

FILED
September 26, 2016
Court of Appeals
Division I
State of Washington

NO. 74364-3-I

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

STATE OF WASHINGTON

Respondent

v.

PEDRO K. CRENSHAW,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. The defense did not seek to have the results of a blood test suppressed on the basis that it was the product of a warrantless search that was not justified by exigent circumstances before that result was admitted into evidence.

a. Has the defendant shown that the standards set out in RAP 2.5(a)(3) have been met so as to justify consideration of the issue for the first time on appeal?

b. Has the defendant demonstrated that he received ineffective assistance of counsel when she did not move for suppression of the blood evidence before trial?

2. Was there sufficient evidence to support the aggravating factor?

3. May the defendant challenge the statutory aggravating factor on the basis that it is unconstitutionally vague?

4. As applied to the facts of this case was the statutory aggravating factor unconstitutionally vague?

5. Under the facts of this case was the exceptional sentence clearly excessive?

II. STATEMENT OF THE CASE

In September 2013 Jennifer and Juan Quintanilla moved to Washington State from their home in Texas. On September 12 they were living with the defendant Pedro Crenshaw temporarily until they found their own home. The Quintinallas had finished dinner and were about to watch a football game when the defendant drove up and texted Ms. Quintanilla to have her husband come outside to talk to him. Mr. Quintanilla went outside for a moment, came back for his shoes, and left again with the defendant in the defendant's car. 10/27/15 RP 129-131, 136-139, 178-187; 10/30/15 RP 800-804.

Around 7:00 p.m. Ms. Kisha Floren was driving home on the Lowell-Larimer Road. That road is a two lane road in a rural area. The speed limit is 35 m.p.h. Ms. Floren saw what turned out to be the defendant's 2013 Cadillac CTS race up behind her. The defendant passed her car and a Kia driving in front of her. The defendant then got back into his lane of travel but missed a curve and drove straight into a pasture. He went through two fences and struck a vehicle pushing it into another vehicle before it stopped. The defendant then got out of the truck and fled on foot. 10/27/15 RP 201-204; 10/29/15 RP 639.

As the defendant walked away from the scene he saw Ms. Floren and waived her off. Angela and Gavin Loth live near where the collision occurred. They saw the defendant walking through their property. The defendant refused Ms. Loth's offer for help. He told Mr. Loth that he was just trying to get home. The defendant then ran into the woods behind the Loth's property up a hill. Both Ms. Floren and Ms. Loth called 911 while Mr. Loth and another neighbor followed the defendant up the hill. They eventually caught up with the defendant and subdued him. When the police arrive a few minutes later the two men brought the defendant out of the woods. The defendant repeatedly stated "I killed my buddy." 10/27/15 RP 207, 212-213, 238-242, 254-257, 393, 395.

The fences and vehicles damaged by the defendant belonged to Reva Barnhart and Michael Urich. When they heard the crash they went outside to inspect the damage. They noticed that both the driver's side and passenger side of the defendant's car was open. By then the defendant had left the scene without contacting Mr. Urich. Mr. Quintanilla was in the passenger seat, severely injured. 10/28/15 RP 303-324.

Police were dispatched at 7:21 p.m. Deputy Barker was first on the scene at 7:28 p.m. He saw that the passenger air bag in the

defendant's car had been deployed and was covered in blood. He saw that the left side of Mr. Quintanilla's face was completely gone. There was a hole where his mouth and nasal cavity had been, and blood was running into the hole. The portion of his face and eye that had been torn off was still partially attached, hanging down to the side. Although he did not appear to be breathing at first, Mr. Quintanilla came to and began breathing rapidly and regularly. He also began to claw at a piece of the fence that had lodged in the hole in his face. Deputy Barker removed the wood, and attempted to calm Mr. Quintanilla down. The deputy did not believe that Mr. Quintanilla had survived the collision. 7/28/15 RP 369-381.

The aid car transported Mr. Quintanilla to Harborview Medical Center at 7:38 p.m. The next morning he was treated by Dr. Dillon, the acting chief of oral and maxillofacial surgery at Harborview. Dr. Dillon described Mr. Quintanilla's injuries "like someone had taken a machete and just cleaved his face in half." The entire half of his face fell on the table, including his lower eyelid, lower jaw, and cheek. His left eye and teeth were gone. His left ear canal was severed down to the skull base which could have resulted in hearing loss absent medical intervention. His facial nerve was severed resulting in permanent paralysis on the left side

of his face. Mr. Quintanilla's speech was affected since he had no control of his mouth. The doctor also observed debris in the wound, including part of a fence post. Dr. Dillon spent about 14 hours in surgery that day cleaning out the wound and reassembling Mr. Quintanilla's facial bones. He had other surgeries as well to put in dental implants and skin grafts. At the time of trial Dr. Dillon estimated Mr. Quintanilla would require at least six more surgeries over the next two years so that he would be "even vaguely functional." 10/27/15 RP 222-234; 10/28/15 RP 366.

Mr. Quintanilla also suffered a brain injury. He was confused and was unable to walk, talk or write. He required therapy to regain those skills. He had memory loss and his judgment was affected. 10/27/15 RP 150-160.

Before picking up Mr. Quintanilla the defendant had met with some co-workers after work and drank some beers and whiskey. Police noted an odor of intoxicants about the defendant after his arrest. The police obtained a sample of his blood just under 3 hours after the collision. The defendant fell asleep for about 30 minutes at the hospital while waiting to draw his blood. A subsequent test showed an alcohol concentration of .89 grams per 100 milliliters of

blood. 10/28/15 RP 408-410; 10/29/15 RP 482-490, 539-541, 565;
10/30/15 RP 802.

Police investigated the defendant's car and the accident scene. A walkthrough of the scene that night and the next morning revealed no evidence of tire marks or skid marks on the roadway. There were three 2 x 4 boards that had penetrated the windshield of the defendant's car. There was substantial damage to the driver's side of the truck that the defendant collided with. The truck had been pushed into a car that was then pushed into a fence. The car sustained substantial damage on both sides. Evidence from the scene and from the "black box" in the defendant's car indicated that the defendant was travelling over 100 m.p.h. 3.5 seconds before the first impact. The car went into a partial broadside as it traveled through a ditch but straightened out before colliding with the truck. There were no mechanical defects on the car that contributed to the collision. 10/28/15 RP 449-457; 10/29/15 RP 639-665, 673-675, 596-617; 10/30/15 RP 708-712.

III. ARGUMENT

A. THE SUPPRESSION ISSUE HAS NOT BEEN PRESERVED FOR REVIEW. THE DEFENDANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

1. Whether The Blood Test Should Have Been Suppressed As The Fruit Of A Warrantless Arrest Is Not A Manifest Constitutional Error.

The defendant argues that the trial court should have suppressed the blood test result because it was based on a search that was not supported by either a warrant or exigent circumstances. He did not move to suppress the blood test on this basis at trial.¹ Generally appellate courts will not consider issues raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule is designed to encourage efficient use of judicial resources by ensuring that a trial court has an opportunity to correct any errors, and thereby avoid unnecessary appeals. State v. Hamilton, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

An exception applies in the case of "manifest error affecting a constitutional right." RAP 2.5(a)(3). A party seeking review of an otherwise unpreserved claim of error must demonstrate that the error is truly of constitutional dimension and show how the alleged

error actually affected his rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Error is "manifest" if the defendant shows the error actually prejudiced him. McFarland, 127 Wn.2d at 333. An appellant shows he was actually prejudiced if the asserted error had a practical and identifiable consequence in the trial of the case. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333.

Police conduct a search within the meaning of the Fourth Amendment when they cause blood to be drawn from a suspect. Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). A search warrant is generally required for a blood draw. Id. at 770. One well recognized exception to the warrant requirement is when the situation presents exigent circumstances. Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013). If those circumstances exist police may conduct a warrantless search to prevent the destruction of evidence. Id. at 1559. Whether exigent circumstances exist to

¹ The defense did object to that evidence in the absence of a proper foundation. 10/26/15 RP 37-38.

justify a warrantless search is determined by the totality of the circumstances. Id.

Because the body naturally metabolizes alcohol and a person's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. Schmerber, 384 U.S. at 770-771; McNeely, 133 S.Ct. at 1561. The natural dissipation of alcohol alone does not constitute an exigent circumstance justifying a warrantless arrest. McNeely, 133 S.Ct. at 1563. Instead, that is one fact that is considered in conjunction factors related to the warrant application process that determine whether exigence circumstances existed. Id. at 1561-1563.

The circumstances of a DUI arrest justified a warrantless blood draw in State v. Perryman, 365 P.3d 628 (Or. 2015). At a suppression hearing an officer testified that it would take approximately 2 to 2-1/2 hours to obtain a warrant. The delay resulted from collecting all the evidence from various sources in order to draft a warrant, going to the magistrate's house to present the warrant or calling for a telephonic warrant, and getting another officer to watch the defendant while he performed those tasks. Id. at. 634. Comparing the facts presented in that case to McNeely the

court held that the warrant application process would have significantly delayed obtaining the blood alcohol evidence even given the availability of a telephonic warrant. Id. at 643-644.

In contrast the record did not support finding that exigent circumstances existed justifying a warrantless blood draw in City of Seattle v. Pearson, 192 Wn. App. 802, 369 P.3d 914 (2016). There police had evidence that the driver of a car involved in a collision had used marijuana prior to driving. Evidence at a suppression hearing established that it took 60-90 minutes to obtain a warrant and that the driver was transported to the hospital where her blood was drawn about 2-1/2 hours after the collision. It also showed that the dissipation of THC in a person's system was dependent on many factors, but generally was completely dissipated within 3-5 hours of consumption. The city failed to show that warrant process could have significantly increased the delay in getting a blood test because it failed to explain why the duties involved in doing so could not have been shared by two of the eight officers on scene at the collision. Thus the city failed to sustain its burden to show that exigent circumstances justified the warrantless blood draw. Id. at 814-817.

In both Perryman and Pierson the defendant brought a pre-trial suppression motion during which a record was developed showing the circumstances of the warrant process in each case. Here the record of the steps police took to attempt to secure the warrant is limited to those facts testified to at trial.

The initial dispatch to the scene occurred at 7:21 p.m. There were five patrol officers and three detectives at the scene at various times. Deputies Peckham and Barker were first on scene and contacted Mr. Quintanilla at around 7:30 p.m. Deputy Wallin, a K-9 officer, arrived and located the defendant. He transferred custody of the defendant to Deputy Lynch about 7:55 p.m. Detective Monson arrived on scene at 8:00 p.m. He was sent to the office to draft a search warrant for blood. Deputy Lynch transferred custody of the defendant to Deputy Ravenscraft. Deputy Ravenscraft then transported the defendant to the hospital at 8:57 p.m. arriving at 9:20. About 9:00 p.m. Detective Lewis arrived on scene and began gathering evidence with Detective Metcalf by walking through the scene and documenting it. Sometime around 9:20 to 9:30 p.m. Detective Monson spoke with a deputy prosecutor who reviewed his draft of the warrant. The deputy prosecutor asked the detective to obtain more information to support a probable cause finding. At

that point the detective notified Deputy Ravenscraft to obtain the blood sample without a warrant because nearly two hours had already passed from the time of the collision. The blood was drawn at 10:15 p.m. – almost three hours after the collision. 10/28/15 358,365, 370, 391-394, 405-406, 422-431; 10/29/15 RP 479, 482-486, 564, 633, 639.

What this record does not show is why he contacted a deputy prosecutor to review the warrant. Nor did it show what additional information the deputy prosecutor required the detective to gather and how long it would take to gather it. All of the evidence leading up to the collision and the defendant's conduct afterwards was observed by someone other than Detective Monson. Most of the evidence was in the possession of civilian witnesses. While civilians gave short written statements to police at the scene, defense counsel demonstrated through cross examination that those statements were not a comprehensive recitation of all the information those civilians possessed. 10/27/15 RP 219, 244, 262-263. If the additional evidence was not contained in the written statements police would have had to conduct additional interviews with those witnesses. There is no record of how much time that might have taken but it most certainly would have further delayed

getting a warrant. The record also does not show what the typical time to contact a magistrate would be in Snohomish County. Nor does it show whether the detective made any initial attempts to contact a magistrate and what the results of those attempts were. The record does not show the travel time involved from the police station to the hospital.

All of the foregoing bears on the warrant process. Depending on what that evidence would show the court could have found that the delay occasioned by the warrant process created exigent circumstances justifying the decision to obtain the defendant's blood without a warrant. Since that evidence is necessary, and it does not appear in the record, the defendant fails to demonstrate the alleged error in admission of the blood test was manifest.

The defendant also fails to establish the necessary prejudice to justify review because the evidence was overwhelming even without the blood evidence. The defendant was charged under alternative theories; that he had been driving recklessly and that he was under the influence or affected by intoxicating liquor or had within two hours after driving an alcohol concentration of .08 or higher as shown by an analysis of his blood or breath. The jury

was instructed that "to operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences. 1 CP 59.

The evidence showed that the defendant was travelling about 100 m.p.h. on a two lane rural road when he passed two cars, and then failed to negotiate a curve. He was unable to stop before he hit the fences that pierced his windshield and seriously injured his passenger. He admitted to drinking beers and whiskey in the hours after work and before the collision. Although he testified that he felt ok to drive, other evidence suggested alcohol had affected him. The black box data showed the defendant's perception and reaction time were compromised. Although a normal reaction time is 1.5 seconds from perception of an event to reaction to that event, the defendant's speed actually increased for 1.5 seconds before there was any attempt to brake at 3 seconds before the first event that cause the car's computer to activate safety equipment. 10/29/15 RP 604-614. When he was contacted by the police there was an obvious odor of alcohol about him. Despite the dramatic events of the evening, the defendant fell asleep at the hospital for about 30 minutes while waiting for the blood draw. This evidence showed that the defendant's judgment

and coordination had been compromised by the alcohol he had to drink, regardless of his blood alcohol level. This evidence overwhelmingly showed the defendant drove in a “rash and heedless manner, indifferent to the consequences.”

Given this overwhelming evidence the defendant cannot show that admission of the blood alcohol results made a difference to the outcome of the case. The blood alcohol level was not much greater than the legal limit. On the other hand much more dramatic evidence demonstrated the defendant was driving recklessly and while under the influence and affected by the alcohol that he had to drink.

2. The Defendant Has Not Shown That He Received Ineffective Assistance Of Counsel.

Alternatively the defendant argues that he received ineffective assistance of counsel when his attorney did not move for suppression of the blood evidence. A claim of ineffective assistance of counsel may be raised for the first time on review. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To demonstrate ineffective assistance of counsel the defendant must show (1) that counsel’s performance was deficient and (2) as a result of that

deficient performance he was prejudiced. McFarland, 127 Wn.2d at 334-335.

There is a strong presumption that counsel's representation was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must overcome the presumption that counsel's performance constituted sound trial strategy. Id. The court will not find the defendant received ineffective assistance of counsel if counsel's actions complained of go to the theory of the case or trial tactics. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut the presumption that that counsel's performance was reasonable the defendant must show that "there is no conceivable legitimate tactic explaining counsel's performance." Id. quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Counsel's performance is judged in light of all of the circumstances at the relevant time. Strickland, 466 U.S. at 690.

To satisfy the prejudice prong the defendant must show that but for counsel's deficient performance the outcome of the proceeding would have been different. Kyllo, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694.

The defendant fails to satisfy the prejudice prong for two reasons. First, there is an insufficient record to show whether or not a suppression motion would have been granted. The circumstances that were established at trial showed that nearly two hours had passed since the collision when the detective faced additional delay in getting a warrant for blood. The officer could have believed that the delay would have threatened the destruction of evidence. A warrantless search under similar facts was upheld based on exigent circumstances in Schmerber. Schmerber, 384 U.S. at 770-771. If counsel would not have prevailed on a suppression motion then the defendant fails to establish that he was prejudiced. McFarland, 127 Wn.2d at 337, n. 4.

Second even if counsel had raised and won a suppression motion, the absence of the blood alcohol evidence would not have altered the outcome of the case. As discussed above there was other evidence that the defendant had been drinking before the collision, and that what he had to drink had impaired his ability to drive. Evidence of alcohol impairment supported both the reckless driving theory of the vehicular assault charge and the DUI theory of that charge under the "affected by" prong. This is particularly so

when coupled with evidence of the defendant's driving at an excessive speed on a curvy two-lane country road.

Finally the defendant fails to show that defense counsel's conduct was not a reasonable trial strategy. Counsel defended on the basis that Mr. Quintanilla's conduct was an intervening act that constituted the proximate cause of the collision. She was aware that the defendant would admit to driving after consuming alcohol, but that he was ok to drive. 10/30/15 RP 802, 806-809; 11/2/15 RP 890-892. Given her strategy and other evidence that the defendant had consumed alcohol counsel she could have concluded the relatively low blood alcohol level would not make a difference.

3. If The Court Considers The Issue And Finds It Was Error To Admit The Blood Alcohol Results It Was Harmless.

If the court does consider the defendant's claim that the court erred in admitting the results of the blood alcohol test, the error was harmless. Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Here there was evidence the defendant had consumed intoxicants before he drove. His excessive speed and crossing a

double yellow line to pass two cars on a two lane country road as he approached a curve was circumstantial evidence his judgment was impaired. His failure to negotiate the curve, and evidence from the black box showing a delayed reaction time was circumstantial evidence that his coordination had been impaired. Taken together this untainted evidence was so overwhelming that any rational trier of fact would have found him guilty. If error in admission of the blood test occurred, it was harmless.

B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE.

The State alleged that the vehicular assault charge was aggravated because the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. RCW 9.94A.535(3)(y). 1 CP 211. The jury found this aggravating factor had been proved. 1 CP 36. The defendant argues that there was insufficient evidence to support this special verdict.

Facts supporting an aggravating circumstance must be proved to a jury beyond a reasonable doubt. RCW 9.94A.637(3). Evidence is sufficient to meet that standard if viewing the evidence in the light most favorable to the State any rational trier of fact could

have found the essential elements beyond a reasonable doubt. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences drawn therefrom. Id.

To find the statutory aggravating factor in RCW 9.94A.535(3)(y) the trier of fact must compare the victim's actual injuries against the minimum injury that would satisfy the definition of the charged crime. State v. Stubbs, 170 Wn.2d 117, 128-129, 240 P.3d 143 (2010). The minimum injury for vehicular assault is "substantial bodily harm." RCW 46.61.522. Substantial bodily harm "means bodily injury which involves a temporary but substantial disfigurement, or which causes temporary but substantial loss of impairment of the function of any bodily part or organ, or which causes a fracture any bodily part." RCW 9A.04.110(4)(b). Evidence which shows the victim suffered great bodily harm would support that aggravating factor to support that finding. State v. Pappas, 176 Wn.2d 188, 192-193, 289 P.3d 634 (2012). "Great bodily harm" is established by evidence of bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes significant permanent loss or

impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c). The aggravating factor may be proved by evidence of injury that substantially exceeded that necessary to prove substantial bodily harm, but are somewhat less than necessary to prove great bodily harm. Pappas, 176 Wn.2d at 192-193.

The evidence presented here established Mr. Quintanilla suffered great bodily harm because he suffered devastating permanent loss of bodily parts and serious permanent disfigurement. Half of his face was sheared off in the collision. He lost an eye, his teeth, and the bone on the left side of his face. Where his eye had been was an open wound with no orbit. He lost much of the bone on the left side of his face. There was insufficient bone left to even anchor an artificial eye. There is no bone in his top jaw so he is unable to have dental implants. His left ear canal was severed down to the skull. The nerves on that side of his face were severed and he will have permanent paralysis there. He has no control over the left side of his mouth which affects his speech. His surgeon stated that Mr. Quintanilla has permanent irreversible disability from his injuries. 10/27/15 RP 157, 228-234.

Mr. Quintanilla also suffered a brain injury that resulted in a cognitive disability. He had to re-learn to walk, talk, and write. His short and long term memory was impaired. And his judgment was impaired. 10/27/15 RP 150-160.

The defendant argues this evidence is insufficient to justify the jury finding of the aggravating factor comparing the injuries Mr. Quintanilla suffered to those in State v. Flake, 76 Wn. App. 174, 883 P.2d 341 (1994), State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), and State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996). Each of these cases predated the amendment to RCW 46.61.522, the vehicular assault statute. Before 2001 the statute required proof of serious bodily injury. In 2001 the statute was amended to require proof of substantial bodily harm. Laws of Washington 2001, Ch. 300, §1. These changes were significant to the court in Pappas. Since the amended statute required a lower standard of injury than previously required the court commented that had Cardenas and Nordby been decided under the current version of the statute the outcome may have been different. Pappas, 176 Wn.2d at 195. Thus those cases that pre-date the amendment to the vehicular assault statute do not define the

parameters of the sufficiency of the evidence for the “substantially greater injury” aggravating factor.

Even if those cases were still persuasive authority, pursuant to the defendant’s argument the injuries present here were sufficient to support the aggravating factor. The defendant argues that evidence supporting the excessive injury aggravator must show risk of death, or permanent disfigurement, or permanent loss or impairment of the function of a body part or organ. BOA at 18. Loss of an eye, teeth, bone, mental and neurological function which will never be regained satisfy that standard. A rational trier of fact could have concluded from the evidence that had Mr. Quintanilla not received immediate medical attention he would have died. The evidence was more than sufficient to support the aggravating factor.

C. THE STATUTORY AGGRAVATING FACTOR IS NOT SUBJECT TO A VAGUENESS CHALLENGE. ALTERNATIVELY, AS APPLIED THE STATUTE WAS NOT VAGUE. THE DEFENDANT HAS NOT PRESERVED A CHALLENGE TO THE JURY INSTRUCTIONS. JURY INSTRUCTIONS ARE NOT SUBJECT TO A VAGUENESS ANALYSIS.

The defendant challenges the aggravating factor that the jury found on the basis that the statute and jury instruction defining that factor are unconstitutionally vague. A party challenging the

constitutionality of a statute has the heavy burden of proving that it is unconstitutional beyond a reasonable doubt. State v. Allenbach, 136 Wn. App. 95, 100, 147 P.3d 644 (2006).

The due process vagueness doctrine serves two purposes. First it provides citizens of fair warning of what conduct they must avoid. Second it protects citizens from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). A vagueness challenge requires showing either (1) that the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) that the statute does not provide ascertainable standards of guilty to protect against arbitrary enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

The sentencing guidelines statutes are not subject to a vagueness challenge because they do not define conduct, allow for arbitrary arrest and criminal prosecution, inform the public of penalties attached to criminal conduct, or vary the legislatively imposed maximum and minimum penalties for the crime. State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). Thus the

defendant's argument that the aggravating factor at issue here is unconstitutionally vague should be rejected.

The defendant argues that Baldwin no longer precludes a vagueness challenge to aggravating factors in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct 2531, 159 L.Ed.2d 403 (2004). He argues that these decisions effectively made the aggravating factors elements of the crime. Presumably he therefore suggests that as elements of the crime the aggravating factors do proscribe conduct that is subject to a vagueness challenge. However, Baldwin has not been overturned. Even after Apprendi and Blakely were decided Baldwin has continued to be applied when aggravating factors are challenged on vagueness grounds. State v. Chanthabouly, 164 Wn. App. 104, 141-142, 262 P.3d 144 (2011), review denied, 173 Wn.2d 1018 (2012). Unless the Supreme Court overturns Baldwin this Court is bound by that decision. State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009), review denied, 169 Wn.2d 1007 (2010).

The defendant argues that because Apprendi and Blakely addressed due process in the context of sentencing factors they are now subject to a vagueness challenge. Neither Apprendi nor

Blakely considered the due process right to notice of sentencing enhancements. Rather the issue before the court in each case dealt with the Sixth Amendment right to a jury trial and the due process right to have the jury find beyond a reasonable doubt every fact used to increase the maximum penalty for an offense. Apprendi 530 U.S. at 475-746, Blakely, 542 U.S. at 305. Since they dealt with a completely different issue neither Apprendi nor Blakely undermine the holding in Baldwin.

Additionally the basis for the court's decision in Baldwin supports a finding that no error occurred. Baldwin reasoned that the sentencing factors were not subject to due process vagueness challenges in part by relying on Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Baldwin, 150 Wn.2d at 460. Lockett noted that in noncapital cases there is no constitutional right to sentencing guidelines. Id. Neither Apprendi nor Blakely addressed Lockett.

The defendant argues that a due process vagueness inquiry applies to aggravating factors because they operate as elements of an offense. This claim should be rejected because aggravating factors are not essential elements of the crime that need to be pled in the information. State v. Siers, 174 Wn.2d 269,

274 P.3d 358 (2012). If they are not essential elements of the crime, then it follows that the statute defining those aggravating factors is not subject to a vagueness challenge because alone it does not proscribe any conduct.

The defendant also argues due process vagueness principals apply to the aggravated penalty statute by citing Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). There the court considered a challenge to a penalty enhancement under the Armed Career Criminal Act Id. at 2555. The court reviewed the standards for a vagueness challenge to that statute noting those principals applied to statutes defining the elements of crime and statutes fixing sentence. Id. at 2557. The court did not discuss its holding in Lockett when it proceeded to conduct a vagueness analysis regarding the residual clause of the statute at issue there. If Johnson does subject the aggravating factor at issue here to a vagueness challenge then under the circumstances of this case the statute passes constitutional muster.

Since RCW 9.94A.535 does not implicate First Amendment rights, such as free speech or free association, whether it is unconstitutionally vague is evaluated in light of the particular facts of the case. Halstien, 122 Wn.2d at 117; State v. Duncalf, 177

Wn.2d 289, 300 P.3d 352 (2013). In Duncalf the defendant relied on Blakely to argue that he could raise a vagueness challenge to RCW 9.94A.535(3)(y) despite the court's decision Baldwin. The court did not decide that issue because under the facts of that case the statute was not constitutionally vague. The defendant had been charged with second degree assault that required the State to prove the victim suffered substantial bodily harm. The victim suffered injuries that were likely permanent. Under those circumstances a person of reasonable understanding would not have to guess that the injuries were significantly greater than those contemplated by the statute, and might subject him to a sentence above the standard range. Duncalf, 177 Wn.2d at 297.

Similarly here Mr. Quintinalla suffered massive permanent damage to his face. He lost half of his face including his eye and teeth. He lost the function of what was left of that side of his face when the nerve was severed. That loss affected his speech. His mental functions were compromised and he had been unable to return to work since the date of the collision. A reasonable person would understand that this kind of injury was substantially greater than contemplated by the legislature when it defined substantial bodily harm in terms of temporary disfigurement or impairment.

The defendant also challenges the statute by arguing that injuries that “substantially exceeds” those necessary to establish the elements of the offense is too subjective to provide an ascertainable standard for applying the aggravating factor. This argument was rejected in Duncalf. There the court noted that the term “substantial” had withstood due process vagueness challenges in the past. The court found the definition of substantial bodily harm was sufficiently objective to compare to a victim’s injuries and found the aggravating factor was not vague under the facts of that case. Duncalf, 177 Wn.2d at 298. Similarly, looking at the definition of substantial bodily injury as a base from which to measure the victim’s injuries here there can be no question that Mr. Quintanilla’s devastating permanent injuries substantially exceeded those injuries necessary to prove the vehicular assault charge. 1 CP 58, 69.

The defendant also challenges the jury instruction on vagueness grounds, arguing they were too subjective to provide the jury standards for applying the aggravating factor to the facts of his case. BOA at 29. The jury was given standard WPIC instructions defining substantial bodily harm which set out the statutory definition for that term. 1 CP 58; WPIC 2.03.01. The jury was

instructed on the aggravating factor using the statutory language. 1 CP 69; RCW 9.94A.535(3)(y).

The defendant did not object to the instruction defining the aggravating factor or the instruction defining substantial bodily harm. 10/30/15 RP 837. The alleged error in the jury instructions is waived unless the defendant demonstrates that constitutes manifest error affecting a constitutional right. RAP 2.5(a)(3), State v. Grodon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To show the alleged error is manifest the defendant must show that he was actually prejudiced, i.e. that the asserted error has a practical and identifiable consequence in the trial of the case. Id. Mr. Quintanilla's injuries were devastating and permanent. They far exceed the temporary injury or disfigurement necessary to establish substantial bodily harm. There could be no confusion about what "substantially exceeds" means in light of the evidence presented. The defendant has not shown that any error in the jury instructions was manifest. The court should therefore refuse to consider his challenge to the instructions for the first time on appeal.

Moreover jury instructions are not subject to a due process vagueness analysis. State v. Releford, 148 Wn. App. 478, 493, 200 P.3d 729, review denied, 166 Wn.2d 1028 (2009). "Unlike

citizens who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a remedy: proposal of a clarifying instruction.” Id., quoting State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006). For that reason also the court should reject the defendant’s challenge to the instruction on vagueness grounds.

D. THE EXCEPTIONAL SENTENCE IMPOSED WAS NOT CLEARLY EXCESSIVE IN LIGHT OF THE DEVESTATING INJURIES SUFFERED BY THE VICTIM.

The standard range for count I, Vehicular Assault was 6-12 months. The standard range for count II, Hit and Run Injury Accident was 12+ to 14 months. 1 CP 24. The State asked the court to impose 60 months on the vehicular assault count to run concurrent with a standard range sentence on the hit and run count. 12/1/15 RP 929. The defense argued the defendant’s military service and lack of criminal history justified a standard range sentence on all counts. 12/1/15 RP 948-952. The court thoughtfully considered both positions before imposing an exceptional sentence of 36 months on the vehicular assault charge and a standard range sentence on the hit and run charge². It cited

² The defendant was also convicted of DWLS 3 and hit and run property damage. The 90 day sentences on each of those charges were run concurrently with the felony charges. 1 CP 16-21.

several reasons why it was rejecting the State's recommendation, but nonetheless imposing the exceptional sentence on that count.

The court found that the jury verdict finding the exceptional sentence was supported by the evidence and that it supplied a substantial and compelling reason justifying the exceptional sentence. "I'm not going to render that verdict a nullity by ignoring it." 12/1/15 RP 959.

The court considered the circumstances of the defendant's conduct noting that the defendant should not have even been driving on that occasion since his license had been suspended. The court noted that the defendant had been regularly driving without a valid license, "[g]oing to work and coming home while suspended, demonstrating, one might say, an utter contempt for the law." 12/1/15 RP 956.

The court considered the defendant's conduct on the date of the collision. The defendant had opportunities to get help for his friend from neighbors who could have called 911. He did not do that but rather ran from the scene knowing that his friend was likely to die but for the quick response of the medical personnel and sheriff's deputies. He ran because he knew that he was in trouble. 12/1/15 RP 957.

The court also considered the severity of the victim's injuries sustained in the collision. The court said:

And then on this occasion, you nearly killed your friend. You nearly killed him, sir. You literally smashed half his face off. He suffered incalculable pain and is permanently disfigured. He will never be the same. One can hope he will be able to perform his chosen career. That is unclear.

12/1/15 RP 956-957.

The court also considered the defendant's military service and lack of criminal history. On balance the court stated that it did not believe that the defendant deserved anything less than three years in prison. 12/1/15 RP 960.

The defendant argues his exceptional sentence should be reversed because it is "clearly excessive." The court should reject this argument because the trial court did not abuse its discretion in setting the length of the exceptional sentence.

An exceptional sentence is reviewed for an abuse of discretion. State v. Souther, 100 Wn. App. 701, 721, 998 P.3d 350, review denied, 142 Wn.2d 1006 (2000). A reviewing court may reverse an exceptional sentence if it finds that the sentence imposed was clearly excessive. RCW 9.94A.585(4)(b). To be "clearly excessive" the defendant must show that the sentence is

clearly unreasonable, i.e. exercised on untenable grounds or for untenable reasons, or that it is a sentence that no reasonable person would have imposed. State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.3d 1123 (1986). If the sentence is based on tenable grounds or tenable reasons then it is excessive only if its length in light of the record "shocks the conscience." State v. Vaughn, 83 Wn. App. 669, 681, 924 P.2d 27 (1996), review denied, 131 Wn.2d 1018 (1997). Trial courts have nearly unbridled discretion in setting the length of the sentence once an aggravating factor supported by the evidence has been found. State v. Burkins, 94 Wn. App. 677, 701, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999). The statutory maximum is the only limit on that discretion. Id. This court has nearly plenary discretion to affirm an exceptional sentence. State v. Chance, 105 Wn. App. 291, 298, 19 P.3d 490, review denied, 144 Wn.2d 1012 (2001).

When the length of an exceptional sentence is challenged as "clearly excessive" courts have looked at various factors such as the maximum term for the offense, the circumstances of the defendant's conduct, and the degree of injury to the victim. In Souther the court upheld a 240 month exceptional sentence on a vehicular homicide conviction under the DUI prong. There the

defendant's culpability was increased because he had prior drinking and driving convictions which should have enhanced his awareness of the dangers of impaired driving. Souther, 100 Wn. App. at 721.

A trial court did not abuse its discretion when it imposed 60 months confinement for a theft charge where the standard range was 2-6 months confinement in State v. Kuntz, 161 Wn. App. 395, 410, 253 P.3d 437 (2011). There the defendant stole about \$347,000 from an elderly man over a 27 month period of time. The court held the sentence that was 210 times the standard range did not "shock the conscience" of the court because it was only half of the statutory maximum, and because of the extent and duration of the theft scheme. Id.

An exceptional sentence of 240 months on a first degree assault conviction was not clearly excessive in State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 197 (2008), review denied, 165 Wn.2d 1050 (2009). The court upheld the sentence in part because the police officer victim suffered life threatening and permanent injuries.

Similar to these cases the facts cited by the trial court justified the length of the exceptional sentence imposed. The defendant had apparently been unlawfully driving for some time

when he committed this offense. Mr. Quintanilla suffered life threatening and life altering injuries. The defendant knew that his passenger was in a terrible state, but he ignored opportunities to save his passenger, choosing to try to escape culpability for his actions instead. The sentence imposed is not even half the maximum penalty that the State had urged the court to impose. Under these circumstances a 36 months sentence is not clearly excessive.

The defendant argues that the sentence is clearly excessive because it is six times the low end of the standard range and three times the high end of the standard range. He argues that this fact is not sufficiently "exceptional" to distinguish him from others convicted of the crime of vehicular assault. Further he argues that his offense was not so aggravated to merit a 36 months sentence. For these reasons he argues the sentence "shocks the conscience" and should be reversed. BOA at 31.

Neither of the factors cited by the defendant bear on the trial court's exercise of discretion in setting the length of an exceptional sentence. The first argument suggests that whether the exceptional sentence is clearly excessive is dependent on the "average case" and on the length of the standard range for the

sentence. The court rejected a rule that would limit the trial court's discretion in setting the length of an exceptional sentence to a specific multiple of the standard range. Oxborrow, 106 Wn.2d at 531-532. It also rejected a limitation on the trial court's discretion by requiring a proportionality comparison to the "average" case. State v. Ritchie, 126 Wn.2d 388, 396-397, 894 P.2d 1308 (1995). Thus, a comparison to other vehicular assault cases does not factor into the length of the sentence. Id. at 397.

The second argument should also be rejected because it ignores all of the evidence and circumstances of the case. It also ignores the nature of the trial court's discretion in setting the length of an exceptional sentence justified by the jury finding that the aggravating factor had been proved. Under the facts of this case a 36 month exceptional sentence is not so excessive that it "shocks the conscience." The sentence should be affirmed.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's convictions and sentence.

Respectfully submitted on September 26, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

PEDRO K. CRENSHAW,

Appellant.

No. 74364-3-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Laura Shaver; lauras@mazzonelaw.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of September, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office