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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD TREVOR DUNCALF,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. SUMMARY OF CASE

The defendant assaulted EJK causing severe and permanent injury. He was convicted of assault in the second degree with the aggravating factor that EJK's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault. Based on this finding, the court imposed an exceptional sentence above the standard range. The imposition of the exceptional sentence is lawful under this Court's recent decision in State v. Stubbs.¹ Further, the exceptional sentence statute is not subject to a vagueness challenge under this Court's decision in State v. Baldwin.² Finally, neither the statute nor jury instructions are vague, and any claim that the jury instructions are vague has been waived.

B. ISSUES PRESENTED

1. May the court impose an exceptional sentence upon a conviction for second-degree assault where the jury finds beyond a reasonable doubt that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense"?

¹ 170 Wn.2d 117, 240 P.3d 143 (2010).

² 150 Wn.2d 448, 78 P.3d 1005 (2003).

2. May the defendant challenge RCW 9.94A.535(3)(y), the exceptional sentence statutory provision at issue, and the pertinent jury instructions, on vagueness grounds?

3. Is the exceptional sentence statute or the pertinent jury instructions void for vagueness?

C. STATEMENT OF THE CASE

A jury convicted the defendant of second-degree assault for intentionally assaulting EJK and "recklessly" inflicting "substantial bodily harm" upon him.³ CP 370, 397. For the same acts, the jury acquitted the defendant of first-degree assault, a crime that required the jury to find that he actually "intended to inflict" "great bodily harm" upon EJK.⁴ CP 363, 396. "Substantial bodily harm" was defined for the jury as "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." CP 373; RCW 9A.04.110(4)(b).

The jury also found the "aggravating circumstance" that EJK's "injuries substantially exceed the level of bodily harm

³ The jury acquitted the defendant of first-degree assault. CP 396.

⁴ The defendant was convicted of a number of other counts not relevant to this appeal.

necessary to satisfy the elements of the offense" of second-degree assault. CP 14, 98; RCW 9.94A.535(3)(y). Specifically, the special verdict form asked the jury to answer the following question:

Did the injuries [EJK] sustained during the commission of the crime of Assault in the Second Degree as charged in Count V substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree?

CP 398. The defendant did not object to the court's instructions pertaining to the aggravating circumstance or to the court's failure to give any defense-proposed instructions. See 13RP 59-76. The defendant did not propose any instruction further defining the aggravating circumstance. See CP 335-44, 346-47.

The injuries suffered by EJK were quite severe and were inflicted by the defendant after he flew into a jealous rage, mistakenly believing that his roommate was sleeping with his girlfriend.

On the evening of April 21, 2007, EJK and his girlfriend, SW, were having sexual intercourse in EJK's bedroom, in an apartment he shared with the defendant. 8RP 14. Without warning, the defendant burst into the room and saw EJK making love to SW. 8RP 14-16. Mistaking SW for his own girlfriend, the defendant pushed EJK off SW and repeatedly punched him in the face with

closed fists, raining at least ten hard blows on him. 8RP 16-17.

The defendant is six foot three, weighs 200 pounds, and is a fitness trainer who can bench press 280 pounds. 13RP 7-10. EJK is maybe five foot eight and weighs just 160 pounds. 8RP 18; 13RP 10.

The first few blows knocked EJK unconscious; the rest battered his face until he "looked like an orangutan." 8RP 17; 10RP 34. The defendant then looked over at SW and said, "I thought you were my girlfriend." 8RP 19. He then fled the scene, leaving EJK unconscious on the bed. 8RP 22-23, 32, 38.

The first officer on the scene testified that "I've never seen a fist do damage like this," likening the "severe trauma" to what occurs in a car accident. 8RP 144. He described blood splattered on the walls and pooling on the floor, and that EJK was having difficulty breathing, his eyes were swollen shut and there was a softball-sized knot on his face. 8RP 141, 144.

When paramedics arrived, EJK was unresponsive. 10RP 129. He was described as having "significant facial trauma" and was subconsciously agitated due to head trauma and trying to clear his airway. 10RP 129. He had to be strapped to a backboard, restrained, and intubated so that he could breathe

properly. 10RP 132-33. His injuries were considered life-threatening. 10RP 139.

EJK suffered at least eight fractures, and likely more as his orbital bones were shattered. 9RP 56-57; 11RP 168-69. He had a "potentially serious" fracture to the skull base, an injury that can lead to cranial bleeding. 11RP 148, 171. EJK had to undergo facial surgery whereby his jaw, broken in multiple places, was realigned, titanium plates were inserted, and his jaw was wired shut for over five weeks. 9RP 74; 11RP 148, 150.

At the time of trial, over a year after the assault, EJK still suffered from nerve damage and an inability to feel his lower jaw and lip. 8RP 92. The damage is likely permanent. 11RP 152-54. As a result, EJK tends to "dribble" and "drool" when he eats and sleeps.⁵ 8RP 92.

When EJK arrived at Harborview Trauma Center, he had blood coming out of his ear canal, was still nonresponsive, and his breathing had to be done manually through an intubation tube. 9RP 41, 43-44, 48. Along with the multitude of facial fractures, EJK

⁵ In court of appeals briefing, the defendant refers to the plastic surgeon as saying that the damage to EJK was moderate. The defendant omitted the fact that the surgeon testified that the term "moderate" is relative, that he treats people who have had their "faces knocked off," and that yes, EJK's injuries were "absolutely" serious. 11RP 170-71.

also had a fractured rib that had punctured the lung membrane, causing a pneumothorax--a potentially life-threatening condition wherein the air escapes from the lung, enters the chest cavity, and compresses the lung. 9RP 65-66, 68.

With a prior first-degree assault conviction, a prior second-degree assault conviction and a prior attempted robbery conviction, among others, the defendant had an offender score of eight and faced a standard range of 53 to 70 months of confinement.⁶ CP 647, 652. Based on the jury's finding of the aggravating factor, the court imposed a sentence of 100 months. 14RP 127; CP 646-54. The court stated that it agreed with the jury's finding, adding that the attack was "a very, very brutal, unprovoked assault,"..."you jumped on him and beat him to a pulp." 14RP 122, 126.

⁶ The court noted that but for one of his strike convictions having been adjudicated in juvenile court, the defendant would be facing a mandatory life sentence. 14RP 125.

D. ARGUMENT

1. **A COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE UPON CONVICTION FOR SECOND-DEGREE ASSAULT WHERE THE LEVEL OF BODILY HARM SUBSTANTIALLY EXCEEDS THE MINIMUM LEVEL OF HARM NECESSARY TO PROVE THE ELEMENTS OF THE CRIME.**

Under RCW 9.94A.535(3)(y), a court may impose an exceptional sentence upon a jury finding that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements" of the crime of second-degree assault. The imposition of an exceptional sentence under these circumstances is in accord with this Court's decision in State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010).

Prior to Blakely v. Washington,⁷ upon a conviction for second-degree assault, a trial court could impose an exceptional sentence above the standard range based on a judge finding that the level of harm to the victim was "significantly more serious than in the usual case." State v. Wilson, 96 Wn. App. 382, 388, 980 P.2d 244 (1999); rev. denied, 139 Wn.2d 1018 (2000), accord, State v. Randall, 111 Wn. App. 578, 45 P.3d 1137 (2002). In 2005, the legislature amended the Sentencing Reform Act (SRA) to

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

comply with Blakely's requirement that a jury, not a judge, must find the facts used to support an exceptional sentence. The statutory amendments were designed to codify the existing common-law aggravating factors. Laws of 2005, ch. 68, §1.

As enacted, RCW 9.94A.535(3)(y) specifically authorizes the imposition of an exceptional sentence upon a jury's finding that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." The obvious purpose of this aggravating circumstance is to permit greater punishment when a defendant causes injuries to his victim that substantially exceed the level of injury required to prove the crime.

Here, the jury found that the defendant intentionally assaulted EJK and recklessly inflicted substantial bodily harm upon him. CP 397; RCW 9A.36.021(1)(a). "Substantial bodily harm" means "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Under the statute, the jury was not required to find that the defendant intended a specific level of injury, only that he intended an assault.

Separately, the jury found that EJK's injuries substantially exceeded the level of bodily harm necessary to satisfy the harm element of second-degree assault--"substantial bodily harm." CP 397-98. This provided the trial court with a legal basis to impose an exceptional sentence.⁸

In some situations, the seriousness of a victim's injuries may not be used to justify an exceptional sentence if that factor has been considered in defining the crime itself. See Wilson, 96 Wn. App. at 387. However, this Court recently affirmed that under RCW 9.94A.535(3)(y), a court can impose an exceptional sentence where the trier of fact has measured the victim's actual injuries against the minimum injury that would satisfy the definition of, in this case, "substantial bodily harm," to see if the injuries "substantially exceed" that benchmark. Stubbs, 170 Wn.2d at 128-29.

Stubbs was convicted of first-degree assault for stabbing Ryan Goodwin in the back of the neck, severing his spinal cord. As

⁸ The defendant has not challenged the sufficiency of the evidence that EJK's injuries substantially exceeded the level necessary to prove second-degree assault. Under such a challenge, a reviewing court would view 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 circumstance beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). As briefly summarized above, EJK's injuries were substantial and severe.

charged, the jury was required to find that Stubbs possessed the "intent to inflict great bodily harm," that he intentionally assaulted Goodwin, and that he actually caused "great bodily harm." See RCW 9A.36.011(1)(c). In convicting Stubbs, the jury also found that Goodwin's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of first-degree assault.

Stubbs argued that the court did not have the authority to impose an exceptional sentence. This Court first answered the legal question of whether exceptional sentences are legally permissible for assault convictions where the bodily harm to the victim substantially exceeds the level of bodily harm necessary to satisfy the elements of the charged offense. The answer to that question is yes. Stubbs, at 127-28. This Court then looked specifically at first-degree assault.

"Great bodily harm," this Court noted, is defined as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See RCW 9A.04.110(c). In analyzing whether an exceptional sentence was possible for first-degree assault, this Court stated that "[t]he question, then, 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." Stubbs, at 129 (emphasis in original).

For first-degree assault and "great bodily harm," this Court held that the legislature created but a single minimum "kind" of harm and therefore an exceptional sentence is not possible upon conviction for first-degree assault. Stubbs, at 129-30. In other words, the minimum level of harm includes harm resulting in the probability of death and there can be no greater harm except death itself under the statute.⁹ This is not true for second-degree assault and the minimum level of injury required to satisfy the definition of "substantial bodily harm."

A person commits second-degree assault if he "intentionally assaults another" and "recklessly inflicts substantial bodily harm" on that person. RCW 9A.36.021. "Substantial bodily harm" "means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that

⁹ In this Court's words, one "cannot imagine an injury that exceeds great bodily harm but leaves the victim alive." Stubbs, at 128.

causes a fracture of any bodily part." RCW 9A.04.110(4)(b). This is the *minimum level* of injury necessary to satisfy the harm element of second-degree assault.¹⁰

Unlike "great bodily harm," where there can be no injury greater than the minimum level to prove the crime--other than death itself, there is injury that is substantially greater than the minimal level of injury necessary to prove second-degree assault. Thus, under Stubbs, a level of bodily harm greater than this minimum level can be used to impose an exceptional sentence if the level of harm is found by a jury to substantially exceed this minimal level--a finding that was made here and has not been factually challenged.

Here, EJK's injuries were severe enough that they would fall under the category of "great bodily harm." However, they do not need to reach that level for an exceptional sentence to be imposed because, unlike the situation with "great bodily harm," there is a level of harm substantially greater than the minimal level needed to satisfy the definition of "substantial bodily harm," but not reaching the level of "great bodily harm", i.e., injury that could result in the probability of death or significant serious permanent disfigurement,

¹⁰ The injury necessary to prove second-degree assault can be as minor as a single broken finger or a broken nose. See State v. Mahoney, 40 Wn. App. 514, 515, 699 P.2d 254 (1985).

or significant permanent loss or impairment of the function of any bodily part or organ. While this Court did use as an example the different levels of harm under the assault statute to demonstrate what could constitute "substantially exceeds" (see Stubbs, at 130), unlike the definition of "great bodily harm," the level of harm that can fulfill the definition of "substantial bodily harm" is not subsumed in the minimal level of harm required to prove the existence of the crime.¹¹

The defendant has argued that because he was acquitted of first-degree assault he cannot receive an exceptional sentence. Such an argument ignores two things: (1) the jury's specific finding that the level of harm substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault, and (2) the different *mens rea* element of the statutes.

While both first-degree and second-degree assault require an intentional assault, only first-degree assault requires an actual intent to cause a specific level of harm. The harm caused as a

¹¹ There are four levels of assault. The two not discussed above are as follows: Fourth-degree assault requires an intentional assault but no harm need be inflicted. RCW 9A.36.041. Third-degree assault occurs when with criminal negligence a person causes "bodily harm" by means of a weapon or other instrument or thing likely to produce bodily harm. RCW 9A.36.031(f). "Bodily harm" means "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a).

result of an act of assault under the second-degree assault statute need only be recklessly inflicted. See Randall, 111 Wn. App. at 583-84 (evidence of the level of injury rising to the level of first-degree assault can be used to impose an exceptional sentence for second-degree assault because the defendant did not possess the same intent to cause the level of harm and thus evidence of second-degree assault was not proof the defendant committed the greater crime of first-degree assault). In other words, a defendant can inflict severe injury amounting to great bodily harm but still be convicted of only second-degree assault if the defendant did not possess the actual intent to cause that level of injury.

The jury found that EJK's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault. CP 397-98. These injuries included potentially life-threatening injuries, "significant facial trauma," at least eight facial fractures, a significant skull injury, and likely permanent nerve damage that has left EJK with an inability to feel and control his lower lip and jaw. 8RP 92; 9RP 74; 10RP 129, 132-33, 139; 11RP 148, 150-54, 171.

In short, while the defendant's intent may have risen only to the level of second-degree assault, the level of bodily harm he

inflicted substantially exceeded the level minimally necessary to prove "substantial bodily harm." In this case, the injuries inflicted by the defendant were so severe as to fall within the definition of "great bodily harm." Under Stubbs, the exceptional sentence is legally justified. This is consistent with case law prior to the SRA statutory amendments that were intended to codify the existing common law. See, e.g., Wilson, supra; Randoll, supra.

2. THIS COURT SHOULD REJECT THE DEFENDANT'S VAGUENESS CHALLENGE.

The defendant argues that the aggravating circumstance in RCW 9.94A.535(3)(y) is unconstitutionally vague under the Due Process Clause and as applied to him via the jury instructions patterned on the statute. However, this Court has previously held that aggravating circumstances are not subject to a due process vagueness challenge because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. The defendant fails to show how this Court's analysis is now wrong simply because a jury, rather than a judge, makes the factual findings concerning the aggravating circumstance before the sentencing judge decides whether the aggravating circumstance is

a substantial and compelling reason to impose an exceptional sentence.

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

Finally, even if the defendant could make a due process vagueness challenge to the statute and instructions, his claims should be rejected. The terms used in defining the aggravating circumstance are ones of common understanding. Under the particular facts of this case, the defendant was on notice that his criminal conduct was aggravated when he severely battered a defenseless and unconscious EJK, causing multiple facial fractures, potentially life-threatening injuries, and possible permanent injury.

a. 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, 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. This 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.

The defendant argues that, in light of Blakely, supra, this Court's decision in Baldwin is incorrect. However, he fails to explain why the fact that a jury, rather than a judge, decides whether the facts exist to support an exceptional sentence,

compels the result that Baldwin is wrong and must be overruled. The change in the finder of fact is the only pertinent change that resulted from Blakely.¹²

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. As this Court recently stated, "an aggravating factor is not the functional equivalent of an essential element." State v. Siers, ___ Wn.2d ___, 274 P.3d 358, 359 (2012). Instead, the statute lists accompanying circumstances that may justify a trial court's imposition of a higher sentence. But a jury's finding of an aggravating circumstance does not mandate an exceptional sentence. The trial court still has discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence.¹³ RCW 9.94A.535.

Additionally, while the defendant asserts that an aggravating circumstance changes the maximum penalty that can be imposed (a sentence above the standard range), this was true at the time

¹² Blakely did also change the burden of proof from "by a preponderance," to "beyond a reasonable doubt."

¹³ For example, in Siers, the jury found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. 274 P.3d at 359.

this Court decided Baldwin. One thing and one thing only is different post-Blakely and the resulting statutory amendments to the Sentencing Reform Act (SRA): the jury now must decide beyond a reasonable doubt the facts supporting an exceptional sentence--a function that once belonged to the sentencing judge.

The Court in Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." Blakely, 542 U.S. at 301. Thus, post-Blakely, the sentencing court could not find facts, not otherwise admitted, in imposing an exceptional sentence. As a result, the legislature amended the statutory sentence provisions of the SRA to provide for the jury to find the facts beyond a reasonable doubt that *could* support imposition of an exceptional sentence. The trial court could then impose an exceptional sentence "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Thus, the only consequence of Blakely and the resulting statutory amendments was to shift the fact finding function of an exceptional sentence proceeding from the sentencing judge to the jury.

The doctrine of *stare decisis* provides that this Court must adhere to its prior ruling unless the defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (this 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."). Because the defendant fails to show that this Court's decision in Baldwin is incorrect and harmful, this Court must adhere to the holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.

b. The Defendant Has Waived Any Vagueness Challenge To The Jury Instructions.

The defendant claims that the aggravating circumstance jury instructions are unconstitutionally vague. However, he never proposed any additional or clarifying instructions, even when the issue was raised by the trial court.¹⁴ This Court has repeatedly held

¹⁴ The trial court suggested that the parties might consider submitting further defining instructions but counsel declined to do so. See 11RP 100-01; CP 335-44, 346-47. When responding to a jury question, the court instructed the jury that it should apply the commonly held meaning of the words "substantially exceeds." CP 392-93. Of note, the Washington State Supreme Court Instruction Committee has stated that it believes "no further explanation of this aggravating circumstance [RCW 9.94A.535(3)(y)] is required." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.34 at 748 (3rd ed. 2008).

that a defendant who believes a jury instruction is unconstitutionally vague has a ready remedy--proposal of a clarifying instruction--and that the failure to propose further definition precludes appellate review.

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. The 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) (defendant who did not take exception to jury instructions waived claim that they were vague and confusing).

The reasons for this waiver rule have been explained as follows:

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), rev. denied, 159 Wn.2d 1017, cert denied, 128 S.Ct. 375 (2007) (emphasis added).

This Court should decline to address the defendant's argument regarding the jury instructions. 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 the defendant 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 Is Not Unconstitutionally Vague.

Even if the aggravating circumstance is subject to a vagueness challenge, the 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 the defendant'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." Douglass, 115 Wn.2d at 182-83. Here, the aggravating circumstance is not unconstitutionally vague when considered in the context of the defendant's actions.

The aggravating circumstance at issue required that the jury find that EJK's injuries substantially exceeded the level of bodily harm necessary to meet the minimal level of harm sufficient to prove the element of substantial bodily harm. EJK suffered multiple facial fractures, a potentially life-threatening injury, and possible permanent injury to his face. 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(y), when a mere broken finger is sufficient to prove the crime of second-degree assault.

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

Some measure of vagueness is inherent in the use of language. Because of this, we do not require impossible standards of specificity or absolute agreement. Vagueness 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 if persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.

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

The term "substantial" is used in a variety of criminal statutes where 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), rev. denied, 159 Wn.2d 1017 (2007); State v. Billups, 62 Wn. App. 122, 129, 813 P.2d 149 (1991) (term "substantial step" is not unconstitutionally vague). The statute's use of the term "substantially exceeds" does not render it unconstitutionally vague.

E. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 31 day of May, 2012.

Respectfully submitted,

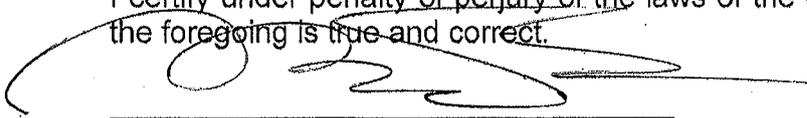
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: D. J. McCurdy
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. DUNCALF, Cause No. 86853-1, 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.



Name
Done in Seattle, Washington

08/08/12

Date

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Cc: McCurdy, Dennis
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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]
Sent: Wednesday, June 06, 2012 11:34 AM
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Subject: Richard Trevor Duncalf/Case # 86853 1

Dear Supreme Court Clerk:

Attached for filings in the above-subject case, please find the Motion to File Overlength Brief and Supplemental Brief of Respondent.

Please let me know if you have difficulties with these electronic filings. Thank you.

Sincerely yours,

Bora Ly
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For

Dennis McCurdy
Senior Deputy Prosecuting Attorney
Attorney for Respondent