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SUPREME COURT NO. 1008783
COURT OF APPEALS NO. 37871-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FLETCHER,

Petitioner.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION III

OPPOSITION TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Columbia County Prosecutor, is the Respondent in this matter.

II. CITATION TO COURT OF APPEALS DECISION AND ORDER

The Court of Appeals issued an Order on March 31, 2022, affirming Petitioner's conviction.

III. ISSUES PRESENTED FOR REVIEW

Whether a first-degree assault was committed with deliberate cruelty when the victim was rendered defenseless, struck more than fourteen times in the face, mouth and head with a sharp crystal candlestick, disfigured and traumatized, the assault only stopped when the candlestick shattered over the victim's head, and the victim lost three of her five senses.

IV. STATEMENT OF THE CASE

The Incident

Laura Romig was a 69-year-old wheelchair-bound retiree. RP 42, 76-79, 152, 154. Ms. Romig was unable to: sit up unassisted, climb or descend stairs, do laundry, or climb into her bath. RP 79-80,125, 152. Ms. Romig was “a little short of hearing but not much.” RP 111. She lived alone. RP 80.

Petitioner, William Fletcher, assisted Ms. Romig in exchange for money. RP 79, 178. When Mr. Fletcher requested money for drugs, Ms. Romig paid his land lady. RP 88.

On January 7, 2019, Mr. Fletcher went to Ms. Romig’s home. RP 89. He picked up her laundry, and offered to mop. RP 89, 180. Ms. Romig felt cautious that Mr. Fletcher put on a pair of gloves to mop floors. RP 90. She asked, “Why are you putting those gloves on?” RP 89. Mr. Fletcher did not need gloves to use her Swiffer. RP 89-90.

Mr. Fletcher went to her kitchen and fell to the floor. RP 91. He yelled, and “flopped” on the floor like a “fish.” RP 91. While on the kitchen floor, Mr. Fletcher pushed himself away from the kitchen cabinets so that he would not hurt himself. RP

91-92. Ms. Romig did not believe that he needed medical assistance. RP 92, 102-103. She watched for injuries or urine but did not see any. RP 92, 103.

Mr. Fletcher stood “straight up” and “stared” at Ms. Romig. RP 103. He “[c]rouched down then and gave [Ms. Romig] this look [she had] never seen on William’s face, it was frightening. It was demonic. It was very scary.” RP 103. Ms. Romig grabbed her phone to call 911. RP 103. Mr. Fletcher looked around the house and picked up a heavy solid lead crystal candlestick with sharp bottom corners. RP 63, 103. She tried to call the police. RP 105. She could not stand and run away. RP 106. Her only escape route was to roll her wheelchair past Mr. Fletcher, she was trapped. RP 108.

Mr. Fletcher ran towards Ms. Romig, knocked her phone out of her hand, and her eyeglasses off her face. RP 103, 106. He hit Ms. Romig in the face, head and mouth with the candlestick. RP 106-107. She said, “[I] knew if I screamed it would exacerbate his behavior and no one would hear me

anyway. The houses were so far apart.” RP 106. Instead, she told Mr. Fletcher in a low voice, “You don’t want to hurt me, now stop.” RP 106. Mr. Fletcher became more agitated when she spoke. RP 106. He continued “hitting and hitting.” RP 106.

She saw “black a couple of times” and fought to remain conscious as he continued to strike her. RP 106. She “thought if I was – became unconscious he would kill me.” RP 106. Ms. Romig lost count at fourteen strikes, but the beating continued. RP 106-107. Mr. Fletcher broke Ms. Romig’s nose and teeth. RP 143. He knocked out some of her teeth. RP 143. Mr. Fletcher gave Ms. Romig a concussion and caused multiple scalp lacerations and contusions during the beating. RP 143. Her pain was an 8 or 9 on a scale of 10. RP 108. She bled in large amounts from her head. RP 41. He only stopped hitting Ms. Romig when the candlestick shattered over her head. RP 108. The candlestick had blood splatter all over it. RP 59. The broken glass landed in her chair, near her walker, and near her wheel. RP 50-51, 60. There was a large pool of Ms. Romig’s

blood on her wooden floor. RP 41. Mr. Fletcher left Ms. Romig alone in her home and went across the street. RP 70, 109, 180.

After Ms. Romig realized Mr. Fletcher left, she stated, “Well, I was bleeding. I really couldn’t see, and I was trying to get my chair where I could pick up my phone and my glasses and I did but it was - - I couldn’t hear 911 on the other end.” RP 109. She could not hear the dispatcher due to the beating. RP 109-111. A neighbor arrived and assisted her with the call. RP 111.

Officer Brooke Connor Ehr arrived on scene. RP 40-41. He stated, “There was a large amount of blood coming from her head, but I could not tell exactly where from her head. She was using a towel that she had in her hand to brush off the blood, but again there was so much blood I could not tell exactly where her injuries were from.” RP 41. She was shaking. RP 41. Office Ehr stated, “When I tried to reassure her, she just kept talking and I – I actually realized that she

actually couldn't hear me. I had to scream to actually communicate with her for her to be able to actually talk to me. So, I had to scream to the point that the other deputy could hear me outside for her to answer one of my questions. RP 42. Ms. Romig "was frantically telling [him] to go find the male..." RP 42.

Ms. Romig received medical treatment at Dayton General Hospital and was transported via helicopter to a level two trauma center, Sacred Heart Hospital. RP 111-112, 143. Ms. Romig stated that her hearing "was all like it was in a well, a deep well and I was gurgling." RP 112. At Sacred Heart Hospital, she received speech therapy. RP 118. She was then transferred to Booker Rest Home for physical and occupational therapy. RP 117-118. It took approximately four days for her eyesight to get "better," but she had double vision and gold rings. RP 112.

Ms. Romig lost three of her five senses: hearing, smell and eyesight. RP 114, 116, 120-121. She suffered pain for a

month. RP 117. She got implants to replace her teeth. RP 121, 132. She stated, [my teeth] "...were broken, knocked out, some of them. So horrible that I couldn't even stand to look at them because it was like pieces. That was really bad." RP 120. She stated, "I've lost my hearing so badly and my hearing doctor wanted me to wait over a year before...he could be sure that it was a permanent -- permanent damage. And I saw him about a month ago and he said it was permanent." RP 78. She got hearing aids to address her hearing loss. RP 116, 121. She stated, "I have a very hard -- if I can't look at someone's face, it's very hard for me to hear them, and I tend to lean in. It's hard to talk about really." RP 121. Her nose was "severely broken" and caused breathing issues, congestion, and loss of smell, but Ms. Romig refused surgery on her nose because it required breaking her nose again and swelling. RP 119-120. She stated, "I don't have [a sense of smell], I miss it too." RP 120. Her vision never completely returned. RP 114.

Ms. Romig suffers from nightmares and post-traumatic stress disorder. RP 117-118. She stated, “I’ll never be the same. I’ve lost so much and it’s been so hard but physically I’ll never be the same. Hearing aids, treatment for horrible headaches.” RP 121. She continued, “Emotionally, am I the same person? No. I was one of those women that was never afraid of anything...Before this beating if I was testifying at trial, my lips wouldn’t quiver. I wouldn’t want to cry...I was a very strong woman.” RP 122.

After Ms. Romig returned to her home, she was terrified. RP 119. She said, “Going back in that living room and bedroom where I went to try to get a towel was very hard. Being alone I mean, every creak and you know old houses how they creak, it would wake me up and I was afraid.” RP 119. She said, “I sold that house. I knew – I wanted to leave Dayton although I loved it here. But I just don’t want to live here. So, I moved and – and got an apartment in a secure building. RP

119. Even after relocating, Ms. Romig still felt anxiety and stress. RP 119.

Jury Instructions

The trial court provided the jury with several instructions explaining assault, deliberate cruelty, and great bodily harm. RP 204-218; CP 131-155.

First degree assault means, “A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he or she assaults another and inflicts great bodily harm or assaults another by any force or means likely to produce great bodily harm or death.” RP 210; CP 139, (Instr. 6).

Great bodily harm means “bodily harm that creates a probability of death or that caused a significant serious permanent disfigurement or that causes a significant permanent loss or impairment of the function of any bodily part or organ.” RP 211; CP 141, (Instr.8).

Deliberate Cruelty means “gratuitous violence or other conduct which inflicts physical, psychological or emotional pain as an end in itself and which goes beyond what is inherent in the elements of the crime or normally associated with the commission of the crime.” RP 211-212, 214; CP 144, (Instr. 11), CP 151, (Instr. 18).

Mr. Fletcher was convicted in Columbia County Superior Court of Assault in the First Degree. RP 248. The jury found via special verdict that Mr. Fletcher’s conduct during the commission of the crime manifested deliberate cruelty. RP 248.

Appeal

In his direct appeal, Mr. Fletcher raised three issues:

- a. The State failed to prove the aggravating factors of deliberate cruelty.
- b. The State failed to prove that the victim was particularly vulnerable.
- c. The trial court erred when it prohibited Mr. Fletcher from presenting voluntary intoxication evidence as a defense.

(Defendant's Brief).

As to the first assignment of error, Mr. Fletcher argued that "great bodily harm" encompassed the most serious violent and traumatic injuries short of death, thus, any injuries contemplated by first-degree assault cannot be characterized as deliberately cruel. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10, 2022 WL 970288 (Ct. App. Mar. 31, 2022); Defendant's Brief at 16.

The majority held in an unpublished decision that the jury's verdict on deliberate cruelty was justified. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *9 (Ct. App. Mar. 31, 2022). The majority held:

[M]r. Fletcher did not simply attack Ms. Romig in a way sufficiently serious to cause great bodily harm. He brutalized Ms. Romig so that she experienced severe pain and psychological trauma. Mr. Fletcher terrorized Ms. Romig by beginning his attack with a demonic look. He then knocked the phone out of Ms. Romig's hands when she tried to call 911 for help. Mr. Fletcher did not end his attack until the candlestick shattered. Mr. Fletcher...was deliberately cruel. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10-11 (Ct. App. Mar. 31, 2022).

The dissent argued that “great bodily harm” is associated with intense pain and emotional suffering, which are not valid distinctions in a first-degree assault. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *16 (Ct. App. Mar. 31, 2022). The dissent argued exceptional sentences are limited to “exceptional circumstances.” *Fletcher*, 2022 Wash. App. LEXIS 722, at *15. The dissent’s test is whether a first-degree assault is typically accompanied by intense pain and emotional suffering. *Fletcher*, 2022 Wash. App. LEXIS 722, at *16-17. The majority’s “deliberate cruelty” test, according to the dissent, was whether physical injuries, no matter how severe, are always accompanied by intense pain and emotional suffering. *Fletcher*, 2022 Wash. App. LEXIS 722, at *16-17. The dissent would affirm the conviction and remand for resentencing without the deliberate cruelty aggravator. *Fletcher*, 2022 Wash. App. LEXIS 722, at *16.

The Court of Appeals rejected Mr. Fletcher’s second and third assignments of error. *See State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *12-14 (Ct. App. Mar. 31, 2022). Mr. Fletcher does not challenge those portions of Court of Appeals’ decision. *See* Petition.

Mr. Fletcher now petitions this Court to review the decision on the deliberate cruelty aggravator. Petition at 1-2. In support, Mr. Fletcher argues that the majority misinterpreted *Tili* and that the facts of Mr. Fletcher’s case are not unusual or unique. Petition at 3.

V. ARGUMENT

Mr. Fletcher’s claim that the injuries contemplated by first-degree assault encompass most serious traumatic and violent injuries short of death, and thus, cannot ever be deliberately cruel, is meritless. Defendant’s Brief at 16; Petition at 10-11; *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10, 2022 WL 970288 (Ct. App. Mar. 31, 2022). Mr. Fletcher asks, “What lens?” Petition at 12.

He designs a three-part test. Petition at 13. Mr. Fletcher does not claim that the jury instructions were improper. *See* Petition. He wants this Court to review the facts of this case under a new definition and standard, one that was never provided to the jury. Petition at 12-14. His claim should be rejected.

Deliberate cruelty should not be reduced to a “test” where in hindsight, appellate courts checks boxes – it is a question of fact for the jury. Petition at 12-13. Mr. Fletcher seeks to reduce the determination of deliberate cruelty to a science and misapplies *Stubbs*. Petition at 10; *State v. Stubbs*, 170 Wn.2d 117, 127-28, 240 P.3d 143 (2010).

A jury’s deliberate cruelty determination is reviewed under an evidence sufficiency standard. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). The State must prove all facts supporting deliberate cruelty beyond a reasonable doubt. RCW 9.94A.537(3); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Evidence is sufficient if, after viewing the evidence in the light most

favorable to the State, any rational jury could find all supporting facts beyond a reasonable doubt. *Yates*, 161 Wn.2d at 752. An evidence sufficiency challenge admits the truth of the State's evidence and any inferences the jury may reasonably draw from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1073 (1992). Courts defer to the jury's assessment of witness credibility and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 1315 (1989).

The majority properly interpreted and applied *Tili* when it analyzed whether the Mr. Fletcher was deliberately cruel, and their decision is consistent with *Tili*. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *9 (Ct. App. Mar. 31, 2022). They held, “Mr. Fletcher did not simply attack Ms. Romig in a way sufficiently serious to cause great bodily harm. He *brutalized* (*emphasis added*) Ms. Romig...” *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10-11 (Ct. App. Mar. 31, 2022).

In *Tili*, this Court considered the psychological or emotional harms as an aggravator under deliberate cruelty and the fact that the defendant's actions went beyond what was necessary to gain the victim's compliance so that he could rape her. *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003). This Court stated, "Tili threatened to kill her and, in fact, did injure her when he repeatedly struck L.M. in the head with a heavy pan until she fell to her knees. He penetrated her vaginally and anally, and further degraded L.M. when he forced her to say she 'liked it.'" *Tili*, 148 Wn.2d at 370. Before leaving her apartment, Tili punched her in the head and bit her back. *Tili*, 148 Wn.2d at 371. This Court disagreed with Tili's argument that his actions were simply elements of first-degree rape. *Tili*, 148 Wn.2d at 371.

Viewing the evidence in the light most favorable to the State, a rational jury could find that Mr. Fletcher was deliberately cruel. *Yates*, 161 Wn.2d at 752. Mr. Fletcher could have caused "great bodily harm" by striking Ms. Romig one or

two times in the head with his hands, but here, his weapon of choice was a heavy lead crystal candle stick with sharp ends. RP 63, 103. It wasn't chosen based upon proximity, he hunted for this weapon. RP 103. Mr. Fletcher held the candlestick in his hand and swung it hard into Ms. Romig's face and skull. RP 106-107. Mr. Fletcher hit her more than fourteen times. RP 106-107. One or two strikes to her skull with the candlestick could have been enough for first-degree assault.

Mr. Fletcher inflicted physical pain as an end in and of itself. The attack was unprovoked – there was no argument, request for drugs or money prior to the attack. RP 103-111. Ms. Romig did not fight back or resist. RP 103-111. The jury could reasonably conclude that Mr. Fletcher attacked her for no other purpose than to inflict pain. Mr. Fletcher whaled on Ms. Romig and his actions went beyond what is required to satisfy the crime of first-degree assault. RP 106-107. More than fourteen strikes to the Ms. Romig's face, skull, and mouth required great desire and concentration on the part of Mr.

Fletcher not just to beat her, but to make Ms. Romig suffer. RP 106-107. She had lacerations and was bleeding on her scalp, but he kept hitting her. RP 106, 143. She begged him to stop in a calm voice, but he kept “hitting and hitting.” RP 106.

Continuing after she begged him was cruel. She blacked out, and he kept “hitting and hitting.” RP 106. Beating after lost consciousness was cruel. He broke her teeth and kept “hitting and hitting.” He knocked her teeth out and kept “hitting and hitting.” RP 106, 143. He broke her nose and kept “hitting and hitting.” RP 106, 143. During the beating her pain was an 8 or 9 out of 10. RP 108.

Mr. Fletcher’s conduct went beyond the elements of first-degree assault. A broken nose, broken teeth, or knocked out teeth would have been enough. Mr. Fletcher caused great bodily harm by knocking out and breaking Ms. Romig’s teeth – causing her to permanently lose her teeth and permanently disfigure her smile. RCW 9A.04.110(4)(c); RP 120-121.

Whether she could get dental implants to improve her

appearance or assist with eating is not a consideration in deliberate cruelty aggravator. RCW 9A.04.110(4)(c). Mr. Fletcher permanently impaired Ms. Romig's senses of hearing and sight. RP 114, 116, 121. He caused her to permanently lose her sense of smell. RCW 9A.04.110(4)(c); RP 120. Just because Ms. Romig "declined nose surgery" that would require the surgeon to break her nose again, more pain, and a recovery period does not mean that the injury is not great bodily harm or permanent loss or impairment of her nose and sense of smell. RCW 9A.04.110(4)(c); Petition at 6. Prosthetic devices cannot make her whole. In her words, "I'll never be the same." RP 121. Mr. Fletcher's actions were intentional and sustained, he didn't want to just hurt Ms. Romig, he wanted her to hurt.

Mr. Fletcher acted with gratuitous violence. Mr. Fletcher only stopped hitting Ms. Romig when the candlestick shattered into pieces – against Ms. Romig's skull – and he was forced to stop because he no longer had a weapon. RP 108. He could have stopped hitting Ms. Romig with the candlestick at any

point, but he liked hitting her, he got satisfaction from it, and he kept going until he lost his weapon. RP 108.

Mr. Fletcher inflicted psychological and emotional pain and suffering, in addition to physical pain and injury. Before the assault, Mr. Fletcher got off the floor, stared at Ms. Romig, and gave her a demonic look. RP 103. The staring and crouching down had the intended effect – to instill fear. RP 103. She was so afraid she reached for her phone to call 911 believing she was in danger. RP 103. After the assault, Ms. Romig felt so unsafe in her home that she sold her house and moved away. RP 119. She had trouble sleeping, nightmares and post-traumatic stress disorder even in her new home. RP 117-118.

In sum, viewing the evidence in the light most favorable to the State, a rational jury could find that Mr. Fletcher acted with deliberate cruelty – that he used gratuitous violence to cause Ms. Romig physical, psychological or emotional pain as an end in itself, and went beyond what was necessary for first-

degree assault. *Yates*, 161 Wn.2d at 752; RP 211-212, 214; CP 144, (Instr. 11), CP 151, (Instr. 18).

The majority's reliance on the demonic look that terrified Ms. Romig, removal of her only means of help or defense – a cell phone – was proper. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10, 2022 WL 970288 (Ct. App. Mar. 31, 2022). A finding of deliberate cruelty need not be based upon injuries to the victim. The intent of the defendant may also give rise to an exceptional sentence. *See State v. Ferguson*, 142 Wn.2d 631, 634, 15 P.3d 1271 (Wash. 2001), *citing State v. Bartlett*, 128 Wn.2d 323, 333-34, 907 P.2d 1196 (1995). Mr. Fletcher intended and succeeded in scaring Ms. Romig prior to the assault. Repeated strikes until the candlestick shattered was an appropriate factor. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *10, 2022 WL 970288 (Ct. App. Mar. 31, 2022). *See State v. Sims*, 67 Wn. App. 50, 61, 834 P.2d 78 (1992), *review denied*, 120 Wn.2d 1028, 847 P.2d 481

(1993)(Defendant deliberately cruel when he inflicts more blows than are necessary to accomplish the underlying crime, or the method of the crime is particularly traumatic). Fourteen strikes by hand – a prolonged and drawn-out attack – could permit a jury to find that Mr. Fletcher intended to inflict physical, psychological or emotional pain as ends in themselves.

Mr. Fletcher’s act of repeatedly and powerfully hitting Ms. Romig on the head with a candlestick, causing her to become unconscious at times, was gratuitous and an aggravating factor. In *Gordon*, the victim was on the ground when the defendants placed him in a chokehold and continued hitting him, stomped on his head and kicked him, “although their punches had already felled him.” *State v. Gordon*, 172 Wn.2d 671, 681, 260 P.3d 884, 888 (2011). This Court held that the “particularly savage beating” was deliberately cruel. *Gordon*, 172 Wn.2d at 681.

Mr. Fletcher’s claim that the majority “failed to discuss how this [demonic] look made [Ms. Romig’s] pain exceed what is normally associated with first degree assault” conflates physical pain with psychological or emotional harm. Petition at 14. His argument should be rejected because physical pain and psychological/emotional pain are distinct harms. Further, it is possible to commit first-degree assault without intimidating and disarming the victim of the only means of help she has, rendering her helpless.

Similarly, the dissent conflates emotional suffering with first-degree assault. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *16-17 (Ct. App. Mar. 31, 2022). The dissent argued that deliberate cruelty is based on whether a first-degree assault is typically accompanied by intense pain and emotional suffering. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *16-17 (Ct. App. Mar. 31, 2022). Emotional suffering is not an element of first-degree assault. RCW 9A.36.011. Further, emotional suffering is not

an element of great bodily harm. RCW 9A.04.110(4)(c). The dissent's standard reads a requirement into first-degree assault and great bodily harm that does not currently exist. The inquiry about whether first-degree assault is "typically accompanied" by intense pain and emotional suffering should be rejected by this Court.

The standard that the majority followed according to the dissent is correct –whether physical injuries, no matter how severe, are always accompanied by intense pain and emotional suffering. *State v. Fletcher*, No. 37871-3-III, 2022 Wash. App. LEXIS 722, at *9, 16-17 (Ct. App. Mar. 31, 2022). It is possible to inflict physical injury upon someone without inflicting intense pain and emotional suffering. Crimes that cause near death or immediate loss of consciousness can inflict physical injury but no intense pain or emotional suffering. For example, shooting a victim in the back or head and immediately placing him into a coma. Further, the way a crime

is committed can inflict intense pain and emotional suffering which can merit additional punishment.

Mr. Fletcher cites *Stubbs* in support of his argument. Petition at 13; *State v. Stubbs*, 170 Wn.2d 117, 127-28, 240 P.3d 143 (2010). Mr. Fletcher’s claim that the majority failed to cite any cases when it found deliberate cruelty is meritless. Petition at 7. Mr. Fletcher ignores that deliberate cruelty is a question of fact for the jury based on the facts and circumstances, and not a scientific test. *Stubbs* discusses a separate aggravating factor from deliberate cruelty – Severity of Injury. *Stubbs*, 170 Wn.2d at 127-28.

Per *Stubbs*, injuries have different severities: “bodily injury,” “physical injury,” “bodily harm,” “substantial bodily harm” and “great bodily harm” and death, the ultimate injury. RCW 9A.04.110; *Stubbs*, 170 Wn.2d at 128-130. Because severity of injury is a very different aggravator than deliberate cruelty, *Stubbs* does not apply. The word cruel does not even appear in the *Stubbs* opinion. *Stubbs*, 170 Wn.2d 117.

This Court held in *Stubbs* that “severity of injury” is an aggravator that was already part of the elements of the offense of first-degree assault because “great bodily harm” is the greatest harm short of death. *Stubbs*, 170 Wn.2d at 127-28. This Court noted that RCW 9.94A.535(3)(y) created a test that requires comparison of the victim's injuries against the minimum injury necessary to satisfy the offense. *Stubbs*, 170 Wn.2d at 128-29; RCW 9.94A.535(3)(y). No such test exists for deliberate cruelty.

Deliberate cruelty is not incorporated into first-degree assault. RCW 9A.36.011. Under Mr. Fletcher’s rationale, any perpetrator of first-degree assault can do whatever they want for as long as they want to the victim, and as long as the victim doesn’t actually die, then the court would be unable to impose any additional penalty beyond the standard range for first-degree assault. Petition at 11-15. The logical extension of Mr. Fletcher’s argument would be that first-degree assault defendants would become except from certain Sentencing

Reform Act aggravating factors under RCW 9.94A.535 that could apply to other felony defendants. Petition at 11-15; RCW 9.94A.535.

The jury disagreed with Mr. Fletcher's argument that this assault did not "shock" the conscience or that it was not deliberately cruel. RP 248. This Court should not second-guess the jury's determination of deliberate cruelty. The Court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Whether the crime was committed in a deliberately cruel manner is a fact specific and case specific determination, based on the circumstances of the crime. Factfinders know deliberate cruelty when they see it. *See State v. Campas*, 59 Wn. App. 561, 566, 799 P.2d 744, 747 (1990)(Deliberate cruelty – Defendant repeatedly bludgeoned and stabbed victim leaving her barely alive but in pain and agony until she died); *State v. George*, 67 Wn. App. 217, 222, 834 P.2d 664, 667-68 (1992)

(Deliberate cruelty – gratuitous repetition of blows) *overruled on other grounds*; *State v. Berube*, 150 Wn.2d 498, 514, 79 P.3d 1144, 1152 (2003)(Deliberate cruelty – Child forced to run in circles around a couch and chased with belt because defendant thought he was lazy, smacked when he looked back at defendant).

Mr. Fletcher asks this Court to establish a rule that would make it impossible to ever impose deliberate cruelty as an aggravator in first-degree assault. Just as *Stubbs* held that “severity of injury” can never be an aggravator in first-degree assault because an element of that crime is great bodily harm, Mr. Fletcher hopes to extend the reasoning in *Stubbs* to the deliberate cruelty aggravator. Petition at 16; *Stubbs*, 170 Wn.2d at 127-28. Even where a statute proscribes behavior that generally could be described as deliberately cruel, it remains possible for a defendant to engage in gratuitous violence more egregious than typical. *State v. Russell*, 69 Wn. App. 237, 253, 848 P.2d 743, 753 (1993). This Court should

decline to extend *Stubbs*' reasoning such that deliberate cruelty could never be an aggravator in first-degree assaults because deliberate cruelty is not an element of the crime and it is a fact-specific determination for the jury.

VI. CONCLUSION

The State respectfully requests that the petition for review should be denied and that the order of the Court of Appeals be affirmed.

This document contains 4843 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 17th day of June 2022.

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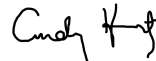
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on the 17th day of June, 2022.



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