69227-5

69227-5

NO. 69227-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES HUDEN,

Appellant.

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

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JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence based on the deceased's particular vulnerability because the evidence was insufficient to prove the aggravating factor beyond a reasonable doubt.

2. RCW 9.94A.535(b)(3), describing the aggravating factor that the victim was particularly vulnerable, is unconstitutionally vague in violation of due process.

Issues Pertaining to Assignments of Error

1. The aggravating factor in this case applies only if the victim is more vulnerable than a typical victim of the offense and if that vulnerability is a substantial factor in the commission of the offense. Here, the victim was shot in the head at point blank range without warning. Did the State fail to prove a person is more vulnerable to this type of attack merely because he is seated in a car and wearing a seatbelt?

2. A penal statute that fails to set forth objective guidelines to guard against arbitrary application is unconstitutionally vague in violation of Fourteenth Amendment due process. The "particularly vulnerable" aggravator in RCW 9.94A.535(3)(b) requires the jury to determine whether the victim was more vulnerable than a typical victim of the offense. Because a jury has no way to know what a typical victim looks like, is this aggravator unconstitutionally vague?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County prosecutor charged appellant James Huden with first degree murder, alleged the victim was particularly vulnerable, and alleged Huden was armed with a firearm at the time of the offense. CP 63-64. The jury found him guilty as charged and the court imposed an exceptional sentence of 960 months. CP 3-6, 14-16. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

After failing to return from an errand the day after Christmas, Russell Douglas was found dead in his car on Whidbey Island on December 27, 2003. 4RP[1] 314, 318. His wife Brenna Douglas, from whom he was separated at the time of his death, testified Douglas was abusive to her and their children, to the extent that at one point, she sought a restraining order against him. 4RP 321-22. The separation arose because Douglas had had yet another affair and was seeing someone else. 4RP 308, 320. Nevertheless, Brenna Douglas testified the separation was amicable, and, over the holidays, she and Douglas were attempting to reconcile. 4RP 315,

[1] There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 18, 2012; 2RP – July 6, 2012; 3RP – July 10, 2012; 4RP – July 11, 2012; 5RP – July 12, 2012; 6RP – July 13, 2012; 7RP – July 16, 2012; 8RP – July 17, 2012; 9RP – July 19, 2012; 10RP – July 20, 2012; 11RP – July 23, 2012; 12RP – Aug. 21, 2012.

327. Their business relationship in running the beauty salon the couple owned together continued to be good, she testified. 4RP 300, 330.

Initially, there were no leads. 5RP 564. Douglas' death was investigated as a homicide in part because there was an obvious gunshot wound to the head but no gun was found at the scene. 5RP 385-89. The coroner and medical examiner testified the gunshot wound caused death within minutes at most, and voluntary movement would have been impossible almost instantly. 5RP 522-23, 530, 546, 553. The coroner also opined Douglas was shot where he was found, seated in the driver's seat of his car. 5RP 505. Although the seat belt was not fastened when Douglas was found, the coroner opined it must have been unfastened after the shooting because an area of the belt located above the wound was saturated with blood, while a lower area was free from blood as if it had been covered with the seatbelt at the time of the wound. 5RP 492-93, 495, 506.

In the summer of 2004, Island County detectives visited Huden and his wife in their Florida home after receiving several phone calls from Huden's friend William Hill. 5RP 583-85. Hill described Huden as his "best friend." 5RP 684-85. The friends met in 2001 and played together in a band for two years. 5RP 636-37. They also spent time together socially and became very close. 5RP 638-39. Hill walked Huden's bride down the aisle

at his wedding. 5RP 639. One thing the friends had in common was a childhood with abusive parents. 5RP 642.

Hill described how his friend Huden had returned to Whidbey Island (where he grew up) to attend a funeral and, while there, had fallen for a woman named Peggy Thomas. 5RP 644-45. In 2003, Hill testified, Huden told him he was leaving his wife and moving to Las Vegas to be with Thomas. 5RP 647. Then, in February 2004, Huden was back in Florida. 5RP 650. About two weeks after Huden's return, he and Hill attended a jam jam session together. 5RP 651. During the drive there, Hill claimed Huden said he had found a man who was an abuser, like his much-hated stepfather, and had murdered him. 5RP 653.

Hill testified Huden told him the only people that knew were Peggy Thomas and the female friend she worked with at the hair salon. 6RP 654. Hill testified Huden described how he and Thomas lured the man to a secluded spot claiming to have a birthday present from Thomas for the man's wife, and then shot him in the head. 6RP 655-56.

When detectives confronted Huden with his friend's accusation, Huden replied he did not know why anyone would say such a thing. 8RP 923. He admitted he and Peggy Thomas had visited Whidbey Island at Christmas in 2003. 8RP 924. He told detectives he met Russell Douglas briefly when he delivered a gift from Peggy for Douglas' wife. 8RP 927,

937. He told detectives he had never owned a firearm. 8RP 924. Detectives did not arrest Huden; they drove him back to his home after interviewing him at the local police station. 8RP 944-45.

Roughly two weeks after interviewing Huden, the Island County Sheriff's Office got a call from law enforcement in New Mexico regarding a firearm that had been turned in. 7RP 776; 8RP 945. Keith Ogden, another friend of Huden's, testified that in October 2003, he taught Huden to fire a gun Huden had recently bought. 7RP 755, 761. After some practice in Ogden's back yard in Las Vegas, Ogden testified, he simply left the shell casings and bullets where they fell. 7RP 758-59. After Christmas, Ogden said, Huden invited him to lunch and asked him to keep the gun because Peggy Thomas' young daughters would be living with them. 7RP 758. When a cousin called him after learning about Douglas' death on the Internet, Ogden turned the gun over to his local sheriff's office. 7RP 768. After learning about the weapon, the detectives returned to Florida to find Huden, but were unable to do so. 8RP 945.

A toolmark examiner from the Washington State Patrol Crime Laboratory testified the bullet taken from Douglas' head and the ones found in Ogden's back yard were all fired from the Bersa .380 that Ogden said was Huden's. 7RP 829-36. A partial DNA profile was obtained from the weapon, and Huden was a possible match, along with one in every 100

people. 8RP 877. The latent print examiner testified Huden's fingerprints were found on several pages of the manual for the Bersa .380. 8RP 907-08.

The State also presented a criminal complaint for unlawful flight to avoid prosecution against Huden and an accompanying arrest warrant showing Huden was arrested in Mexico in June 2011. Exs. 75, 76; 8RP 912-13. A federal marshal testified the fact that Mexico's immigration service was involved in the arrest, and the absence of any record of legal entry into Mexico, meant Huden must have been in Mexico illegally. 8RP 915-16.

Huden presented alibi testimony from a friend he had lunch with in Tukwila on December 26, 2003 and expert testimony refuting the claim that Douglas was shot in his car wearing a seatbelt. 9RP 1044, 1150-51. The defense argued Hill and Ogden were not credible and their stories did not make sense. 10RP 1253-55. The State argued Douglas was a particularly vulnerable victim because, at the time he was shot, he was seat belted into his car with no opportunity to run. 10RP 1246.

C. ARGUMENT

1. THE EXCEPTIONAL SENTENCE WAS UNWARRANTED BECAUSE A PERSON WEARING A SEATBELT IS NOT PARTICULARLY VULNERABLE TO A SUDDEN GUNSHOT TO THE HEAD.

A trial court must impose a sentence within the standard range for the offense unless it finds substantial and compelling reasons to support an

exceptional sentence. RCW 9.94A.535. Facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. State v. Suleiman, 158 Wn.2d 280, 288-289, 143 P.3d 795 (2006). A sentencing court may rely on a jury finding of an aggravating factor if it finds substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.537.

Exceptional sentences are reversed on appeal when the evidence in the record does not support the reason given or when the reasons given do not justify an exceptional sentence. RCW 9.94A.585. The jury's finding of particular vulnerability is reviewed for substantial evidence, *i.e.* whether, viewing the evidence in the light most favorable to the State, any rational person could have found the asserted fact beyond a reasonable doubt. State v. Hyder, 159 Wn. App. 234, 259, 244 P.3d 454 (2011); State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010).

The 80-year exceptional sentence imposed in this case rests on the aggravating factor that the defendant knew or should have known the victim was particularly vulnerable. CP 5-6, 13, 14; RCW 9.94A.535(3)(b). The evidence was insufficient to establish this aggravating factor because Douglas was no more vulnerable than other victims of similar attacks and the seatbelt was not a substantial factor in the offense.

An exceptional sentence may be imposed if "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). This aggravating factor requires both (1) that the victim be more vulnerable to the particular offense than other victims would be and (2) that the particular vulnerability was a substantial factor in the commission of the crime. State v. Jackmon, 55 Wn. App. 562, 566-67, 778 P.2d 1079 (1989).

Jackmon illustrates these two requirements. In that case, the victim was shot in the neck from behind while sitting at a desk. Id. The trial court imposed an exceptional sentence based in part on the aggravator that the victim was particularly vulnerable because of his pre-existing broken ankle.[2] Id. at 565.

The court determined the question on appeal was whether the broken ankle "rendered the victim more vulnerable to the particular offense than a non-disabled victim would have been." Id. at 567. The court concluded the victim's broken ankle did not render him any more vulnerable to this type of attack than any other person: "The victim was shot from behind, apparently without warning, while sitting down. It is highly unlikely that an able bodied person would have been able to escape Jackmon's attack." Id. Therefore,

[2] At the time, former RCW 9.94A.390(2)(b) permitted an exceptional sentence if the trial court found "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."

the court held the evidence was insufficient to justify an exceptional sentence based on the victim's particular vulnerability. Id.; see also State v. Serrano, 95 Wn. App. 700, 710-12, 977 P.2d 4 (1999) (victim shot five times in the back while working in a cage on a hydraulic lift; court held vulnerability of being in lift cage was not a substantial factor).

The facts of this case directly parallel Jackmon and Serrano. Douglas was shot in the head at point blank range. 5RP 530, 537. The attack was almost certainly a surprise because he was apparently expecting a gift for his wife. 6RP 655. As in Jackmon, it is "highly unlikely" that even a person not wearing a seatbelt, or even not in a car, would be able to escape from such an attack. 55 Wn. App. at 567. The seatbelt was not a substantial factor in accomplishing the crime, and Douglas was no more vulnerable than any other victim of a surprise attack with a firearm.

The manner in which the offense was committed did not make Douglas particularly vulnerable. The State therefore failed to prove the aggravating factor beyond a reasonable doubt and there was thus no substantial or compelling reason to support the exceptional sentence. RCW 9.94A.537(6). Huden respectfully requests this Court reverse the exceptional sentence and remand for imposition of a sentence within the standard range.

2. THE "PARTICULARLY VULNERABLE" AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE.

a. Since *Blakely*,[3] a Statute Violates Due Process When It Permits Increased Punishment Based on a Jury Finding but Is Too Vague to Prevent the Jury from Making an Arbitrary Decision.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). When a challenged provision does not involve First Amendment rights, it is evaluated as applied. Douglass, 115 Wn.2d at 182.

Prior to the landmark decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Washington's Supreme Court held that the void-for-vagueness doctrine did not apply to aggravating

[3] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

factors used to increase criminal sentences beyond the standard range.[4] State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The Baldwin court reasoned that the aggravating factors detailed in the Sentencing Reform Act to limit judicial sentencing discretion did not implicate due process vagueness concerns because there is no constitutional right to sentencing guidelines and because the guidelines do not set penalties. Id. at 459-61.

But since Blakely, the Baldwin rationale no longer stands. Aggravating factors are now the equivalent of elements of a more serious offense and, therefore, must be found by a jury beyond reasonable doubt. Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (quoting Apprendi v. New Jersey, 530 U. S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); State v. Benn, 161 Wn.2d 256, 263, 165 P.3d 1232 (2007). Blakely, Apprendi, and their progeny rest on the Sixth Amendment right to a jury trial, applied to the states via the right to due process of law under the Fourteenth Amendment. Apprendi, 530 U.S. at 476. Fourteenth Amendment due process also requires striking down statutes that are so vague as to permit arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. This line of cases makes clear that Fourteenth Amendment due process applies, not merely to elements of the offense, but

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[4] The issue of whether aggravating factors may be challenged for vagueness post-Blakely is currently pending at the Washington Supreme Court in State v. Duncalf, no. 86853-1. Oral argument was held September 13, 2012.

to additional facts that increase the punishment that can be imposed. As the court explained regarding the sentencing enhancement at issue in Apprendi:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently

Apprendi, 530 U.S. at 476.

Under due process vagueness principles, the elements of a crime must be sufficiently clear as to prevent arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. Since Blakely and Apprendi, the same due process concerns that apply to elements of an offense, also apply to aggravating factors. As the Court has noted, the requirements of due process may not be avoided simply by labeling the statute differently:

> Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague

Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 520, 15 L. Ed. 2d 447 (1966) (discussing a Pennsylvania statute permitting juries to require acquitted defendants to pay court costs on pain of imprisonment). The aggravating factor under RCW 9.94A.535(3)(b) provides the State with a procedure for depriving a defendant of liberty. Therefore, it must meet the challenge that it is unconstitutionally vague. Giaccio, 382 U.S. at 402.

b. The "Particularly Vulnerable" Aggravator Is Unconstitutionally Vague Because the Jury Has No Frame of Reference for a Typical Victim of an Offense.

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. Giaccio, 382 U.S. at 402-03. A statute fails to guard against arbitrary enforcement when it fails to provide ascertainable standards or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974). To survive a vagueness challenge, a sentencing factor must have a "common-sense core of meaning . . . that criminal juries should be capable of understanding." Tuilaepa v. California, 512 U.S. 967, 973, 114 S. Ct. 2630, 2635-36, 129 L. Ed. 2d 750 (1994) (citing Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 2959, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)).

For a jury, the "particularly vulnerable" aggravator in RCW 9.94A.535(3)(b) lacks ascertainable standards and, therefore, invites unfettered latitude in its application. As discussed above, this aggravator requires the jury to decide whether the victim in a given case was more vulnerable to the particular offense than the typical victim of that offense. Jackmon, 55 Wn. App. at 566-67. But a jury is not instructed as to how vulnerable the typical victim of a given offense is. In the days before Blakely, when a judge found the aggravating factors supporting an exceptional sentence, judges could perhaps be supposed to have a bank of knowledge upon which to determine whether a given victim was more vulnerable than was typical for that offense. But a juror cannot be presumed to have such a bank of knowledge.

For a jury, there is no "common-sense core of meaning" regarding the typical victim of a given offense. Tuilaepa, 512 U.S. at 973. The only way for the jury to make this determination is on an arbitrary, ad hoc, or entirely subjective basis.[5] Jurors are often encouraged to apply their common sense and their every day experience when evaluating evidence. But unless the juror has been extremely unlucky or happens to have a career in the criminal justice field, the juror has no common sense or daily experience of what a typical murder victim looks like or how vulnerable that

[5] Or perhaps on the basis of the episodes of television series such as "Law and Order" or "CSI" the juror has seen.

person might be. The lack of any way to ascertain a "typical" murder victim renders this factor unconstitutionally vague as applied to Huden. Goguen, 415 U.S. at 578.

D. CONCLUSION

The evidence was insufficient to show Douglas was more vulnerable than a typical victim of the type of offense committed here, and RCW 9.94A.535(3)(b) is unconstitutionally vague in violation of due process because the jury had no framework in which to determine whether he was. Huden therefore requests this Court vacate his exceptional sentence and remand for resentencing within the standard range.

DATED this 11th day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69227-5-I
	)	
JAMES HUDEN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE**BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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2013 APR 11 PM 4:44

[X] ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239
ICPAO_webmaster@co.island.wa.us

[X] JAMES HUDEN
DOC NO. 360361
WASINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF APRIL, 2013.

x Patrick Mayovsky