71620-4

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No. 71620-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HUGH WILCOX,

Appellant.

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

The Honorable Jeffrey Ramsdell

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The aggravating circumstance in support of the exceptional sentence – that the victim's injuries substantially exceeded the level of bodily harm necessary to support the elements of the offense – is void for vagueness, and the constitutional violation cannot be cured by de novo appellate review.

2. The trial court erred in imposing an exceptional sentence where the State did not prove that the conduct producing the harm was significantly more serious than in the typical offense.

3. The trial court erred in refusing the defense proposed instruction that would have required the jury to find that Wilcox's conduct exceeded the level necessary to satisfy the elements of the offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A vague statute violates the Fourteenth Amendment's due process clause because it fails to provide the public with adequate notice of what conduct is proscribed and does not protect the public from arbitrary or ad hoc enforcement. Should this Court conclude that the aggravating circumstance contained in RCW 9.94A.535(3)(y) violates due process vagueness prohibitions? (Assignment of Error 1)

2. In enacting statutory aggravating circumstances following the United States Supreme Court's decision in Blakely v. Washington, 542

US. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Legislature indicated that it intended to codify these circumstances as they existed at common law. Laws of 2005, Chapter 68, § 1. At common law prior to Blakely, the "conduct more egregious than typical" aggravating factor required the State to prove that the conduct producing the harm, and the harm caused, were more egregious than in the typical case. Where the State did not prove, and the jury did not find, that Wilcox's conduct substantially exceeded the level necessary to satisfy the elements of the offense of assault in the second degree, must Wilcox's resulting exceptional sentence be vacated? (Assignments of Error 2, 3)

C. STATEMENT OF THE CASE.

Hugh Wilcox and Stephen Jennings were roommates in a house in Lake City Way they shared with Wilcox's wife, Cheryl,[1] Michael Munoz, and Kara Anderson. RP 690.[2] Wilcox and Jennings had known each other for several years before they started living together. Jennings, who was gay, was attracted to Wilcox, and this caused tension in Wilcox's relationship with his wife. RP 691-92. Jennings was also a

[1] Because Cheryl and Hugh Wilcox share a common last name, Cheryl Wilcox is referred to in this brief by her first name. No disrespect is intended.

[2] Pretrial and trial transcripts are contained in consecutively paginated volumes, and are referenced in this brief as "RP" followed by page number. The sentencing hearing is referenced in this brief as "RP (Sentencing)" followed by page number.

methamphetamine addict, which affected his mood and emotional stability. RP 490.

On November 7, 2012, Jenning was coming down off a methamphetamine high. He had woken up on the couch and was irritable. RP 499. He and Cheryl argued. RP 502, 692-93. Wilcox intervened. What happened next is not clear.

According to Cheryl, when the argument started, Jennings was on the couch. She left the room to go to the bathroom. RP 693. She was gone no more than a "few seconds"; when she returned Jennings was sitting on the floor holding his head. RP 695-96.

Anderson witnessed part of the altercation between Wilcox and Jennings. RP 626. She saw Wilcox yell at Jennings and push him on his forehead with the palm of his hand. RP 625. She then left the room. While she was gone, she did not hear any loud noises, but when she came back into the room, she saw Jennings on the floor with his arms around Wilcox, obviously injured. RP 628-29, 632.

Due to the apparent severity of Jennings's injuries, Munoz and Wilcox carried Jennings to Munoz's truck and rushed him to the emergency room at Northwest Hospital. RP 610-13. At the hospital, it was determined that Jennings had suffered a severe compressed skull fracture in the left temporal bone and significant hemorrhaging, and that it

would be necessary to transfer him to a level one medical center for immediate surgery. RP 299, 330. Jennings was taken to Harborview Medical Center, where he remained until February 26, 2013. RP 545, 573. The brain injury that Jennings suffered left him with lasting severe deficits, including partial paralysis, significant speech impairments, and an impaired ability to swallow. RP 575-76.

Wilcox was tried on charges of assault in the first degree and assault in the second degree with an allegation that the level of injury suffered substantially exceeded the level of necessary to satisfy the elements of the crime, pursuant to RCW 9.94A.535(3)(y). CP 8-9. The jury acquitted him of assault in the first degree, but convicted him of assault in the second degree and by special verdict unanimously found that the aggravating circumstance had been proven. CP 61-62. The trial court relied on the jury's special verdict to impose an exceptional sentence of 73 months incarceration. RP (Sentencing) 15. Wilcox appeals. CP 78-79.

D. ARGUMENT

1. **The aggravating circumstance requiring the jury to find the victim's injuries "substantially exceed" the level necessary to establish the elements of the offense violates due process vagueness prohibitions, and the violation cannot be cured by de novo appellate review.**

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

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Laws which impart an uncommon degree of subjectivity to the jury's consideration of a fact are subject to invalidation on due process vagueness grounds. As the Supreme Court

has stated, a criminal statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," violates due process. Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The instructions on the aggravating circumstance contained in RCW 9.94A.535(3)(y) violated due process vagueness prohibitions because the requirement that the jury find that Jennings' injuries "substantially exceeded" the level necessary to establish the elements of the offense is so subjective as to render it standardless. Further, the court's failure to accord those aggravating circumstances a narrowing construction that would have saved them from constitutional infirmity requires reversal.

a. The instructions on aggravating circumstances were unconstitutionally vague.

Before Blakely established that the SRA violated the Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process, based on the faulty premise that they involved matters of judicial sentencing discretion, due process vagueness challenges to aggravating circumstances were generally deemed "theoretically and analytically unsound" and thus not given serious consideration or rejected out of hand by the appellate courts of this state. See e.g. State v. Jacobsen, 92 Wn.

App. 958, 966, 965 P.2d 1140 (1998); State v. Owens, 95 Wn. App 618, 628-29, 976 P.2d 656 (1999). In Jacobsen, the Court stated,

> Because there is no constitutional right to sentencing guidelines--or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines--the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case. Even vague guidelines cabin discretion more than no guidelines at all. What a defendant may call arbitrary and capricious, the legislature may call discretionary, and the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.

Jacobsen, 92 Wn. App. at 966 (quoting United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990)). It was also assumed that because judges would factor their own awareness of the "typical" case into their assessment whether an aggravating circumstance had been established, the subjectivity of certain aggravating circumstances would be minimized, further reducing the likelihood of a due process violation. State v. Nordby, 106 Wn.2d 514, 518-19, 723 P.2d 1117 (1986). Given the now-irrefutable proposition that aggravating circumstances, as facts which increase punishment, operate as elements of a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply.

In the death penalty context, the Supreme Court has held a challenged provision is unconstitutionally vague in violation of the Eighth Amendment if it "fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague sentencing factor creates "an unacceptable risk of randomness," Tuilaepa v. California, 512 U.S. 967, 974, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), and for this reason the "channeling and limiting of the sentencer's discretion. . . is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Cartwright, 486 U.S at 362 (citations omitted).

The Court explained the rationale for its holding in Cartwright thusly:

> To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Cartwright, 486 U.S. at 364.

Comparably here, reasonable minds will differ on the quantum of evidence needed for injuries to "substantially exceed" what is necessary to establish "substantial bodily harm." According to statute,

> "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110.

In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (2013), the Supreme Court concluded that "[t]he statutory definition of 'substantial bodily harm' offers a sufficiently objective definition for jurors to compare to a particular victim's injuries and apply the 'substantially exceeds' standard of the aggravating factor." Id. at 298. The Court reached this conclusion by evaluating other statutes in which the use of the term "substantial" or "substantially" did not render the statute impermissibly vague. Id. at 297-98 (citations omitted).

But in so concluding, the Court failed to consider the question in light of the fact that a jury evaluating whether the aggravating circumstance had been proven must apply "substantially" in light of a baseline which it is impossible for jurors to determine with uniformity or predictability. According to the statute's language, a jury could conclude that "substantial bodily harm" had been established based solely upon

proof that the victim had suffered "a fracture of any bodily part." It might seem axiomatic that a fracture of the skull is more serious than a fracture of a finger, for example, but this is an inherently subjective determination. A concert pianist might view a fractured finger as a very substantial injury, and might testify accordingly. And a skull fracture might not in every instance result in the kind of disability suffered by Jennings.

The trial evidence established that Jennings may have been particularly susceptible to a severe injury because of his history of drug use or other physical issues, such as poor bone density or high blood pressure. RP 644-46. But a jury, lacking the experience of a trial judge and left without concrete definitional instructions, might determine that the aggravating circumstance had been established based on evidence that to a trial judge, would support imposition of no more than the high end of the standard range. It is on these grounds that the court should have defined the aggravating circumstance or accorded it a limiting instruction to save them from constitutional infirmity.

b. The court's failure to accord the instructions a narrowing construction that would have saved them from constitutional infirmity requires reversal.

Wilcox objected to the aggravating circumstance and requested the Court require the jury to find not only that the injury sustained by Jennings substantially exceeded the level necessary to satisfy the elements

of the offense, but that the conduct giving rise to the injury also exceed this level. CP 19-22. The court declined Wilcox's request. RP 735.

Considering undefined aggravators similar to the one at issue here, the Ninth Circuit held that the problem created by the failure to narrow a vague aggravator is not cured by *de novo* appellate review, the remedy prescribed by the United States Supreme Court in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part by Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 156 (2002). Valerio v. Crawford, 306 F.3d 742, 756-57 (9th Cir. 2002), cert. denied sub nom., McDaniel v. Valerio, 538 U.S. 994 (2003). The Court reasoned that where an appellate court performs the narrowing construction, the court violates the defendant's Sixth Amendment jury trial guarantee, because "[i]n performing a Walton analysis, the state appellate court is not reviewing a lower court finding for correctness; it is, instead, acting as a primary factfinder." Valerio, 306 F.3d at 756-57; but see Ybarra v. McDaniel, 656 F.3d 984, 996 (9th Cir. 2011) (holding, "even if the unconstitutionally vague 'depravity' aggravating factor had been appropriately narrowed, we are confident that the jury would nonetheless have applied it"[3]).

[3] The holding in Ybarra is not in conflict with Valerio. Rather, the Court in Ybarra, having concluded that error occurred, proceeded to evaluate the effect of the error on the outcome. Ybarra, 656 F.3d at 995 (assessing whether the constitutional error

The Supreme Court has not yet resolved whether an appellate court may cure the finding of a vague aggravating circumstance by applying a narrowing construction. See Bell v. Cone, 543 U.S. 447, 453-54, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (declining to reach issue). However, the Valerio Court properly concluded that Walton's prescription for *de novo* review where the jury was the factfinder cannot be undertaken without violating the Sixth Amendment. As in Valerio, this Court should conclude the trial court's failure to cure the vague instructions on aggravating circumstances cannot be rectified by according those instructions a narrowing construction on appeal. This Court should reverse Wilcox's sentence and remand for resentencing within the standard range.

"had substantial and injurious effect or influence in determining the jury's verdict"). This standard, articulated in Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), is uniquely applied to prisoners seeking federal habeas corpus review.

2. **The exceptional sentence must be vacated because the State did not prove that the conduct giving rise to the harm exceeded the level necessary to satisfy the elements of the offense.**

a. Because the statutory aggravating circumstances were designed to codify existing common law aggravating factors, the State had to prove that the conduct, and not merely the injury, substantially exceeded the level necessary to satisfy the elements of the offense.

In enacting statutory aggravating circumstances following the United States Supreme Court's decision in Blakely, the Legislature's intent was to codify existing common law factors. Laws of 2005, Ch. 68, § 1. At common law, the aggravating factor contained in RCW 9.94A.535(3)(y) was known as the "conduct more egregious than typical" aggravating factor. State v. Wilson, 96 Wn. App. 382, 388, 980 P.2d 244 (1999) (citing Jacobsen, 92 Wn. App. at 970-71), rev. denied, 994 P.2d 846 (2000); see also State v. Flake, 76 Wn. App. 174, 183, 883 P.2d 341 (1994) ("According to case law, the seriousness of a victim's injuries is a valid aggravating factor if 'the conduct producing the harm, and the harm produced, were significantly more serious than what is typically involved in the crime.") (citations omitted).

Below, the trial court rejected Wilcox's contention that codification of the common law aggravating circumstance required the State to prove the conduct that produced Jennings's injuries substantially

exceeded the level necessary to satisfy the elements of the offense. RP 735. The court reasoned that instructing the jury consistent with the defense request "would ... make the aggravator for Assault II a nullity" by essentially defining Assault in the Second Degree plus the aggravating circumstance identically to Assault in the First Degree. But recent Supreme Court precedent makes plain that the court's analysis was incorrect.

In State v. Pappas, 176 Wn.2d 188, 289 P.3d 634 (2012), the Court repudiated the very assumption made by the trial court here. The Court stated that RCW 9.94A.535(3)(y) "requires comparison of the victim's injuries against the minimum injury necessary to satisfy the offense." Pappas, 176 Wn.2d at 192. The Court explained:

> While the jump between statutory categories of harm necessarily meets the "substantially exceed" test, injuries can "substantially exceed" one category of harm without reaching the severity of the next category. This is supported by the language of RCW 9.94A.535(3)(y), which only requires that the injuries "substantially exceed," rather than a requirement to meet a higher category of harm.

Id.

In other words, the Court construed the Legislature's intent in codifying the aggravating circumstance at issue as essentially creating a possibility for an intermediary category of offense; something "substantially" more severe than a second degree assault, yet not quite

meeting the standard of a first-degree assault. Once the jury makes the finding that the aggravating circumstance has been proven, it is for the judge to decide whether the finding is a "substantial and compelling reason" to impose an exceptional sentence. Id.

The trial court's summary rejection of Wilcox's argument that codification of the aggravating circumstance as it existed at common law required the State to prove conduct more egregious than typical was incorrect in light of Pappas. This Court should conclude that the codification of this aggravating circumstance imposed on the State the burden of proving not only that the injury substantially exceeded the level necessary to satisfy the elements of the offense, but also that the conduct producing this injury exceeded this level.[4]

b. The State did not prove Wilcox's conduct substantially exceeded the level necessary to satisfy the elements of the offense.

Assuming the Legislature meant what it said when it indicated that the aggravating circumstances in RCW 9.94A.535 were intended to codify aggravating factors as they existed at common law, this Court must conclude that the State had to present proof of egregious conduct by Wilcox. But the etiology of Jennings's injuries was a mystery.

[4] If the statute indeed imposed this burden on the State, then the jury instruction proposed by Wilcox correctly stated the law, and it was error for the court to fail to issue it.

Forensic pathologist John Lacy testified that Jennings's fractures almost certainly would have had to result from a blunt force injury with an object. RP 651. He believed it was highly improbable that the injury could have been caused by a blow with fists. Id. In fact, despite having attended or conducted thousands of autopsies, Lacy had only once seen fractures so severe caused by a fist blow – and in that case, the individual who suffered the injuries had previously undergone brain surgery, and there was a metal plate in his head that contributed to causation. RP 652. Here, there was no evidence of similar previous trauma.

Although no one observed Jennings sustain the injury at issue, there was no plausible way that Wilcox could have struck Jennings with sufficient force to inflict such a grievous injury. Cheryl Wilcox testified that she was gone from the room for "a few seconds." RP 698. Anderson had merely stepped into the kitchen. RP 628. Both were in proximity and reentered the living room immediately after Jennings was hurt. Neither of these individuals described hearing a noise consistent with Jennings's injury, or seeing an object that could have been used to inflict blunt force trauma.

Under interrogation, Wilcox told law enforcement that he held Jennings on the couch and heard his head "crunch," but photographs of the living room do not show any hard edges that Jennings's head could have

been pushed against to sustain the injuries described. Ex. 8. In consideration of this evidence, the jury concluded that the State failed to prove Wilcox intended to inflict great bodily harm and instead acted recklessly, and acquitted Wilcox of assault in the first degree. CP 60, 68; RP (Sentencing) 15.

Given the absence of any evidence of how Jennings's injury was caused, the State failed to prove that the conduct giving rise to the harm substantially exceeded the level necessary to satisfy the elements of the offense of assault in the second degree as it was charged and prosecuted here.

c. The remedy is remand for resentencing within the standard range.

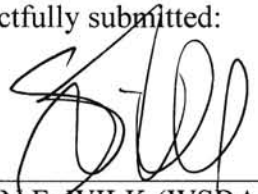
Where an exceptional sentence is improperly imposed, the remedy is remand for resentencing within the standard range. State v. Stubbs, 170 Wn.2d 117, 130, 240 P.3d 143 (2010). Accordingly, Wilcox's sentence should be vacated, and this matter remanded for imposition of a standard-range sentence.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Hugh Wilcox's exceptional sentence and remand for resentencing within the standard range.

DATED this 5th day of September, 2014.

Respectfully submitted:



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

STATE OF WASHINGTON, Respondent, v. HUGH WILCOX, Appellant.	)))))))))	NO. 71620-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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