jury’s decisions or verdicts.

The jury’s verdicts authorized the sentence imposed. The trial court did not err in imposing sentence.

III

Notwithstanding the fact that the jury’s guilty verdict and special verdict authorized the exceptional sentence imposed, Duncalf suggests that the jury’s special verdict finding—the finding explicitly set forth in the SRA as an aggravating circumstance authorizing the imposition of an exceptional sentence—is insufficient to support the imposition of his sentence. Rather, he suggests, the trial court erred by imposing an exceptional sentence absent a jury finding that Ketchum suffered “great bodily injury.” Because neither the constitution nor a statute compels such a finding, and because, in any event, Duncalf cannot assert this purported instructional error for the first time on appeal, we disagree.

Although, generally, we do not review claims of error that were not

presented to the trial court, an exception exists where the claim of error constitutes a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Instructional errors are of constitutional magnitude only where the jury is not instructed on every element of the charged crime. State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). “As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” Stearns, 119 Wn.2d at 250.

Accordingly, our Supreme Court has recently held that an error of constitutional magnitude was not extant where the jury was not instructed as to the meaning of “deliberate cruelty” and “particular vulnerability,” the statutory aggravating circumstances that, there, authorized the imposition of the defendant’s exceptional sentence. State v. Gordon, No. 84240-0, 2011 WL 4089893, at *3-4 (Wash. Sept. 15, 2011). In Gordon, the jury was presented with the alleged statutory aggravators and found that they applied; however, the jury was not instructed further as to the meaning of the aggravating circumstances. 2011 WL 4089893, at *1-2. The Supreme Court determined that further instruction would be merely definitional and, thus, the purportedly erroneous instruction could not be challenged on that basis for the first time on appeal: “Further elaboration in the instructions would have been in the vein of definitional terms, and the omission of such definitions is not an error of

constitutional magnitude satisfying the RAP 2.5(a) standard.” Gordon, 2011 WL 4089893, at *4.

Similarly, here, our Supreme Court’s discussion in Stubbs of the meaning of “substantially exceed,” as employed in the statutory aggravator set forth in RCW 9.94A.535(3)(y), is simply an explanation of that aggravating circumstance. Here, the jury made the only finding necessary to authorize the sentence imposed—the finding specifically set forth by our legislature in RCW 9.94A.535(3)(y)—that Ketchum’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of assault in the second degree. Although Stubbs describes what is meant by “substantially exceed”—and, in so doing, concludes that only those injuries that constitute great bodily harm “substantially exceed” substantial bodily harm—it does not create “elements” of the statutory aggravator that must be found by the jury. 170 Wn.2d at 130-31; see Gordon, 2011 WL 4089893, at *2-4.

Indeed, the jury’s question to the court during deliberations—“[W]hat constitutes ‘substantially exceeded’ the level of bodily injury necessary to constitute substantial bodily harm?”—demonstrates that any instruction pertaining to the meaning of that term is simply a definitional instruction, not a statement of an “element” that must be found by the jury. CP at 392. In making that inquiry, the jury was requesting a *definition* of the term “substantially exceed.” Accordingly, the court responded that “[t]here is no specific, legal

definition of that term.” CP at 393. Moreover, the jury here was instructed as to the definitions of both “substantial bodily harm” and “great bodily harm.”

In order to authorize an exceptional sentence, the jury must find as a fact that the aggravating circumstance was proved. See Apprendi v. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (noting that an aggravating factor is “the functional equivalent of an element”). The jury is not required, however, to find the definition of a term within that aggravating circumstance. Gordon, 2011 WL 4089893, at *4. Here, the jury made the only finding necessary to authorize the imposition of the exceptional sentence.

The jury’s general verdicts and special verdict can be harmonized, and the jury’s special verdict finding authorizes the imposition of Duncalf’s exceptional sentence. Moreover, the absence of an instruction to the jury further defining the alleged aggravating circumstance does not compel the vacation of that exceptional sentence. Such a claim of error does not constitute a manifest constitutional error that may be raised for the first time on appeal, and Duncalf did not object to the instructions on this basis at trial.²

² Duncalf additionally contends that RCW 9.94A.535(3)(y) is unconstitutionally vague because it fails to provide a standard to govern the determination of whether a victim’s injuries “substantially exceed” those necessary to satisfy the elements of the charged offense. He further asserts that his right to due process was violated because there is no objective standard for what constitutes a “substantial and compelling” reason to impose an exceptional sentence and that his right to appeal was violated because the trial court did not articulate its reasons for the length of the sentence imposed. These claims are unmeritorious.

First, our Supreme Court has made clear that, because sentencing guidelines neither define conduct nor “allow for arbitrary arrest and criminal prosecution by the State,” “the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines.” State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). Duncalf has no liberty interest in being sentenced below the maximum term authorized by the jury’s special verdict finding. See Baldwin, 150 Wn.2d at 461 (holding that because “nothing in

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Affirmed.

Dupre, C. S.

We concur:

Grosse, J

these [sentencing] guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest"). Because Duncalf has no right to be sentenced below the maximum term authorized by the jury's finding of the aggravating circumstance, no right has been violated. Moreover, "the sentencing court need not state reasons in addition to those relied upon to justify the imposition of an exceptional sentence above the standard range in the first instance to justify the length of the sentence imposed." State v. Ritchie, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995) (quoting State v. Ross, 71 Wn. App. 556, 573, 861 P.2d 473, 883 P.2d 329 (1993)).

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Cox, J. (concurring) — I agree with the majority that Richard Duncalf cannot challenge for the first time in this appeal the trial court's decision not to instruct the jury on the definition of "substantially exceeds." The supreme court recently defined this term in State v. Stubbs.¹ I write separately to state my belief that such an instruction is required in future cases.

RCW 9.94A.535(3)(y) permits a judge to impose an exceptional aggravated sentence, provided a jury finds that the victim's injuries "substantially exceed" the level of bodily harm *necessary* to satisfy the *elements* of the offense.² Here, the level of bodily harm required for second degree assault is "substantial bodily harm."³ To "substantially exceed" that level of harm, this jury should have been required to find that the victim's injuries met the definition of "great bodily harm."

At this trial, the judge noted the absence of any proposed jury instruction to define "substantially exceed," and suggested that such an instruction would be necessary. Nevertheless, neither Duncalf nor the State proposed such an instruction. Moreover, Duncalf chose not to except to the court's instructions to the jury, which did not include such a definition.

During deliberations, the jury submitted the following question to the

¹ 170 Wn.2d 117, 129, 240 P.3d 143 (2010).

² State v. Stubbs, 170 Wn.2d 117, 129, 240 P.3d 143 (2010).

³ RCW 9A.36.021(1)(a).

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court:

[W]hat constitutes “substantially exceeded” the level of bodily injury necessary to constitute substantial bodily harm?^[4]

The court responded:

There is no specific, legal definition of that term. Apply the commonly held meaning to the words.^[5]

The jury acquitted Duncalf of first degree assault. But it convicted him of second degree assault. The jury also returned a special verdict that Ketchum’s injuries “substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree.”⁶ Based on this special verdict, the court imposed an exceptional sentence of 100 months of confinement.

During this appeal of Duncalf’s sentence, the supreme court decided Stubbs. The court stated that RCW 9.94A.535(3)(y), the post-Blakely amendment to the SRA that permits a court to impose an exceptional sentence, requires the jury to answer a different question than what was required under prior law.⁷ The specific question now is whether the “victim’s injuries substantially exceed the level of bodily harm **necessary** to satisfy the **elements** of the offense.”⁸

⁴ Clerk’s Papers at 392.

⁵ Clerk’s Papers at 393.

⁶ Clerk’s Papers at 398.

⁷ Stubbs, 170 Wn.2d at 128-29.

In Stubbs, the crime of conviction was first degree assault. The supreme court stated that no injury short of death could exceed the definition of “great bodily harm,” the level of harm necessary to prove first degree assault.⁹ The court stated that the question is “whether injuries that fall *within* that definition are, nevertheless, so much worse than what is *necessary* to satisfy that element that they can be said not only to exceed, but to *substantially* exceed, that minimum.”¹⁰

The State argued in that case that injuries that fall within the definition of “great bodily harm” may still be so much worse than what is necessary to satisfy the element that they can be said to “not only exceed, but substantially exceed injuries at the low end of the range” of great bodily harm.¹¹ The supreme court rejected this argument:

Though injuries at the far end of the spectrum of “great bodily harm” exceed the minimum, the legislature evidently views them as differing in degree, not kind. . . . While there are different degrees of “great bodily harm,” the legislature has classified injuries such as [the victim’s] that create a probability of death the same as injuries . . . [that result in] a significant permanent loss or impairment of the function of a bodily part or organ. *One case of “great bodily harm,” then, is not qualitatively different than another case. **Such a leap is best understood as the jump from “bodily harm” to “substantial bodily harm,” or from “substantial bodily harm” to “great bodily harm.” That is what is meant by “substantially exceeds.”***^{12]}

⁸ Id. at 129 (citing RCW 9.94A.535(3)(y)) (emphasis added).

⁹ Id.

¹⁰ Id.

¹¹ Id.

Here, the majority correctly concludes that in order to “substantially exceed” the bodily harm element of second degree assault—“substantial bodily harm”—the victim’s injuries must meet the definition of “great bodily harm.”¹³

The State argues, and the majority agrees, that “the severe injuries sustained by Ketchum are sufficient to constitute ‘great bodily harm,’” as RCW 9A.04.110(4)(c) requires. Perhaps they are. But we will never know because the jury in this case was never instructed to decide whether Mr. Ketchum’s injuries met the definition of “great bodily harm” for purposes of the aggravating circumstance. Rather, the court instructed the jury to determine whether the injuries “substantially exceeded” those of substantial bodily harm without further definition or clarification. Presumably, the jury followed the trial court’s instruction that “There is no specific, legal definition of that term. Apply the commonly held meaning to the words.” But, as Stubbs held after the trial in this case, this guidance is no longer legally correct.

In any event, Duncalf does not challenge the sufficiency of the evidence

¹² Id. at 130 (emphasis added).

¹³ The three levels of bodily harm, in ascending order, are: (a) “bodily harm,” defined as “physical pain or injury, illness, or an impairment of physical condition”; (b) “[s]ubstantial bodily harm,” defined as “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”; and (c) “[g]reat bodily harm,” 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) (emphasis added).

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to support a finding of “great bodily harm” Moreover, he does not challenge the sufficiency of the evidence to support the jury finding in this case: that the victim’s injuries “substantially exceeded” those necessary for substantial bodily harm. Thus, we are not required to examine whether the evidence in this case is sufficient to meet the proper standard.

The importance of a correct finding to support an aggravated sentence is more than a matter of semantics. In Blakely v. Washington,¹⁴ the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁵ Under our state statutes, a jury should have the proper definition of “substantially exceed” before it when it makes the determination that an aggravating circumstance exists.¹⁶

With these principles in mind, I conclude that affirming the sentence in this case is proper. Duncalf’s challenge comes too late for this court to provide any relief.

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

¹⁵ Id. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

¹⁶ State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997) (a term is technical when it has a meaning that differs from common usage (citing State v. Scott, 110 Wn.2d 682, 694, 757 P.2d 492 (1988) (Utter, J., dissenting))).

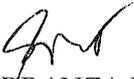
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Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 62237-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Dennis McCurdy, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 21, 2011

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