No. 45296-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NAKIA L. OTTON,

Appellant.

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

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. The State properly concedes that the aggravating circumstance of "clearly too lenient" was improperly based on a judicial finding of fact.

The State concedes the "clearly too lenient" finding was improper. Br. of Resp. at 9-10. The exceptional sentence based on the judicial finding that Mr. Otton's "prior unscored domestic violence offenses" resulted in a standard range sentence that was clearly too lenient, was erroneous as a matter of law. CP 53 (Finding of Fact 1(b)). Case law unequivocally holds that the "clearly too lenient" aggravator must be found by a jury beyond a reasonable doubt. *State v. Alvarado*, 164 Wn.2d 556, 564-65, 192 P.3d 345 (2008); *State v. Hughes*, 154 Wn.2d 118, 136-37, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. Saltz*, 137 Wn. App. 576, 581-82, 154 P.3d 282 (2007). The State's concession is well-taken.

The judicial Finding of Fact 1(a) and Conclusion of Law 1 cannot stand.

2. The aggravating circumstance of "particular vulnerability" was unsupported by evidence that Ms. Dugan's disability was a substantial factor in the commission of the offense.

The exceptional sentence based on the finding that Ms. Dugan's disability was a substantial factor in commission of the offense was unsupported by the record and clearly erroneous. When an exceptional sentence is based on vulnerability, the State must prove the defendant knew or should have known of the victim's particular vulnerability and that vulnerability was a substantial factor in the commission of the offense. RCW 9.94A.535(3)(b); *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006); *State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001), *overruled on other grounds in State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

Ms. Dugan's disability was not a "substantial factor" in the commission of the offense. Rather, the evidence established that Mr. Otton and Ms. Dugan were in a romantic relationship, they lived together, and they argued after Mr. Otton came home intoxicated and fell asleep on the bedroom floor. RP 129-30. The evidence further established that Mr. Otton has a history of assault behavior against romantic partners, including an incident involving Ms. Dugan before she became disabled. RP 162-63, 168; CP 5.

The State contends *State v. Barnett*, 104 Wn. App. 191, 16 P.3d 74 (2001), *abrogated on other grounds in State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010), is distinguishable on the grounds that the victim therein was able-bodied. Br. of Resp. at 11-12. However, the *Barnett* court did not reverse the finding of vulnerability because the victim was able-bodied, but because her alleged vulnerability due to being alone was not a factor in the offense. Similar to the present case, the *Barnett* court noted, "Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime." 104 Wn. App. at 205.

The State relies on *Gore*, in which the defendant was convicted of two counts of rape and two counts of attempted rape against four separate victims, all of whom were petite and three of whom were teenagers. 143 Wn.2d at 316-17. On appeal, the defendant did not challenge the court's factual finding that the victims' small size was a substantial factor in the commission of the offenses. 143 Wn.2d at 316. Rather, he challenged whether small stature was an "extraordinary vulnerability." *Id.* at 318. Conversely here, Mr. Otton does not challenge that Ms. Dugan was disabled, but does contend that her disability was not a factor in the commission of the offense. The State's reliance on *Gore* is misplaced.

In *State v. Ford*, the court upheld an exceptional sentence based on particular vulnerability, where the defendant targeted random victims specifically because they were elderly or disabled. 87 Wn. App. 794, 798, 942 P.2d 1064 (1997), *overruled on other grounds*, 137 Wn.2d 472, 973 P.2d 452 (1999). Similarly, in *State v. Ritchie*, the court upheld an exceptional sentence based on particular vulnerability, where the 17-year-old defendant brutally killed his elderly neighbor whom he targeted because she lived alone and suffered from dementia. 126 Wn.2d 388, 398, 894 P.2d 1308 (1995). By contrast, Ms. Dugan was not a randomly selected victim and there was no evidence she was targeted due to her disability. The State's reliance on these cases is inapt. *See* Br. of Resp. at 12-13.

The State conflates proof of a disability with proof that the disability was a substantial factor in the commission of the offense, when it lists Ms. Dugan's disabilities and summarily concludes the disabilities were a substantial factor. Br. of Resp. at 13. The State apparently reasons that an exceptional sentence based on "particular vulnerability" would be justified for any offense committed against a victim who suffered from a disability or other vulnerability. This reasoning is contrary to RCW 9.94A.535(3)(b), *Suleiman*, *Gore*, and *Barnett*, and other cases which specifically require proof of both a disability and a substantial connection

between the disability and the commission of the offense, and should be rejected.

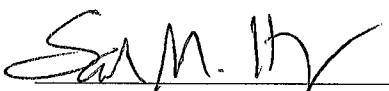
In the absence of evidence that Ms. Dugan's disability was a substantial factor in the commission of the offense, Finding of Fact 1(b) and Conclusion of Law 1 cannot stand.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in Brief of Appellant, Mr. Otton respectfully requests this Court reverse his convictions for assault and harassment. In the alternative, Mr. Otton requests this Court reverse his sentence and remand for sentencing within the standard range.

DATED this 8th day of July 2014.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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	)	NO. 45296-1-II
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	)	
NAKIA OTTON,	)	
	)	
APPELLANT.	)	

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[X] NAKIA OTTON 892364 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

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