

67936-8

67936-8

NO. 67936-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KEITH CRAIG,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

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**BRIEF OF RESPONDENT**

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2012 JUN 25 PM 3:02  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

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A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove Malicious Mischief in the Second Degree, the State must show that the defendant caused over \$750 damage to another's property. The owner of the home burglarized by Craig testified that it cost \$1100 to repair damaged doors, and a picture documenting the damage was admitted into evidence. Was there sufficient evidence to demonstrate that Craig caused over \$750 damage?

2. It is proper to instruct jurors that they must be unanimous to answer "no" to a special verdict question on a statutory aggravating factor. At trial, jurors were instructed that they needed to be unanimous to answer either yes or no to the question whether the defendant had committed the current crime shortly after release from incarceration. Was the jury properly instructed as to the aggravator for rapid recidivism?

3. In order to prevail on a vagueness challenge, a defendant must show that the circumstance is unconstitutionally vague as applied to him. Craig committed the current Residential

Burglary fifteen days after being released from custody for a prior Residential Burglary. Has Craig failed to show that the rapid recidivism aggravator is vague as applied to him?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Keith Craig, was charged by amended information with two counts of Residential Burglary (counts one and two), one count of Theft in the Second Degree (count three) and one count of Malicious Mischief in the Second Degree (count four). CP 9-11. The State also alleged that Craig committed the current crime shortly after release from incarceration (RCW 9.94A.535(3)(t)- referred to as "rapid recidivism" aggravator) and that Craig's high offender score resulted in some of the current offenses going unpunished (RCW 9.94A.535(2)(c)- referred to as "free crimes" aggravator). Id. Prior to the start of trial, count two was severed. 1RP 21.<sup>1</sup> That count, which involved a separate

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<sup>1</sup> The Verbatim Report of Proceedings consists of eight volumes, referred to as follows: 1RP (9/6/2011), 2RP (9/7/2011- morning), 3RP (9/7/2011- afternoon), 4RP (9/8/2011), 5RP (9/9/2011), 6RP (9/13/2011), 7RP (9/14/2011), 8RP (10/14/2011).

incident from the one discussed here, resulted in a mistrial.

7RP 71-72.

Following a jury trial on counts one, three and four, Craig was convicted as charged. CP 63-65. The court then held a bifurcated trial on the aggravating factor of rapid recidivism and the jury found the aggravator present on all three counts. CP 66-68.

At sentencing, the court imposed an exceptional sentence on the Residential Burglary charge and imposed high-end consecutive sentences on the other two counts. CP 289-96. The court found the free crimes aggravator was present. 8RP 19.<sup>2</sup> Orally and in its written findings of facts and conclusions of law, the court indicated that it was imposing an exceptional sentence based on both the rapid recidivism and free crimes aggravators. Id. CP 285-87. The trial court specifically declared that “any one of the aggravating factors, standing alone, is a sufficient basis, in and of itself, for the imposition of this sentence.” CP 287.

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<sup>2</sup> The sentencing transcript (8RP) incorrectly and repeatedly refers to “three crimes,” but references RCW 9.94A.535(2)(c) and should read “free crimes.”

## 2. SUBSTANTIVE FACTS

Nancy Cifuentes left her Seattle residence at approximately 5:30 a.m. on April 7, 2011. 3RP 4-5. When she returned home at about 2 p.m. she found her home had been burglarized and the bedrooms ransacked. Id. Several items were missing from the home and her father's ashes, which had been in an urn, had been dumped all over the floor. 3RP 11-12. Cifuentes found that the back door and screen door (located on the same entrance to the home) were open and damaged. 3RP 5-6, 9-10. Lying near the doorway in the kitchen was an old kitchen knife that Cifuentes used as a gardening tool. 3RP 5. Cifuentes normally kept the knife inside her enclosed garage but had left the knife out in the garden the previous day. 3RP 9-10. Cifuentes called police immediately. 3RP 5.

When police officers arrived they observed the damaged back door and determined it had likely been the burglar's point of entry. 3RP 22. Seeing the knife nearby, officers believed that the knife had been used by the burglar to gain entry. Id. One of the officers was able to lift prints from the knife and attempted to lift prints from the urn. 4RP 64-65. Two latent prints of comparison value were lifted from the knife. 4RP 27. A Seattle Police

Department latent print examiner examined the latent prints and found that one matched Craig's right ring finger and the other matched his right little finger. 4RP 28.

Prior to this incident, Craig had been incarcerated on a community custody violation stemming from previous convictions for Residential Burglary. 5RP 11-12; 8RP 7-8. Craig was released from custody for that violation on March 24, 2011. 5RP 23.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS CRAIG'S MALICIOUS MISCHIEF CONVICTION.

Craig argues that the State failed to prove beyond a reasonable doubt that the damage to the back and screen doors exceeded \$750. Viewing the evidence in the light most favorable to the State, Craig's argument fails. The State produced sufficient evidence that Craig caused over \$750 damage to the doors, based on the testimony of Cifuentes regarding the cost of repairs and the admission of a picture documenting the damage.

A person is guilty of Malicious Mischief in the Second Degree if he knowingly and maliciously causes physical damage to another's property in an amount exceeding \$750. RCW

9A.48.080(1)(a). At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Even where there is conflicting testimony as to the amount of damage, for the purpose of determining the degree of malicious mischief, an appellate court must find the evidence sufficient to support a conviction if the prosecution presented witness testimony as to the amount of damage. State v. Coria, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial

evidence in the record to support the conviction. Fiser, 99 Wn. App. at 718.

Craig challenges the sufficiency of the State's evidence solely as to the dollar amount of the damage caused. Craig's sufficiency challenge essentially boils down to an attack on the testimony of the victim, Nancy Cifuentes. In order to do so, however, Craig misstates Cifuentes's testimony and argues that the stated cost of replacing the screen door and back door was insufficient because Cifuentes upgraded her doors rather than just replacing them. App. Br. at 5, 6. The record does not support this claim. Rather, to reach this conclusion requires one to draw significant inferences against the State, contrary to the standard applied in a sufficiency challenge. Salinas, *supra*.

The most blatantly incorrect claim is Craig's assertion that Cifuentes upgraded her screen door to something that was "more secure and *better looking*." App. Br. at 6 (italics in original). Craig both misquotes the record and fails to provide the context of the statement. According to the record, when Cifuentes was asked why she had to replace the two doors, she responded:

My screen door had a rip in it. And I felt that it wouldn't—I couldn't get it to close properly and I decided to replace it with something more secure and *better locking*.

3RP 16 (emphasis added). The victim did not upgrade her doors to something that was better looking, as Craig incorrectly states.

Rather, she needed to get a door that *locked* securely, something that the door, after being damaged by the defendant, would no longer do.

To support Craig's claim that the damage estimate improperly included upgrading costs, he points to Cifuentes's testimony about new locks and bolts. App. Br. at 5. Cifuentes testified that "[w]e got new bolts which would lock from the inside and all the locking hardware." 3RP 10. The statement, taken in the context of her entire testimony, does not support Craig's assertion that Cifuentes upgraded the locks and bolts from their original condition.

A picture of the damage, which was admitted at trial, shows that Craig cut a large hole in the door next to the original deadbolt lock and the locked door knob so that he could reach through and

unlock both to commit the burglary. Ex. 2.<sup>3</sup> The statement quoted above was clearly Cifuentes's explanation of what had to be done to make the replacement doors as secure as the originals had been before Craig committed the damage shown in Exhibit 2. On appeal, Craig's argument infers that Cifuentes's use of the word "new" meant that she upgraded. To interpret the remarks to mean that the new bolts or hardware were different or superior to those in the original door requires one to improperly draw inferences against the State.

Secondly, Craig asserts that the damage assessment did not take into account prior damage to the screen door and that the damage amount exceeded the cost of repairs to return the doors to their original condition. However, Craig fails to acknowledge that the damage here was such that the doors needed to be replaced, thus making any previous minor damage to the screens irrelevant to the assessment of damage. According to Cifuentes's testimony, although there had previously been minor damage to the screen from her cats, there was a large tear in the screen that had not been present before her home was burglarized that needed to be

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<sup>3</sup> Exhibits 1 and 2 have been designated by the State in its Supplemental Designation of Clerks Papers and Exhibits.

repaired. 3RP 17. Further, the victim testified that because of the damage, the screen door would not close or secure properly.

3RP 16. Likewise, because there was a large hole in the back door, she replaced it and the screen door, costing a total of about \$1100 in labor and parts.

Cifuentes's testimony provided sufficient evidence that the doors cost more than \$750 to repair. A victim's word is sufficient evidence to support a conviction. See RCW 9A.44.020(1) (a defendant's conviction for a sex offense does not require that the "testimony of the alleged victim be corroborated"); State v. Whitney, 44 Wn. App. 17, 21, 720 P.2d 853 (1986) (same regarding a kidnapping conviction). Craig's post-conviction effort to discredit Cifuentes's testimony is misplaced. On appeal, a reviewing court must defer to the trier of fact on issues of witness credibility, conflicting testimony, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. Given that Cifuentes was the only witness who testified about the repair cost, the jury must have found her testimony credible and persuasive. This Court should not second-guess the jury's credibility determination.

In maintaining his claims, Craig fails to direct this Court to Coria, supra, which is controlling authority from the Washington

Supreme Court. In Coria, where the defendant was charged with Malicious Mischief in the Second Degree,<sup>4</sup> the State presented an officer's testimony on the dollar value of the property damage and photographs of the damage. Coria, 146 Wn.2d at 641. The officer estimated the total damage at \$620, which resulted in a \$555 dollar estimate pertaining to the malicious mischief charge. Id. The defendant did not object to this evidence at trial. Id. The defendant's wife testified that the total repair cost of the damage was \$67. Id. On appeal, the defendant claimed the evidence was insufficient to convict him. Id. at 640. The Supreme Court disagreed and found that sufficient evidence supported the conviction despite the conflict in testimony, as credibility determinations are left to the finder of fact. Id. at 641.

Likewise, Craig cites to the testimony of Officer Ward to attempt to contradict the victim's testimony regarding the \$1100 cost estimate. Even if the testimony conflicts with Cifuentes's, this Court must find sufficient evidence exists based on Cifuentes's testimony, under the rationale of Coria.

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<sup>4</sup> Coria was charged under the previous version of RCW 9A.48.080, which required more than \$250 damage for Malicious Mischief in the Second Degree. The statute has since been amended to increase the amount to \$750, but was not otherwise changed.

Regardless, the officer's testimony is not actually in conflict with that of Cifuentes on this issue. In cross examination of Officer Ward, the defense attorney was attempting to point out that no one could know with absolute certainty if the knife was the tool used to gain entry. 3RP 32-33. Counsel asked the officer if he made any attempt to test the knife to see if it could do the kind of damage done here. 3RP 33. Officer Ward responded that he did not do any testing but that, based on his recollection, the door was in poor repair and not of very good quality because it was thin and had a hollow core. Id.

Craig claims, based on this testimony, that the "door itself was already damaged before the burglary." App. Br. at 5. There is absolutely no evidence to support this claim. It is apparent from the officer's testimony that he only saw the door *after* the burglary had been committed. In fact, there is nothing in the officer's testimony to suggest that he had ever been to the house or had any opportunity to observe the back door of the house before the burglary. Rather, Officer Ward's statement about the door being in poor repair, as discussed above, refers to its state after the burglary. In earlier testimony, Officer Ward testified that the door was identified as the point of entry and had obvious damage

around the door handle and the lock mechanism, further supporting Cifuentes's testimony about the damage. 3RP 22. Thus Officer Ward's testimony actually corroborated that of Cifuentes and provided even further evidence of the damage.

Moreover, the jury was able to see the photograph of the knife used to cut a large tear in the screen and the damage to the back door. Ex. 1; Ex. 2. The jury, in observing the photographs, reasonably concluded that it had cost more than \$750 to repair the doors in light of the significant damage caused. Admitting the truth of Cifuentes's testimony and drawing all reasonable inferences in favor of the State, there is substantial evidence from which a rational trier of fact could find that the damage to the door exceeded \$750. This Court should affirm Craig's malicious mischief conviction.

2. THIS COURT SHOULD REJECT CRAIG'S  
CHALLENGE TO THE SPECIAL VERDICT  
INSTRUCTION.

Citing the Washington Supreme Court in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and Division One in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), Craig challenges the instruction for the "rapid recidivism" aggravator, arguing that

jurors should not have been told that they had to be unanimous to answer “no.”<sup>5</sup> As Bashaw and Ryan have since been reversed by State v. Nunez, Nos. 85789–0, 85947–7, 2012 WL 2044377 (June 7, 2012), this Court should reject Craig’s challenge to the aggravator instructions.

In Nunez, Washington Supreme Court held that it is not error for jurors to be instructed that they must be unanimous to answer “no” regarding the presence of an aggravating factor. Nunez, 2012 WL 2044377 at 1. Instruction 29 used here was identical to the one used at trial in Ryan and Nunez and upheld by the Supreme Court in Nunez. Id.; CP 57. As the jury was properly instructed, this Court must affirm the jury’s finding on the aggravating circumstance.

3. CRAIG HAS FAILED TO ESTABLISH THAT THE AGGRAVATING FACTOR OF RAPID RECIDIVISM IS UNCONSTITUTIONALLY VAGUE.

Craig claims that the rapid recidivism aggravator under RCW 9.94A.535(3)(t), that he committed his current crimes “shortly after being released from incarceration,” is unconstitutionally vague

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<sup>5</sup> Craig filed his opening brief on May 7, 2012, while the Washington State Supreme Court’s decision in Ryan was pending.

under the Due Process Clause. This claim fails for several reasons. First, the Washington Supreme Court has held that aggravating circumstances are not subject to due process vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. Second, even if a vagueness challenge could be brought here, it would fail under these circumstances. Because his vagueness challenge does not implicate the First Amendment, Craig must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him.

a. The Aggravating Circumstance Is Not Subject To A Due Process Vagueness Challenge.

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).

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

In his attempt to circumvent Baldwin, Craig relies on Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). But the fact that a jury, rather than a judge, now makes the finding of whether an aggravating circumstance accompanied the commission of the crime does not establish that the reasoning in Baldwin is no longer valid. RCW 9.94A.535 merely lists accompanying circumstances that *may* justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating

circumstance does not mandate an exceptional sentence. State v. Williams, 159 Wn. App. 298, 314, 244 P.3d 1018 (2011) (trial court is not required to impose an exceptional sentence merely because a jury finds an aggravating circumstance proved). Thus, even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. Id.; RCW 9.94A.535. Under Baldwin, the aggravating circumstance is not subject to Craig's vagueness challenge.

b. The Aggravating Circumstance Is Not Unconstitutionally Vague As Applied.

The aggravating circumstance at issue is the jury's finding that Craig committed his current crimes "shortly after being released from incarceration." RCW 9.94A.535(3)(t). This finding was based on Craig's release from incarceration on March 24, 2011 for a community custody violation from prior Residential Burglary convictions. 5RP 11-12, 23; 8RP 7-8. His current convictions for Residential Burglary, Theft in the Second Degree, and Malicious Mischief in the Second Degree are based on crimes he committed

only two weeks later, April 7, 2011. CP 105. Even if Craig could challenge this aggravating circumstance for vagueness, his claim would fail under these facts.

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 (1993). A statute is vague if it either fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. Eckblad, 152 Wn.2d at 518.

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. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). That a law requires subjective evaluation to determine whether the enactment has been violated does not mean the law is unconstitutional. State v. Zigan, 166 Wn. App. 597, 605, 270 P.3d 625, 629 (2012).

Because Craig's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). The challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Id. at 182-83.

Craig claims that the term "shortly after" is unconstitutionally vague. But the term is not so vague that persons of ordinary intelligence must guess at its meaning or differ widely as to its application. Nor is it necessary that the amount of time encompassed by "shortly" be delineated with certainty; the length of time that qualifies as "shortly" may vary with the circumstances. State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010).

Division Three recently rejected an identical claim in State v. Zigan, 166 Wn. App. 597, 270 P.3d 625, 629 (2012). Zigan committed the crime of Vehicular Homicide just over two months after his release from jail for violating sentencing conditions for a prior crime. Id. at 600. The court held that, as applied to Zigan's circumstances, RCW 9.94A.535(3)(t) is not vague. Id. Based on

the mere two months that had passed since release, the court noted that “[n]o reasonable person could believe that the circumstances presented here constitute anything other than the defendant committed the current offense shortly after being released from incarceration.” Id. (internal quotations removed).

It is readily apparent that the aggravating circumstance is not unconstitutionally vague when considered in the context of Craig's conduct. Craig committed Residential Burglary, Theft in the Second Degree, and Malicious Mischief in the Second Degree *fifteen days* after being released from jail for Residential Burglary. A person of ordinary intelligence would understand that committing the same crime roughly two weeks after being released from jail would place his conduct within the scope of this aggravating circumstance. Craig's vagueness challenge must fail.

Even assuming, arguendo, that Craig were able to prevail on his vagueness challenge, this Court should not reverse Craig's sentence as he requests. The trial court explicitly found the free crimes aggravator to be present under RCW 9.94A.535(2)(c) and held that, standing alone, that aggravator supported the sentence imposed. Thus, even if this Court were to reverse the jury's finding

of rapid recidivism, the sentence must not be reversed as it was not dependent upon this aggravating factor alone.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Craig's conviction and sentence.

DATED this 6 day of July, 2012.

Respectfully submitted,

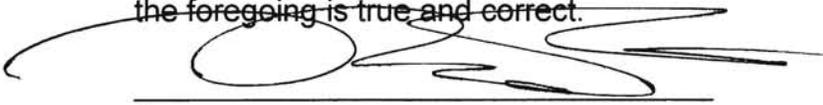
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KEITH RICHARD CRAIG, Cause No. 67936-8-I, in the Court of Appeals, Division I, 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

07-06-12  
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Date