

67936-8

67936-8

No. 67936-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KEITH RICHARD CRAIG,

Appellant.

---

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

The Honorable Douglass A. North

---

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury's verdict that Mr. Craig was guilty of second degree malicious mischief.

2. Court's Instruction 29 on the aggravating factors misstated the law on jury unanimity as it applied to the special verdict.

3. The trial court erred in imposing an exceptional sentence.

4. RCW 9.94A.535(3)(t), as applied to Mr. Craig, is unconstitutionally vague and violates the Fourteenth Amendment Due Process Clause.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense beyond a reasonable doubt. Evidence of damage exceeding \$750 is an essential element of second degree malicious mischief. The victim of the burglary here testified to the improvements she made to the door used as entry, but failed to provide proof that the actual damage to the door exceeded \$750. Is Mr. Craig entitled to reversal of his conviction with instructions to dismiss?

2. A jury instruction that requires the jury be unanimous to find the State had not proven the special verdict beyond a reasonable doubt is erroneous and the enhancement must be stricken. Here, the trial court instructed the jury using such an improper instruction. Must this Court order the exceptional sentence reversed and Mr. Craig resentenced to a standard range sentence?

3. 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)(t), setting forth the aggravating element of commission of an offense shortly after release from confinement does not provide any standard to govern the determination of what constitutes "shortly." By leaving it to the jury in Mr. Craig's case to define this element, was Mr. Craig deprived of due process?

#### C. STATEMENT OF THE CASE

Nancy Cifuentes left her house in the Fremont neighborhood of Seattle on April 7, 2011, at approximately 5:30 a.m.

9/7/2011pmRP 4. When she returned at approximately 2:00 p.m., she found her bedroom and her roommate's bedroom ransacked with several items missing. 9/7/2011pmRP 4-5. She went into her

kitchen where she discovered the screen door open and the rear door open as well with a large hole cut into it. *Id.* at 5. Lying near the doors was an old knife Ms. Cifuentes used to garden. *Id.* She immediately called the police. *Id.*

The investigating police officer surmised the hole in the door was created by the knife. 9/7/2011pmRP 22. The officers searched the knife for fingerprints and were able to secure two fingerprints from the knife. 9/8/2011RP 64. The Seattle Police Department latent print examiner matched these two fingerprints to appellant Keith Craig. 9/8/2011RP 23-37.

Mr. Craig was charged with residential burglary, second degree theft, and second degree malicious mischief. CP 9-11. The State also alleged two aggravating factors: recent recidivism and “free crimes.” CP 9-12.<sup>1</sup> Following a jury trial, Mr. Craig was convicted as charged. 9/9/2011RP 9. After a separate jury trial on the recent recidivism aggravating factor, the jury answered “yes” to the special verdict. *Id.* at 36.

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<sup>1</sup> Mr. Craig was also charged with an additional count of residential burglary for an unrelated burglary. CP 1. This count of the amended information was severed by the trial court and set for trial after the Cifuentes’ burglary. 9/6/2011RP 21. Following a jury trial on this count, the jury was unable to reach a verdict and a mistrial was declared. 9/14/2011RP 71-72.

The trial court imposed an exceptional sentence consisting of the statutory maximum of 120 months on the residential burglary and the high end of the standard range on the other two counts to run consecutive to each other. 1014/2011RP 19.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE  
PRODUCED THAT MR. CRAIG CAUSED IN  
EXCESS OF \$750 IN DAMAGE

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can

be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove the damage to the door exceeded \$750. A person commits second degree malicious mischief if he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding \$750. RCW 9A.48.080(1)(a). For purpose of malicious mischief, the term “physical damage,” in addition to its ordinary meaning, includes “any diminution in the value of any property as the consequence of an act.” RCW 9A.48.100(1). The statutory definition of “physical damages” includes its “ordinary meaning.” RCW 9A.48.100(1). “The ordinary meaning of damages includes the reasonable cost of repairs to restore injured property to its former condition.” *State v. Gilbert*, 79 Wn.App. 383, 385, 902 P.2d 182 (1995), *citing State v. Ratliff*, 46 Wn.App. 325, 328-29, 730 P.2d 716 (1986), *review denied*, 108 Wn.2d 1002 (1987).

Ms. Cifuentes testified she did not merely replace the damaged doors but upgraded the doors: “We got new bolts which would lock from the inside and all the locking hardware.” 9/7/2011pmRP 10. According to the investigating police officer, the door itself was already damaged before the burglary:

[T]he back door was a hollow core door. It wasn't a solid core thick door you typically would find on the exterior of a residence. As I recall, my recollection is it was a very thin wood door in poor repair.

9/7/2011pmRP 33.

Regarding the screen door, despite merely having a rip in the screen, Ms. Cifuentes "decided to replace it with something which was more secure and *better looking*." *Id.* at 16 (emphasis added). In addition, the screen door had already been damaged before the break-in: "There is damage to the screens because of the cats." *Id.* at 17.

Ms. Cifuentes certainly provided ample proof of the upgrades she made to the screen door and entry door, but failed to provide any proof of the actual damages that were inflicted on the doors. "[D]amages include[] the reasonable cost of repairs to restore injured property to its former condition." *Gilbert*, 79 Wn.App. at 385. Nothing was provided in the way of proof of what the costs would have been to restore the doors to their original condition as required by RCW 9A.48.080. This would have required taking into account the screen door with the rip in it caused by Ms. Cifuentes' cats, and would have taken into account the hollow core door in poor repair. The failure to provide any proof of

the damages rendered the essential element of damage exceeding \$750 unproven. As a result, Mr. Craig is entitled to reversal of his conviction for a failure of the State to carry its burden of proving the essential element beyond a reasonable doubt.

c. Mr. Craig is entitled to reversal of his second degree malicious mischief conviction with instructions to dismiss.

Since there was insufficient evidence to support the second degree malicious mischief, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT'S INSTRUCTION 29 ON THE AGGRAVATING FACTORS MISSTATED THE LAW ON JURY UNANIMITY REQUIRING REVERSAL OF THE EXCEPTIONAL SENTENCE

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury must be unanimous to find the State has proven the special finding beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

The Supreme Court has held that jury unanimity is not required to answer "no" to a special verdict question. *Goldberg*, 149 Wn.2d at 894. In *Goldberg*, upon discovering that jurors were not unanimous in answering "no" to a special verdict question, the trial court ordered the jurors to resume deliberations until they

reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw*, the trial court instructed the jury in precisely the same manner regarding the special verdict: “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

*Bashaw*, 169 Wn.2d at 147 (emphasis added). Further, the Court ruled such an error can essentially never be harmless even where as in *Bashaw*, the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

*Id.* at 147-48 (emphasis added).

Subsequently, in *State v. Ryan*, this Court, closely following the decision in *Bashaw*, determined that the *Bashaw* decision was grounded in due process, was of constitutional dimension allowing the defendant to raise the issue for the first time on appeal, and ruled the error could never be harmless. 160 Wn.App. 944, 948-49, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011). As a result, this Court reversed the exceptional sentence.

Here, the same infirm instruction as that used in *Ryan* was used. Instruction 29 required the jurors to be unanimous if the answered “yes” or “no” to the special verdict. CP 57. As in *Ryan* and *Bashaw*, this instruction was erroneous, and was an error which could never be harmless. As a result, this Court must reverse Mr. Craig’s exceptional sentence and remand to the trial court for imposition of a standard range sentence.

3. RCW 9.94A.535(3)(t) PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE DEFENDANT COMMITTED THE CURRENT OFFENSE SHORTLY AFTER RELEASE FROM CONFINEMENT" VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS

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).

a. The vagueness doctrine applies to statutes that establish aggravating factors. Before *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Supreme Court held 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, 458, 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 concluded the vagueness doctrine did not apply to statutory aggravating factors, reasoning, “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. *Blakely* plainly held that aggravating factors which warrant an exceptional sentence under the SRA alter 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 application of the vagueness doctrine, the doctrine must apply here as the aggravator increases the maximum penalty for the offense.

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); *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

Whether it is because it is an element of a new offense or merely because the aggravating factor in this case increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply. *See Baldwin*, 150 Wn.2d at 459; *see also, State v. Schmidt*, 208 P.3d 214 (Ariz. 2009) (concluding aggravating factor unconstitutionally vague).

b. RCW 9.94A.535(3)(t) as applied in this case regarding the commission of a new offense “shortly” after release from incarceration is vague. Mr. Craig was released from confinement on for a community custody violation from a sentence for residential burglary on March 24, 2011. A jury found he

committed a new residential burglary on April 7, 2011. CP 63. RCW 9.94A.535(3)(t) permits a court to impose an exceptional sentence if the jury determines “[t]he defendant committed the current offense shortly after being released from incarceration.” The trial court by special verdict charged the jury with answering that question here. CP 66-68. The jury answered “yes.” *Id.*

Various cases have found the State proved or did not prove the existence of this aggravating element. *See e.g., State v. Combs*, 156 Wn.App. 502, 232 P.3d 1179 (2010) (finding State did not prove element where defendant committed attempting to elude police officer six months after release from conviction on drug possession); *State v. Williams*, 159 Wn.App. 298, 244 P.3d 1018 (2011) (concluding state proved aggravator where defendant committed new third degree assault on same day he completed sentence and was release for prior conviction of third assault); *State v. Saltz*, 137 Wn.App. 576, 154 P.3d 282 (2007) (affirming proof where defendant reoffended within one month of release and where he stipulated to both the facts and that his reoffense occurred “shortly after being released from incarceration”); *State v. Butler*, 75 Wn.App. 47, 876 P.2d 481 (1994) (affirming proof of aggravator where defendant committed a robbery and attempted

rape within 12 hours of release from incarceration on another robbery conviction). But no case has ever defined what the term “shortly” means.

Indeed, in *Combs*, while the court found six months was not a short period of time, the court nonetheless declined to define the applicable time frame of the aggravating element, specifically concluding that in other circumstances six months might be a short period of time. 156 Wn.App. at 506-07. Rather than define the limits, the court compared the definition of the element to the definition of pornography provided by Justice Potter Stewart, “I know it when I see it.” *Combs*, 156 Wn.App. at 507, n.5 (citing *Ohio v. Jacobellis*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964)).

While a particular appellate judge, or even panel of judges may know what the element means when they see it, that does not save the statute. What matters is that in light of the recognition that the same factor means different things in different circumstances, how do juries objectively apply that factor? As *Combs* recognized, this element is entirely subjective, and courts have refused to provide any limiting definition that permits objective application by a jury.

After California's determinate sentencing scheme was struck down in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2006), the California Supreme Court addressed the problems with submitting factors typically decided by judges to juries:

[T]o the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to "provid[e] criteria for the consideration of the trial judge." ... It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are "framed more broadly than" criminal statutes and necessarily "partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses." ... Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether "[t]he victim was " particularly vulnerable," whether the crime "involved ... a taking or damage of great monetary value," or whether the "quantity of contraband" involved was " large."

*People v. Sandoval*, 41 Cal. 4<sup>th</sup> 825, 161 P.3d 1146, 1155-56 (2007) (emphasis in original).

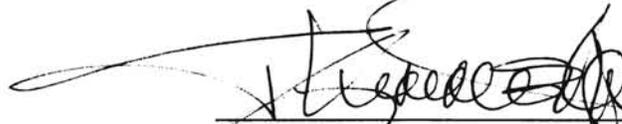
Importantly, Mr. Craig does not contend that the statute is vague because a different jury might reach a different result. Instead, he contends the doctrine is violated because there is no assurance that a subsequent jury would apply the same definition of "substantially exceeds." Because RCW 9.94A.535(3)(t) does not guard against this arbitrary and inherently subjective application, and in fact requires it, it is void for vagueness. Mr. Craig's sentence, which is predicated on this unconstitutionally vague aggravator, must be reversed for imposition of a standard range sentence.

E. CONCLUSION

For the reasons stated, Mr. Craig requests this Court reverse his malicious mischief conviction with instructions to dismiss and/or reverse his sentence and remand for entry of a standard range sentence.

DATED this 3rd day of May 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67936-8-I
v.	)	
	)	
KEITH CRAIG,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3<sup>RD</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
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[X] KEITH CRAIG	(X)	U.S. MAIL
844994	( )	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	( )	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520		

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 COURT OF APPEALS DIV 1  
 STATE OF WASHINGTON  
 2012 MAY -31 PM 4:54

**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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