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No.74364-3-I

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

STATE OF WASHINGTON,
Respondent,
v.
PEDRO CRENSHAW,
Appellant.

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

AMENDED BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The blood test result was inadmissible because it stemmed from a warrantless blood draw and there were no exigent circumstances.
2. The State did not prove the aggravating factor that the victim's injuries substantially exceeded the level necessary to establish the elements of the offense of vehicular assault.
3. RCW 9.94A.535(3)(y), as applied to Mr. Crenshaw, is unconstitutionally vague and violates the Fourteenth Amendment Due Process Clause.
4. The sentence is clearly excessive.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Extraction of blood from a suspect is an intrusion requiring a warrant. Absent an exception, such as exigent circumstances, warrantless searches are unconstitutional. That alcohol or drugs may naturally dissipate in a person's body does not present a per se exigency. Were the blood test results admissible when the State did not get a warrant, nor establish any exigent circumstances justifying the warrantless blood draw?
2. The defendant may not be given a sentence over the standard sentence range unless a jury unanimously finds, based on the evidence presented, the State proved the statutory aggravating

factor beyond a reasonable doubt. Was the exceptional sentence invalid where the jury's finding of excessive injury is not supported by the evidence?

3. A vague statute violates the Fourteenth Amendment's due process clause because it fails to provide adequate notice of what conduct is proscribed and does not protect from arbitrary or ad hoc enforcement. RCW 9.94A.535(3)(y), setting forth the aggravating factor of injuries which substantially exceed those necessary to prove a crime does not provide any standard to govern the determination of what injuries are minimally necessary or when injuries "substantially exceed" this undefined base. Should this Court conclude that the aggravating factor contained in RCW 9.94A.535(3)(y) violates due process vagueness prohibitions?
4. Is a sentence three times the high end of the standard range clearly excessive?

C. STATEMENT OF THE CASE

Juan Quintanilla and appellant, Pedro Crenshaw, met through their employment at Boeing in San Antonio, Texas. RP2¹ 178:25-179:1. They

¹ This brief refers to the Verbatim Report of Proceedings as "RP" and designates each day as follows: RP1 shall designate proceedings for October 26, 2015 (Volume I); RP2 is October 27, 2015 (Volume II); RP3 is October 28, 2015 (Volume III); RP4 is October 29, 2015 (Volume IV); RP5 is October 30, 2015 (Volume V); RP6 is November 2, 2015 (Volume VI); RP7 is December 1, 2015 (Volume VII).

stayed in touch over the years after Mr. Crenshaw's job transferred him to Everett, Washington. RP2 180:8-181:5; RP2 182:1-5. In July 2013, Mr. Quintanilla and his wife Jennifer Quintanilla moved to Washington from Texas. RP2 129:20-23. After residing with Mr. Quintanilla's sister for a short period of time, Mr. and Mrs. Quintanilla moved into Mr. Crenshaw's home in Snohomish, Washington. RP2 129:5-16.

On September 12, 2013, Mr. Crenshaw returned home from an after work get together at the Mukilteo Lodge. RP5 802 4-7. He asked Mr. Quintanilla to take a ride with him. RP5 804:5-8. Mr. Crenshaw was driving and Mr. Quintanilla was his passenger. RP2 187:10-12; RP2 188:12-14. The two drove down East Lowell Larimer Road and as it curved the vehicle went off the road crashing through a fence and hitting two parked cars. RP2 204:18-205:12; RP5 805:3-10; RP5 808:23-809:20. Prior to the crash, witnesses observed the vehicle traveling at a high rate of speed and the "black box" contained in the vehicle recorded the speed as high as 104 miles per hour seconds before the crash. RP2 203:20-24; RP4 591:12-20; RP4 602:16-608:8.

Immediately after the crash, Pedro exited the vehicle and ran to get help. RP5 811:13-15. Mrs. Quintanilla is a nurse and believing he was not far from home, he tried to run in that direction. RP5 813:16-814:17. Mr. Crenshaw encountered several people as he ran through the

neighborhood. RP2 207:5-20; RP2 238:20-239:1; RP2 254:19-25; RP3 11; RP3 350:7-8; RP4 573: 19-21. Mr. Quintanilla remained in the vehicle, severely injured, as parts of the fence had come through the windshield. RP3 375:7-377:14. A call for help came in at 7:21 p.m. and officers arrived shortly thereafter to the 6400 block of Lowell Larimer Road. RP3 357:12-14; RP3 363:22. Deputy Barker was the first to arrive to the scene of the accident freeing Mr. Quintanilla from the vehicle, so he could be transported to Harborview Medical Center. RP3 377:15-378:5; RP3 358:5-9; Rp3 358:23-359:3.

Officers found Mr. Crenshaw at a house nearby and detained him at the scene. RP3 394:9-12. At 8:57 p.m. he was transported to the hospital while officers awaited a warrant for a blood draw. RP3 406:4-10; RP4 481:8-10. Deputy Monson submitted a draft of the search warrant for Mr. Crenshaw's blood to a deputy prosecuting attorney at approximately 9:30 p.m. RP3 406:8-11. The deputy prosecuting attorney returned the search warrant requesting additional information, and because the process was taking time, Deputies Monson and Ravenscraft decided to terminate efforts to get a search warrant because any alcohol in Mr. Crenshaw's system was dissipating. RP3 406:14-407:5. At 10:15 p.m., Mr. Crenshaw's blood was drawn. RP4 486:11-13. It was later tested and returned a result of .089. RP4 541:15.

Mr. Quintanilla remained at Harborview Medical Center for six weeks moving through their intensive care unit to their rehabilitation floor. RP2 148:22-149:12. His injuries consisted of a small brain bleed, broken bones to his face, loss of his left eye, severed left ear canal, and a severed facial nerve. RP2 226:1-4; RP2 229:6-15; RP2 230:1-6; RP2 230:7-10; RP2 230:13-15. He underwent physical, cognitive, speech, and occupational therapy. RP2 154:2-7. Mr. Quintanilla underwent many surgeries and had approximately six surgeries to go to repair his face, eye, and teeth. RP2 231:22-234:8. Mr. Quintanilla's doctor, Dr. Jasjit Dillon, estimated the six surgeries taking eighteen to twenty-four months to complete. RP2 155:24-25; RP2 234:22-25. Dr. Dillon rated Mr. Quintanilla's injuries a seven or eight on a scale of one to ten, with ten being the most devastating. RP2 231:3-13. Dr. Dillon also stated he had seen injuries at the level of Mr. Quintanilla's before. RP2 235:15-21.

Mr. Crenshaw was charged in a four count Amended Information with Vehicular Assault, Hit and Run Injury Accident, Hit and Run Unattended Vehicle, and Driving While License Suspended in the Third Degree. CP 211-213². Mr. Crenshaw pled guilty to Driving While License Suspended Third Degree on the first day of trial. CP 200-205.

² CP shall designate the "Clerk's Papers."

Jury instruction were given on November 2, 2015. CP 38. Included in those jury instruction was an instruction regarding the statutory aggravator. CP 69. Mr. Crenshaw was found guilty by a jury of Vehicular Assault, Hit and Run Injury Accident, and Hit and Run Unattended Vehicle. CP 33, 34, 37. The jury made a special finding of the aggravator that the injuries substantially exceeded those necessary to prove the crime of vehicular assault. CP 36.

Mr. Crenshaw had no prior felony convictions, so his standard range on the vehicular assault was six to twelve months and twelve to fourteen months on the Hit and Run Injury Accident. CP 23-24. The Court imposed a thirty-six month sentence. CP 25.

D. ARGUMENT

1. THE BLOOD EVIDENCE WAS INADMISSIBLE BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS BLOOD DRAW.

Article 1, section 7 of the Washington constitution commands that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. 1 § 7. The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” U.S. Const. amend. IV.

The State's intrusion into a person's body to draw blood triggers constitutional provisions. Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 1558, 185 L.Ed. 2d 696 (2013); State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984). Absent a recognized exception, warrantless blood draws are unlawful. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). One exception is exigent circumstances. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). This exception applies where delay caused by securing a warrant would permit the destruction of evidence. Tibbles, 169 Wn.2d at 370. The natural metabolization of alcohol or marijuana in a person's bloodstream does not present a per se exigency. McNeely, 133 S. Ct. at 1556; Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 942 (2014) ("the natural dissipation of marijuana in the blood stream does not constitute a per se exigent circumstance justifying a warrantless search."). An exigency must exist based on the totality of the circumstances. McNeely, 133 S. Ct. at 1556; Tibble, 169 Wn.2d at 370.

In determining whether exigent circumstances exist, the availability of a telephonic warrant must be considered. State v. Ringer, 100 Wn.2d 686, 702, 674 P.2d 1240 (1983). Noting the availability of telephonic warrants, the United States Supreme Court held in McNeely that in a driving under the influence investigation, if police "can

reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficiency of the search,” the police must do so. McNeely, 133 S. Ct. at 1561-63. As with all exceptions to the warrant requirement, under article 1, section 7, the State bears the burden of proving an exigency. Tibbles, 169 Wn.2d at 372; State v. Hinshaw, 149 Wn.App. 747, 754, 205 P.3d 178 (2009) (“The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action.”). Whether exigent circumstances exist is a legal question reviewed de novo. Hinshaw, 149 Wn.App. at 752.

- a. The blood test evidence was inadmissible because it stemmed from a warrantless blood draw for which there were no exigent circumstances.

Recent case law supports overturning the conviction and suppressing the results of a warrantless blood draw when the only articulable rationale for a warrantless blood draw is dissipation of an intoxicant in the blood. In City of Seattle v. Pearson, the Court ruled that the trial court committed prejudicial error when it admitted the blood test result after a warrantless blood draw. City of Seattle v. Pearson, 192 Wn. App. 802, 807, 369 P.3d 194 (2016). There, the defendant struck a pedestrian with her car. Id. When officers arrived the defendant ultimately admitted she had smoked marijuana earlier in the day. Id. at 807-08. She was arrested for vehicular assault and driving under the

influence and transported to the hospital for a blood draw. Id. at 808. They arrived at the hospital two hours after the collision, and about thirty minutes later a nurse drew the defendant's blood. Id. at 808-09. The Municipal Court granted the defendant's motion to suppress the blood evidence. Id. at 809. The City moved to reconsider presenting evidence from a forensic toxicologist that tetrahydrocannabinol (THC) dissipates from blood very quickly. Id. The City also presented evidence that a warrant, typically done via e-mail, takes about an hour to an hour and a half. Id. The Municipal Court granted the City's motion to reconsider finding exigency justified the warrantless blood draw. Id. The defendant was convicted and her conviction was affirmed after an appeal to the Superior Court. Id. at 810. This Court reversed the conviction finding the natural dissipation of THC in the defendant's blood alone did not constitute exigency sufficient to bypass the warrant requirement. Id. at 816.

In this case, like City of Seattle v. Pearson, Mr. Crenshaw's blood was drawn without a warrant and there were no exigent circumstances to justify the intrusion. The initial call for the collision was at 7:21 p.m. RP4 481:11-13. Deputy Monson was called to the scene of the collision at 8:00 p.m. and while in route he was told to go to the office to begin working on a search warrant to obtain a blood sample from Mr. Crenshaw.

RP3 406:4-10. At 8:57 p.m. Deputy Ravenscraft transported Mr. Crenshaw to the hospital. RP4 481:8-10. They arrived at 9:21 p.m. RP4 486:8-10. Deputy Monson submitted a draft of the search warrant at approximately 9:30 p.m., but the deputy prosecuting attorney returned it requesting additional information. RP3 406: 8-22. Deputy Monson and Deputy Ravenscraft then decided to forego the search warrant because the time passing was allowing any alcohol in Mr. Crenshaw's system to dissipate. RP3 406:23-407:5. At 10:15 p.m., Mr. Crenshaw's blood was drawn. RP4 486 11-13. Choosing to speed up the process of obtaining a blood sample because time is passing and alcohol may be dissipating is not a sufficient exigent circumstance to bypass the search warrant requirement as established in McNeely and City of Seattle v. Pearson.

No officer considered any exigency other than dissipation. Both Deputy Monson and Ravenscraft mistakenly believed a warrantless blood draw was a matter of course when there is a vehicular assault, seemingly unaware that McNeely caused the Legislature to change former RCW 46.20.308(3). RP3 407:10-18; RP4 482 13-483:6; RP4 484:11-15. Prior to McNeely, the law provided that, where a person was under arrest for vehicular homicide or vehicular assault, a blood test could be administered "without the consent of the individual so arrested." Former RCW 46.20.308(3). The law was changed to comply with the McNeely

decision, and now allows a blood test pursuant to arrest for vehicular homicide or vehicular assault “without the consent of the individual so arrested pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.” RCW 46.20.308(3). The McNeely rule imposed a new obligation on the State to obtain a search warrant in many instances where a warrant had been deemed unnecessary under the prior rule.

Reversal of Mr. Crenshaw’s conviction is required because Deputies Monson and Ravenscraft bypassed the warrant requirement set forth in RCW 46.20.308(3) and drew Mr. Crenshaw’s blood unlawfully with only the passage of time and dissipation as their exigent circumstance.

b. Trial counsel was ineffective for failing to move to suppress the blood evidence.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687.

To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. See e.g., State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Here, trial counsel did not move to suppress the blood evidence when such motion would have likely succeeded, and there can be no strategic explanation for this failure because the blood evidence proved one alternative element of the offense. Trial counsel's performance was

deficient in this regard because no reasonable attorney aware of the relevant authority baring warrantless blood draws would have ignored that authority and allowed the State an opportunity to strengthen their case. There can be no other explanation for failing to move to suppress the blood evidence other than ineffectiveness.

Mr. Crenshaw's trial was prejudiced from the moment the jury heard the blood evidence, which was in the State's first sentence to the jury - "the lethal combination of speed and alcohol can have the most horrifying results." RP2 106:4-5. The State continued to focus on the blood evidence throughout its case in chief. Testimony about blood evidence may seem insignificant when the record reflected speeds up to 104 miles per hour, but without the blood evidence the State would have had to prove Mr. Crenshaw's driving was reckless or that he drove with a disregard for the safety of others – and the only evidence of either of these alternatives was Mr. Crenshaw's speed. Had the blood evidence been suppressed prior to trial, the State's case would have been much weaker because there is nothing in the record to suggest that Mr. Crenshaw drove in a "rash or heedless manner, indifferent to the consequences." See, e.g., State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005) (The phrase "in a reckless manner" means "driving in a rash or heedless manner, indifferent to the consequences.").

- c. Mr. Crenshaw can raise this issue for the first time on appeal because it is an issue of constitutional magnitude affecting his right to a fair trial.

While Mr. Crenshaw did not move to suppress the blood test results before trial, this court should consider his argument on appeal because it is an error affecting a constitutional right. An appellate court may refuse to decide a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for claims of manifest errors affecting constitutional rights. *Id.* For this exception to apply, the appellant must identify a constitutional error and show how the error affected the appellant's right to trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (citing *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). A constitutional error is manifest if the appellant can show actual prejudice. *Id.* at 99. A manifest error of constitutional magnitude may be harmless, and the burden to show an error was harmless rests with the State. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Admitting the blood evidence absent a warrant, waiver, or exigency is a manifest error affecting Mr. Crenshaw's constitutional rights. Mr. Crenshaw was prejudiced because the State did not have sufficient evidence to convict him of Vehicular Assault absent the blood

evidence. Thus, Mr. Crenshaw may raise this issue for the first time on appeal.

- d. Admitting the blood test result was not harmless because the result was a major focus of the State's case.

Error in admitting evidence obtained through an unconstitutional search is subject to the constitutional harmless error test. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Constitutional error is presumed to be prejudicial and the government bears the burden of proving that the error was harmless beyond a reasonable doubt. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The blood evidence were a major focus of the trial and the prosecutor relied on the blood evidence in her opening statement, case in chief, and closing argument. Admitting the blood evidence established an alternative element of the offense. As such, admitting the blood test result was prejudicial error requiring reversal.

2. THE JURY'S FINDING THAT THE VICTIM'S INJURIES SUBSTANTIALLY EXCEEDED THE LEVEL NECESSARY TO ESTABLISH THE ELEMENTS OF THE OFFENSE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

The Sixth Amendment requires the State to prove, and a jury to find beyond a reasonable doubt, all facts necessary to support an exceptional sentence. U.S. Const. amend. 6; Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L.Ed. 2d 403 (2004); Apprendi v.

New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000); RCW 9.94A.537. Consequently, aggravating circumstances are treated as elements of the charged crime for constitutional purposes. Apprendi, 120 S. Ct. at 2364-66; accord, Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 2419, 153 L. Ed. 2d 524 (2002) (“[T]hose facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.”).

A conviction or special verdict must be reversed where no rational trier of fact, viewing the evidence in a light favorable to the State, could have found every element of the crime charged beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The existence of a fact cannot rest in guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). If the reviewing court finds insufficient evidence to prove an element, reversal is required. State v. Hickman, 135 Wn.2d at 103.

Over the course of two decades common law has developed legal principles refining what constitutes injuries which substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. In some instances where courts have found excessive injury, the defendant’s conduct far exceeded what is required to establish the offense. In State v. Pappas, the victim suffered a severe brain injury as a result of a

motorcycle collision with a telephone pole. State v. Pappas, 164 Wash.App. 917, 918, 265 P.3d 948 (2011). Consequently the victim had little control over the left side of her body, she could not eat or bathe unassisted, and she had speech impediments. Id. at 922. The Court stated there was no question these injuries constituted “great bodily injury”. Id. at 922. In State v. Flake, the victim suffered injuries in a motor vehicle accident which left him a quadriplegic, unable to move from the chin down and unable to feed himself or speak. State v. Flake, 76 Wn.App. 174, 177 fn. 1, 883 P.2d 341 (1994). The Court upheld the exceptional sentence for vehicular assault based in part on the severity of the injuries for which the defendant expressly conceded far surpassed those typical of a vehicular assault. Id. at 181 fn. 8.

On the other hand, courts have held a finding of excessive injury is unsupported where it is based on injuries contemplated within the standard range. In State v. Nordby, the Supreme Court determined that the seriousness of the injuries suffered by the victim could not justify an exceptional sentence for vehicular assault because the injuries suffered were considered by the Legislature in setting the standard range for the offense of vehicular assault. State v. Nordby, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986). The injuries in Nordby consisted of broken legs, a

broken arm necessitating surgery, a coma for several days, and pain during the incident which was to continue for some time. Id. at 515.

Subsequently in State v. Cardenas, the Supreme Court again held that while the victim's injuries were severe, they were the type of injuries contemplated by the Legislature and cannot justify an exceptional sentence for vehicular assault. State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996). The injuries in Cardenas included a compound leg fracture, wound to the left ankle, multiple breaks in the right foot, a fractured pelvis, a concussion, hospitalization for three months, surgery during which a rod was placed in the right leg, amputation of the left leg, loss of memory and cognitive functions, which may be permanent requiring physical, occupational, and psychological therapy, and indefinite use of a cane or walker. Id. at 4.

These cases illustrate that to support an excessive injury aggravator the evidence must show a risk of death, or permanent disfigurement, or permanent loss or impairment of the function of a part or organ. One cannot know which injuries substantially exceed the baseline and which injuries do not when the State does not present any evidence regarding atypical injuries and normal injuries in a vehicular assault case. Here, Mr. Quintanilla's injuries consisted of a small brain bleed, broken bones in his face, loss of his left eye, severed left ear canal, and a severed facial nerve,

RP2 226:1-4; RP2 229: 6-15; RP2 230:1-6; RP2 230:7-10. RP2 230:13-

15. Mr. Quintanilla stayed in the hospital for approximately six weeks and underwent physical therapy, cognitive rehabilitation, speech therapy, and occupational therapy, which his wife, Jennifer Quintanilla, says greatly helped in his recovery. RP2 148:22-23; RP2 151:18-20; RP2 153:18-23; RP2 154:20-155:17.

In terms of Mr. Quintanilla's recovery, Dr. Dillon estimated Mr. Quintanilla had about six surgeries to go, which will include giving him a prosthetic eye and teeth, and repairing the sag in his face. RP2 231:22-234:8. Dr. Dillon estimated the six surgeries would be done in about eighteen to twenty-four months. RP2 234:22-25. In rating the devastation of Mr. Quintanilla's injuries, Dr. Dillon stated:

Q: In all the years that you've been doing this – I mean, I think we can imagine what you've seen. In terms of the – what you're dealing with in the operating room, would you have described this in the spectrum of an easier case or a harder case to deal with?

A: I mean, it's challenging. To put it into perspective, if I would say 1 to 10, 10 is the hardest one I've done, I would say 10 is someone taking a shotgun and just blowing their face off at close range. 9 would be a bear coming and just taking out your face. He was around a 7 or an 8.

RP2 231:3-13.

Q: Dr. Dillon, have you ever seen – when you talked about the pieces of bone that were kind of falling out and having

to piece back together, have you ever seen this level of fracturing or breaking of that bone there?

A: Oh, yeah.

Q: To that degree?

A: Yeah.

RP2 235:15-21.

Accordingly, the excessive injuries factor found by the jury could not support an exceptional sentence because Mr. Quintanilla will recover from the accident and the injuries he suffered albeit there has been a rigorous recovery process.

3. RCW 9.94A.535(3)(y) AND JURY INSTRUCTIONS THAT FOLLOW VIOLATE DUE PROCESS VAGUENESS PROHIBITIONS BECAUSE NO ASCERTAINABLE STANDARDS EXIST.

The Fourteenth Amendment's due process vagueness doctrine has a twofold purpose: (1) to provide the public with adequate notice of what conduct is proscribed and (2) to protect the public from arbitrary or ad hoc enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A law violates due process vagueness prohibitions if either requirement is satisfied. Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990) (internal citation omitted). The party challenging the prohibition has the burden of overcoming the presumption of constitutionality. Id.

Laws which impart an uncommon degree of subjectivity to the jury's consideration of a fact are subject to invalidation on due process vagueness grounds. "A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). As the Supreme Court has stated, a criminal statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," violates due process. Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

- a. The void-for-vagueness doctrine applies to RCW 9.94A.535(3)(y) and jury instructions that follow this statute because aggravators are elements of the offense and failing to instruct a jury on every element is a manifest error of constitutional magnitude.

The Washington Supreme Court has held that sentencing statutes cannot be challenged under due process vagueness challenges because there is no constitutionally protected liberty interest. State v. Baldwin, 150 Wn.2d 448, 460-61, 78 P.3d 1005 (2003). But, since Baldwin was decided, the United States Supreme Court held that the constitutional protections of due process do apply to sentencing factors that increase penalty beyond the standard range. See Apprendi v. New Jersey, 530 U.S.

466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (For Apprendi purposes, the “statutory maximum” is the maximum sentence a judge may impose based solely on facts admitted by the defendant or reflected in the jury’s verdict.). Before Blakely established that the SRA violated the Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process, based on the faulty premise that they involved matters of judicial sentencing discretion, due process vagueness challenges to aggravating factors were generally deemed “theoretically and analytically unsound” and thus not given serious consideration or rejected outright by the appellate courts of this State. See e.g. State v. Jacobson, 92 Wn. App. 958, 966, 965 P.2d 1140 (1998); State v. Owens, 95 Wn. App. 618, 628-29, 976 P.2d 656 (1999). In Jacobsen, the Court stated,

Because there is no constitutional right to sentencing guidelines—or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines—the limitations the Guidelines places on a judge’s discretion cannot violate a defendant’s right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case. Even vague guidelines cabin discretion more than no guidelines at all.

What a defendant may call arbitrary and capricious, the legislature may call discretionary, and the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.

Jacobsen, 92 Wn. App. At 966 (quoting United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990)). It was also assumed that because judges would factor their own awareness of the “typical” case into their assessment whether an aggravating circumstance had been established, the subjectivity of certain aggravating circumstances would be minimized, further reducing the likelihood of a due process violation. State v. Nordby, 106 Wn.2d 514, 518-19, 723 P.2d 1117 (1986).

Blakely held that aggravating factors that warrant exceptional sentences under the Sentencing Reform Act (“SRA”) alter the statutory maximum for the offense. Blakely, v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). It is for that reason that the Sixth and Fourteenth Amendments require the State to plead the aggravators and prove them beyond a reasonable doubt to a jury. Thus, even under Baldwin’s flawed understanding of the application of the vagueness doctrine and the now irrefutable proposition that aggravating circumstances, as facts which increase punishment, operate as elements of a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply.

After Blakely, the conclusion that the due process vagueness doctrine applies to aggravating factors is inescapable because the Supreme Court has continued to make it clear that the right to a jury determination of facts essential to punishment channels sentencing judges' discretion. Blakely, 542 U.S. at 304-05. This rule is tied to the other foundational premise of Blakely, Apprendi v. New Jersey, and the many decisions applying the Apprendi rule: because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating factors 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).

More recently, in Johnson v. United States, the United States Supreme Court struck down as unconstitutionally vague portion of the sentencing provision of the Armed Career Criminal Act ("ACCA") known as the "residual clause." 135 S. Ct. 2551, 192 L.Ed. 2d 569, 83 USLQ

4576 (2015). Johnson focused on whether a portion of the ACCA’s definition of “violent felony” was unconstitutionally vague. The statute “forbids certain people – such as convicted felons, persons committed to mental institutions, and drug users – to ship, possess, and receive firearms.” Id. at 2555 (citing 18 U.S.C. § 922(g)). The general penalty for violating this ban is up to ten years’ imprisonment. 18 U.S.C. § 924(a)(2). “But if the violator has three or more earlier convictions for a ‘serious drug offense’ or a ‘violent felony,’ the [ACCA] increases [the] prison term to a minimum of 15 years and a maximum of life.” Johnson, 135 S. Ct. at 2555 (citing 18 U.S.C. § 924(e)(1) and Johnson v. United States, 559 U.S. 133, 136 (2010)). Thus, the definition of “violent felony” took on a tremendous significance. Ultimately the Court struck down the clause, holding that “[i]ncreasing a defendant’s sentence under the clause denies due process of law.” Id. at 2557. The Court reasoned that “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” Id.

Johnson reiterates the principle that the prohibitions of vagueness not only apply to statutes defining elements of crimes, but also to statutes fixing sentences. Johnson, 135 S. Ct. at 2556 (citing United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)).

Making aggravating factors susceptible to vagueness challenges is consonant with the Due Process Clause itself. As the Supreme Court has explained numerous times, the vagueness doctrine serves two purposes: it ensures laws affecting criminal liability and punishment are specific enough to put defendants on fair notice of the consequences of their actions, and it protects against arbitrary enforcement of those laws.

Holding that aggravating factors are immune from vagueness challenges runs afoul of both principles.

- b. RCW 9.94A.535(3)(y) as applied in this case by the special verdict requiring the jury to decide whether the injuries “substantially exceed” the level necessary to satisfy the elements of the offense violates the vagueness prohibitions.

RCW 9.94A.535(3)(y) does not provide ascertainable standards. A statute is vague where it fails to provide ascertainable standards so as to protect against arbitrary and subjective application. Grayned, 408 U.S. at 108. That is readily demonstrated by the litigation history of State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013); State v. Pappas, 164 Wash.App. 917, 265 P.3d 948 (2011), State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010), State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996), State v. Armstrong, 106 Wn.2d 547, 723 P.2d 1111 (1986), and State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986). The Court in Stubbs adopted a specific definition of the term “substantially exceeds”, defining

it as injuries which satisfy the next greater degree of the offense. Stubbs, 170 Wn.2d at 130. In adopting a specific definition, the Court implicitly rejected the common understanding. Thus, at no point prior to Stubbs was there an agreed-upon definition of “substantially exceeds”.

Beyond the lack of a legal definition of the term, the facts of every case present ambiguity as to whether injuries are ordinary or atypical. Neither RCW 9.94A.535(3)(y) nor the court’s instruction to the jury provides objective guidance in its application of the aggravator. Here, Instruction 27 read:

If you find the defendant guilty of Vehicular Assault as charged in Count 1, then you must determine if the following aggravating circumstance exists:

Whether the victim’s injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm, as defined in Instruction 17.

CP 69. Instruction 17 read:

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.

CP 58.

The United States Supreme Court has made clear, “It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.” Walton v. Arizona, 497 U.S. 639,

653, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds by, Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Nevertheless, an aggravating factor that is vague may be applied if state courts have adopted an acceptable limited definition. Walton, 497 U.S. at 654-55. In Stubbs, the Court adopted a proper limited definition of “substantially exceeds”. The definition pronounced in Stubbs and the definition of the next greater degree of injury would be sufficient to shield the statute from vagueness challenges. However, definitions for “substantially exceeds” or the next greater degree of injury were not provided in this case.

In State v. Gordon, the Court concluded aggravating factors submitted to the jury need not be defined beyond the statutory terms. State v. Gordon, 172 Wn.2d 671, 679-80, 260 P.3d 884 (2011). Walton makes clear, however, that where the statutory language is inherently vague, it is not sufficient to merely provide the jury an instruction which parrots that vague language. Walton, 497 U.S. at 653. Gordon cannot preclude providing the jury a constitutionally mandated limited construction to an inherently vague statute. Importantly, in Gordon the Court was not presented with a vagueness challenge to the aggravators at issue, and thus decided only what the Sixth Amendment required. While the Sixth Amendment may be satisfied so long as the jury makes the

necessary factual finding to support punishment, the Due Process Clause requires that inherently vague statutory factors be sufficiently explained to the jury.

The RCW 9.94A.535(3)(y) has a specific legal meaning beyond its vague terms and that specific legal meaning is easily relayed to the jury through a jury instruction defining the phrase “substantially exceeds”. RCW 9.94A.535(3)(y) and jury instructions that follow violated due process vagueness prohibitions because the requirement that the jury find Mr. Quintanilla’s injuries “substantially exceed” those necessary to establish the elements of the offense is so subjective that it has no standard. Reasonable minds will differ on the quantum of evidence needed for injuries to “substantially exceed” the bodily harm. Mr. Crenshaw’s sentence which is predicated on this unconstitutionally vague aggravator must be reversed.

4. THE IMPOSITION OF A THIRTY-SIX MONTH SENTENCE WAS CLEARLY EXCESSIVE BECAUSE ITS LENGTH SHOCKS THE CONSCIENCE.

An exceptional sentence should be reversed where it is “clearly excessive.” RCW 9.94A.585(4)(b). Washington courts have chosen to give this language little meaning. A trial court has wide discretion to determine the length of an exceptional sentence that is otherwise justified by legitimate aggravating factors. State v. Ritchie, 126 Wn.2d 388, 396,

894 P.2d 1308 (1995). Still, reversal is necessary where the length of the sentence “shocks the conscience.” Ritchie, at 396 (quoting State v. Ross, 71 Wn. App. 556, 571, 861 P.2d 473 (1993), review denied, 123 Wn.2d 1019 (1994)).

RCW 9.94A.585 governs when an exceptional sentence may be reversed by a reviewing court. “To reverse a sentence which is outside the standard range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

Whether an exceptional sentence is clearly excessive is reviewed for an abuse of discretion. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The sentencing court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the aggravating factor. State v. Oxborrow, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). Action is excessive if it goes beyond the usual, reasonable, or lawful limit. Id. at 531. “Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” Id.

When a sentencing court does not base its sentence on improper reasons, a reviewing court will find a sentence excessive if, in light of the record, its length “shocks the conscience.” State v. Vaughn, 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (quoting State v. Ritchie, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995)). Exceptional circumstances must truly distinguish the crime from others of the same category. State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003).

Mr. Crenshaw was convicted of Vehicular Assault, Hit and Run Injury Accident, Hit and Run Unattended Vehicle, and Driving While License Suspended in the Third Degree. CP 33, 34, 37, 200-205. Mr. Crenshaw had no prior felony criminal history, so his standard sentence range on the Vehicular Assault was six to twelve months and twelve plus to fourteen months on the Hit and Run Injury Accident. CP 23. The Court imposed a thirty-six month sentence. CP 25. The thirty-six month sentence imposed represents six times the low end of the standard range and three times the high end of the standard range. As such, his circumstances were not sufficiently “exceptional” to distinguish him from others convicted of the crime of Vehicular Assault. Moreover, his offense was not so aggravated as to merit a thirty-six month sentence. The length of the sentence imposed therefore “shocks the conscience” and should be reversed.

E. CONCLUSION

Based on the arguments set forth above, this Court should reverse Mr. Crenshaw's conviction.

Respectfully submitted this 5th day of July, 2016.



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