

71620-4

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No. 71620-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

HUGH WILCOX,

Appellant.

2016 OCT 13 PM 10:40  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

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

The Honorable Jeffrey Ramsdell

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Hugh Wilcox advances two bases for reversal of his exceptional sentence. First, he challenges the aggravating circumstance requiring the jury to find that the victim's injuries "substantially exceed" the level necessary to establish the elements of the offense as violating due process vagueness prohibitions. Second, he argues that the State did not prove that the conduct giving rise to the harm at issue rose to the level necessary to satisfy the elements of the offense.

The State claims the latter argument is waived. But the State fails to understand that Wilcox's arguments on appeal challenge the *sufficiency* of the evidence adduced to support the aggravating circumstance. The State's claim lacks merit, and must be rejected.

**1. Because aggravating circumstances elevate the maximum punishment to which a defendant is exposed, they are elements which must be proven beyond a reasonable doubt.**

Any fact that increases the punishment a defendant faces upon conviction of a crime is, by definition, an element that must be submitted to the jury and proven beyond a reasonable doubt. Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 2157-58, 186 L.Ed.2d 314 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI; XIV. Aggravating circumstances

increase the potential punishment a defendant faces upon conviction of the underlying crime to the statutory maximum. RCW 9.94A.537(6).

As with other elements, an accused person's sentence based upon an aggravating circumstance must be supported by sufficient evidence.

See State v. Gordon, 172 Wn.2d 671, 680, 260 P.3d 884 (2011)

(considering sufficiency challenge to aggravating circumstances); State v.

Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

**2. Consistent with the aggravating factor that existed at common law, the State must prove that the conduct substantially exceeded the level necessary to satisfy the elements of the offense.**

At common law, the aggravating circumstance codified in RCW 9.94A.535(3)(y) was known as the “conduct more egregious than typical” aggravating factor. See Br. App. at 13 (discussing cases). Specifically, at common law, “the seriousness of a victim’s injuries [was] a valid aggravating factor if ‘the conduct producing the harm, and the harm produced, were significantly more serious than what is typically involved in the crime.’” State v. Flake, 76 Wn. App. 174, 183, 883 P.2d 341 (1994).

In enacting statutory aggravating circumstances to comport with the demands of the Sixth Amendment and the Fourteenth Amendment guarantee of due process, the Legislature’s intent was to codify

aggravating factors as they existed at common law. Laws of 2005, Ch. 68, § 1.<sup>1</sup> Thus, to support the jury's verdict on the aggravating circumstance alleged here, the State had to prove both that Wilcox's conduct *and* the injury sustained by Jennings exceeded the level necessary to satisfy the elements of the offense. Flake, 76 Wn. App. at 183; State v. Wilson, 96 Wn. App. 382, 388, 980 P.2d 244 (1999).

**3. The State did not prove that Wilcox's conduct substantially exceeded the level necessary to satisfy the elements of the crime.**

Consistent with the rules of appellate procedure, Wilcox assigned error to the want of proof that Wilcox's conduct substantially exceeded the level necessary to establish the elements of the offense, clearly explained the basis for the assignment of error in his "issues pertaining to assignments of error", and supplied extensive argument regarding the lack of evidence regarding Wilcox's conduct. See Br. App. at 1-2 (Assignment

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<sup>1</sup> The statement of legislative intent reads:

The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions *and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.*

. Laws of 2005, Ch. 68, § 1

of Error 2, Issue Pertaining to Assignment of Error 2), and at 13-17 (Argument 2); RAP 10.3. Consequently, it is a mystery as to why the State offers no response to this argument. See Br. Resp. at 20-30 (focusing argument on the propriety of the jury instruction given by the trial court).

The State agrees that the Washington Supreme Court concluded that the aggravating circumstance contained in RCW 9.94A.535(3)(y) codified the “serious injury” aggravating circumstance. See Br. Resp. at 23-24 (citing State v. Stubbs, 170 Wn.2d 117, 131, 240 P.3d 143 (2010)). However in contending that the defendant’s conduct is not a relevant consideration, the State fails to relate the aggravating circumstance to the aggravating factor as it was defined as common law, and misunderstands the holding in Stubbs.

In Stubbs, the issue on review was narrow. Stubbs contended that no injury short of death can substantially exceed the level of bodily harm necessary to satisfy the element of “great bodily harm” required to prove first-degree assault See Stubbs, 170 Wn.2d at 119. Consequently, the Court’s focus on the *nature* of the injury rather than the *conduct* involved makes sense, because the question of Stubbs’s conduct was not before the Court. The State’s analysis is unpersuasive.

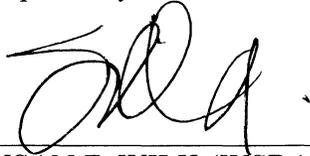
“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, as argued in the Brief of Appellant, the State presented little evidence of Wilcox’s *conduct*. See Br. App. at 15-17. In other words, the State failed to show how Jennings sustained his injuries. The State thus failed to present sufficient evidence to prove the aggravating circumstance. Wilcox is entitled to be resentenced within the standard range. Stubbs, 170 Wn.2d at 130.

B. CONCLUSION

As argued in the Brief of Appellant and this Reply, this Court should reverse Hugh Wilcox’s exceptional sentence and remand for resentencing within the standard range.

DATED this 17<sup>th</sup> day of February, 2015.

Respectfully submitted:



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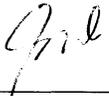
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] KRISTIN RELYEA, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] HUGH WILCOX 828507 MCC-WASHINGTON STATE REFORMATORY PO BOX 777 MONROE, WA 98272</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2015.

X \_\_\_\_\_ 

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