71620-4 71620-4

NO. 71620-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUGH WILCOX,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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2. Whether the defendant has waived his vagueness challenge to the aggravating circumstance instruction by failing to propose a clarifying instruction at trial.

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B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Hugh Wilcox with one count of Assault in the First Degree – Domestic Violence, and in the alternative, with one count of Assault in the Second Degree – Domestic Violence. CP 8-9. The second-degree assault charge included the aggravating circumstance that the victim's injuries substantially exceeded the level of bodily injury necessary to satisfy the elements of the offense. Id. Although a jury acquitted Wilcox of first-degree assault, it found him guilty of second-degree assault and found both the domestic violence allegation and aggravating circumstance present. CP 60-62. The trial court imposed an exceptional sentence of 73 months. CP 70-77; 2RP 15.[1]

2. SUBSTANTIVE FACTS

On November 6, 2012, Wilcox assaulted his roommate, Stephen Jennings, causing him permanent, life-threatening brain injury. RP 286, 545-46, 581. Prior to the assault, Jennings got into

[1] The Verbatim Report of Proceedings consists of 10 volumes. The first nine volumes are consecutively paginated and designated as RP (1/23/14, 1/27/14, 1/28/14, 1/29/14, 1/30/14, 2/3/14, 2/4/14, 2/4/14, 2/10/14, 2/11/14, and 2/12/14). The tenth volume is designated as 2RP (2/27/14).

a verbal argument with Wilcox and his wife, Cheryl.[2] RP 502. Jennings testified that he remembered Wilcox hitting him twice on the head, and a third time somewhere else. RP 454. Although Jennings's memory of the assault was limited, he remembered falling from the couch where he was seated to the floor, and his right side being paralyzed. RP 454, 457. Jennings testified that he never attempted to push or hit Wilcox, or Cheryl, because they were both "bigger" than him. RP 506.

One of their roommates, Kara Anderson, who was present when the assault began, largely corroborated Jennings's memory of the incident. Anderson saw Wilcox strike Jennings on the head with the palm of his hand while Jennings was sitting on the couch. RP 626-28. Wilcox's blow sent Jennings back in his seat, and Anderson to the kitchen because she wanted to avoid being part of the confrontation. RP 627. Anderson testified that she did not see Jennings hit or push Wilcox prior to the assault. RP 626.

Cheryl testified that prior to the assault, she had been arguing with Jennings about him breaking her stuff and throwing it away. RP 693. She turned and walked into the bathroom, leaving Jennings seated on the couch and Wilcox nearby. RP 694. When

[2] To avoid confusion with the defendant, the State will refer to Cheryl Wilcox by her first name. The State intends no disrespect.

she returned seconds later, Jennings was laying on the floor, holding his head, and "acting funny." RP 698. Cheryl did not see how Jennings ended up on the floor, nor did she see Wilcox hit Jennings. RP 696, 698. Further, similar to the other witnesses, Cheryl did not see Jennings hit or push Wilcox. RP 697.

Another roommate, Mike Munoz, arrived home after the assault and found Jennings on the floor, holding his head and looking dazed. RP 609-10. He and Wilcox picked up Jennings, who could no longer stand on his own, and carried him to Munoz's truck. RP 610. Although they "flew down" to Northwest Hospital, Jennings could not walk or speak by the time they arrived. RP 612-13. An emergency healthcare provider found Jennings slumped over in a wheelchair in the hospital lobby without a wallet, identification, or anyone to explain what had happened. RP 289-90.

Wilcox later admitted to police that he had intervened in an argument between Cheryl and Jennings, and that he had cracked Jennings's skull in the process. RP 559-60. Wilcox acknowledged that he had held Jennings down by his head and that he heard it "crunch." Ex. 13 at 22:08, 22:25. Additionally, Wilcox told a friend

that he put Jennings's head "down with force" and that "it sounded like a chicken bone crunching." Ex. 17, track 4 at 1:09.

Northwest Hospital staff transferred Jennings to Harborview Medical Center for emergency brain surgery upon determining that he had suffered a massive brain bleed and a severe compressed skull fracture. RP 299, 330. Jennings's skull had been indented and shattered into multiple "jagged little pieces," causing a large and potentially fatal amount of bleeding in his brain.[3] RP 539, 545-46, 548. Additionally, the midline of Jennings's brain had shifted 11 millimeters, a significant amount. RP 335.

At Harborview, doctors removed part of Jennings's skull and a blood clot in an effort to relieve the pressure on his brain. RP 545, 575. Following the surgery, Jennings required a nearly four-month stay at Harborview in the intensive care and in-patient rehabilitation units. RP 573-74. Jennings was discharged to a nursing facility and a guardian was appointed to make medical care decisions on his behalf. RP 581.

By the time of trial, Jennings was still living in the nursing facility, paralyzed on the right side of his body, forced to use a

[3] A defense expert likened the "little sharp shards of bone" shoved into Jennings's brain to the fragments that result when someone "steps on a Dorito." RP 644.

wheelchair, and unable to communicate easily. RP 446, 451. Jennings's treating physician testified that he is not expected to make a full recovery. RP 581.

Prior to closing, Wilcox proposed that the court amend the aggravating circumstance instruction to require the State to prove that he intended to cause Jennings great bodily harm. CP 22; RP 734-35. Wilcox argued that the proposed intent element was required under the case law, even though it was not included in the pattern instruction. CP 22; RP 734-35. The State opposed the amendment, contending that neither the statute nor the case law required a finding of intent. Supp CP __ (sub 67, Trial Memorandum/State).

The trial court agreed, reasoning that requiring the State to prove that Wilcox intended to cause Jennings great bodily harm would transform the aggravating circumstance instruction into "an instruction that for all intents and purposes is the instruction for assault in the first degree."[4] RP 735. The court instructed the jury that to find Wilcox guilty of the aggravating circumstance, it must find that "the victim's injuries substantially exceeded the level of

[4] First-degree assault requires the intent to inflict great bodily harm, unlike second-degree assault which requires the reckless infliction of substantial bodily harm. Compare RCW 9A.36.011 (elements of first-degree assault), with RCW 9A.36.021 (elements of second-degree assault).

bodily harm necessary to constitute substantial bodily harm," specifically that "the victim suffered great bodily harm." CP 49.

C. ARGUMENT

1. WILCOX'S VAGUENESS CHALLENGE TO THE AGGRAVATING CIRCUMSTANCE FAILS.

For the first time on appeal, Wilcox argues that the trial court erred by imposing an exceptional sentence based on the "substantially exceeds" aggravating circumstance because it is unconstitutionally vague under the due process clause. Wilcox's claim fails on multiple grounds. First, the sentencing guidelines are not subject to a void-for-vagueness challenge under established Washington Supreme Court precedent. Second, Wilcox waived a vagueness challenge to the aggravating circumstance instruction by failing to object, or propose a clarifying instruction, at the time of trial. Third, even if Wilcox could raise a vagueness challenge, his claim fails because the "substantially exceeds" aggravating circumstance was not unconstitutionally vague as applied to him.

a. Exceptional Sentence Aggravating Circumstances Are Not Subject To Due Process Vagueness Challenges.

Under the due process clause, a statute is void for vagueness if it either (1) fails to define the offense with sufficient

precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that proscribe or mandate conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Supreme Court has previously held that aggravating circumstances are not subject to vagueness challenges under the due process clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Id. at 459. Because the guidelines do not set penalties, a citizen reading them would not have to guess at the possible consequences of engaging in criminal conduct. Id. Consequently, the due process concerns that underlie the void-for-vagueness doctrine have "no application" in the context of sentencing guidelines. Id. Further, the guidelines do not create a "constitutionally protectable liberty interest" because they do not require that a specific sentence be imposed. Id. at 461.

Wilcox does not acknowledge Baldwin, let alone argue that it is incorrect and harmful as required to overturn established precedent. State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212

(2008). Instead, Wilcox appears to argue that a due process vagueness challenge is possible in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Wilcox, however, does not provide any legal argument explaining how Blakely, a decision firmly rooted in the Sixth Amendment right to a jury trial, bears on the due process vagueness doctrine which exists to provide notice to the public, and protect it from arbitrary state enforcement.[5] Baldwin, 150 Wn.2d at 458. The "substantially exceeds" aggravating circumstance does not define conduct, authorize arrest, inform the public of criminal penalties, or vary legislatively defined criminal penalties.

The Court's analysis in Baldwin remains valid after Blakely. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. As the Supreme Court has stated, "an aggravating factor is not the functional equivalent of an essential element." State v. Siers, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). Instead, the statute lists accompanying circumstances that "may" justify a trial court's imposition of a higher sentence. RCW 9.94A.535. A jury's finding of an aggravating circumstance

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[5] Post-Blakely, the Washington Supreme Court has declined to resolve whether Baldwin remains good law. See State v. Duncalf, 177 Wn.2d 289, 296, 300 P.3d 352 (2013) (finding it "unnecessary to address the broad question of whether Baldwin survives Blakely").

does not mandate an exceptional sentence. The trial court still must decide whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence.[6]

The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (recognizing that precedent is "not lightly set aside," and that "the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful"). Because Wilcox fails to show that the Court's decision in Baldwin is incorrect and harmful, this Court must adhere to precedent holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.

Nonetheless, to the extent that Wilcox relies on Eighth Amendment death penalty cases to support his vagueness challenge, his claim should be rejected. Wilcox cites several decisions of the United States Supreme Court addressing vagueness challenges under the Eighth Amendment. Brief of

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[6] For example, in Siers, the jury found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. Siers, 174 Wn.2d at 272-73.

Appellant at 8-9. However, he fails to cite any authority holding that a vagueness challenge under the Eighth Amendment applies outside the death penalty context. Several courts, including this Court, have held that it does not. See State v. E.A.J., 116 Wn. App. 777, 792, 67 P.3d 518 (2003) (rejecting Eighth Amendment vagueness challenge to juvenile manifest injustice); Holman v. Page, 95 F.3d 481, 487 (7th Cir. 1996) (holding that Eighth Amendment vagueness inquiry does not apply to non-capital cases), overruled on other grounds, Owens v. United States, 387 F.3d 607 (7th Cir. 2004).

The theoretical underpinnings of a vagueness challenge under the Eighth Amendment do not support its application outside capital cases. It originates in the notion that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Lewis v. Jeffers, 497 U.S. 764, 774, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (quoting Gregg v. Georgia, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Claims of vagueness directed at capital punishment aggravating circumstances are made under the

Eighth Amendment on the basis that open-ended discretion to impose the death penalty is unconstitutional. Maynard v. Cartwright, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). This body of law has not been applied outside the death penalty context.

Even if Wilcox could assert an Eighth Amendment vagueness claim, the court's review is "quite deferential." Jones v. United States, 527 U.S. 373, 400, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999). "As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." Id. In Jones, the Court rejected an Eighth Amendment vagueness challenge to an aggravating factor that asked the jury to "consider whether the victim was especially vulnerable to petitioner's attack." Id.

For reasons discussed more fully below, the "substantially exceeds" aggravating circumstance had a core meaning that a jury could understand. As Wilcox acknowledges, the Washington Supreme Court concluded in State v. Duncalf that the statutory definition of "substantial bodily harm," the level of injury required to prove the crime charged here, "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." 177 Wn. 2d 289, 298, 300 P.3d 352 (2013). Thus, even assuming that Wilcox could assert an Eighth Amendment vagueness claim, his claim would fail under Duncalf and the deferential standard of review.

b. Wilcox Has Waived His Vagueness Challenge To The Aggravating Circumstance Instruction.

Wilcox claims that the aggravating circumstance instruction is unconstitutionally vague. However, he failed to propose any additional or clarifying instructions remedying the alleged vagueness. At trial, Wilcox proposed in argument and briefing that trial court amend the aggravating circumstance instruction to include an element of intent. RP 734-35 ("I would ask to provide a jury instruction that included that he needed to have intended to cause this great bodily harm."); CP 22 ("ask the trial court to instruct the jury that in order to find an aggravating factor . . . the jury must find that Hugh Wilcox acted with intent to cause Great Bodily Harm"). Wilcox never suggested that the court should add the element of intent to cure the vagueness he now alleges.

The Washington Supreme Court has repeatedly held that a defendant who believes a jury instruction is unconstitutionally

vague has a ready remedy--proposal of a clarifying instruction--and that the failure to propose further definition precludes appellate review. In State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991), the defendant attempted to challenge the term "unlawful force" in the jury instructions as unconstitutionally vague. The Court held that the claim was waived:

> Although Fowler did take exception to the assault instruction proposed by the court, his exception did not involve the potential vagueness or overbreadth of the court's definition of the term "unlawful force." His objection cannot be raised for the first time on appeal.

114 Wn.2d at 69; see also State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946) (defendant who did not take exception to jury instructions waived claim that they were vague and confusing).

The reasons for this waiver rule have been explained as follows:

> Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed and to protect against arbitrary enforcement of law. See City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). *This rationale applies to statutes and official policies, not to jury instructions.* 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 ready remedy: proposal of a clarifying instruction.

State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006) (emphasis added); see also State v. Releford, 148 Wn. App. 478, 493-94, 200 P.3d 729 (2009) (holding that the defendant waived his vagueness challenge to a jury instruction by failing to object to the instruction at trial).

Accordingly, Wilcox's claim of error regarding the alleged vagueness of the aggravating circumstance instruction is waived. A defendant who believes an instruction is vague should request a clarifying instruction at the time of trial to ensure that the jury is properly instructed. To hold otherwise would encourage defendants to delay raising such issues until they receive an adverse verdict. Because Wilcox did not propose any language clarifying the alleged vagueness, he has waived claiming that the instruction was vague.

c. The "Substantially Exceeds" Aggravating Circumstance Is Not Unconstitutionally Vague As Applied To Wilcox.

Even if the aggravating circumstance statute is subject to a vagueness challenge, Wilcox's claim would fail. The party challenging a statute under the "void for vagueness" doctrine bears

the burden of overcoming a presumption of constitutionality, i.e., "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

A statute fails to provide the required notice if it prohibits or requires an act in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 83 L. Ed. 322 (1926)).

Nonetheless, courts have long recognized that "[s]ome measure of vagueness is inherent in the use of language." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991); Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions constitute prohibited conduct. Watson, 160 Wn.2d at 7.

Because Wilcox's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating

circumstance is unconstitutionally vague as applied to him. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). A challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Douglass, 115 Wn.2d at 182-83. Here, the "substantially exceeds" aggravating circumstance is not unconstitutionally vague when considered in light of Jennings's injuries.

The aggravating circumstance at issue required that the jury find that Jennings's injuries substantially exceed "substantial bodily harm," the level of bodily injury required to prove second-degree assault. RCW 9A.36.011. The trial court's aggravating circumstance instruction provided that in order to find the "substantially exceeds" aggravating circumstance, the jury must find that Jennings suffered "great bodily harm." CP 49. The instructions defined "great bodily harm" as a bodily injury that (1) creates a probability of death, (2) causes significant serious permanent disfigurement, or (3) causes a significant permanent loss or impairment of the functioning of a body part or organ. CP 40.

Notably, Wilcox does not challenge the sufficiency of the evidence that Jennings's life-threatening and permanent injuries substantially exceeded the level of harm necessary to prove second-degree assault. After Wilcox's assault, Jennings's skull was indented and shattered into multiple "jagged little pieces," resulting in a large and potentially fatal amount of blood on his brain. RP 539, 545-46, 548. Jennings arrived at Harborview unconscious and unable to breathe on his own. RP 540. The midline of his brain had shifted over a centimeter, a significant amount. RP 335. By the time of trial, Jennings required a wheelchair to move, was paralyzed on the right side of his body, and unable to communicate easily. RP 451. Jennings's doctor does not expect him to fully recover. RP 581.

Given the seriousness and extent of Jennings's injuries, a person of common intelligence would not have to guess that causing such severe and permanent injuries could lead to an exceptional sentence under RCW 9.94A.535(3)(y), particularly when fracturing someone's finger is sufficient to prove second-degree assault.

Moreover, the Washington Supreme Court rejected a void-for-vagueness challenge to the "substantially exceeds" aggravating

circumstance in Duncalf, where the defendant was also charged with second-degree assault, and the victim suffered substantial and likely permanent impairment of his lower jaw, an arguably less severe injury with far less consequences than that suffered by Jennings. 177 Wn.2d at 297. Additionally, the court noted that a number of criminal statutes employing the term "substantial" have withstood due process vagueness challenges. Id. at 297-98.

Despite acknowledging the holding in Duncalf, Wilcox maintains that "reasonable minds will differ on the quantum of evidence" required for injuries to "substantially exceed" what is necessary to establish "substantial bodily harm." Brief of Appellant at 9-10. Wilcox's argument, however, overlooks the large body of Washington case law recognizing that "vagueness in the constitutional sense is not mere uncertainty." See Watson, 160 Wn.2d at 7 (quoting State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988), and citing multiple Washington Supreme Court cases in accord). Wilcox's musings about what admittedly "might" occur when a jury applies the "substantially exceeds" aggravated circumstance falls far short of the high bar required to prove a statute unconstitutional beyond a reasonable doubt. Watson, 160 Wn.2d at 10; see also City of Seattle v. Eze, 111 Wn.2d 22, 28, 759

P.2d 366 (1988) (recognizing that "the presumption in favor of a law's constitutionality should be overcome only in exceptional cases").

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE.

Wilcox argues that the trial court should have instructed the jury that the State must prove that his conduct, in addition to Jennings's injuries, substantially exceeded the level required to prove second-degree assault. Wilcox, however, waived this claim on appeal by failing to request such an instruction at trial. Even if Wilcox has preserved the claim of error, it fails because the statute and case law required the State to prove only that Jennings's injuries substantially exceeded the level of harm necessary to prove second-degree assault.

a. Wilcox Waived His Challenge To The Aggravating Circumstance Instruction.

As discussed earlier, Wilcox focused all of his efforts at trial on urging the trial court to instruct the jury that he "*acted with intent* to cause Great Bodily Harm." CP 22 (emphasis added); RP 734-35 ("ask to provide a jury instruction that includes that he needed to have intended to cause this great bodily harm"); RP 736 (objecting that "there is no intent element that he even intended to

substantially exceed substantial bodily harm"). Consequently, the court and prosecutor responded to Wilcox's objection as one requiring a finding of intent. RP 736 (trial court ruling that "the aggravator is intended to focus on the victim's injuries not the intent of the defendant"); Supp CP __ (sub 67, Trial Memorandum/State) (prosecutor disputing that a "finding of intent" is required). At no point, did Wilcox propose, or anyone discuss, revising the jury instruction to include the word "conduct."[7]

Wilcox does not acknowledge the inconsistency between the intent language he proposed at trial, and the conduct language that he now claims should have been included in the aggravating circumstance instruction. A defendant's conduct and intent are separate elements. See State v. Eaton, 168 Wn.2d 476, 480-81, 229 P.3d 704 (2010) (recognizing that "as a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea"). Wilcox cannot claim that he preserved his "conduct" challenge to the aggravating circumstance instruction by proposing that it should be amended to include the element of intent.

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[7] Although Wilcox relied on some of the same case law at trial that he does on appeal, he never argued that the trial court should instruct the jury that the State must prove that his conduct substantially exceeded the level required to prove second-degree assault. CP 19-22; RP 668-69, 734-36.

A defendant who fails to object to a jury instruction below waives the claim of instructional error on appeal, unless the defendant can demonstrate manifest constitutional error. RAP 2.5(a); State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Wilcox does not attempt to make such a showing, nor can he given that the "conduct" language he complains was omitted is not required by the statute, or case law for the reasons discussed below. See RCW 9.94A.535(3)(y) (aggravating circumstance statute referencing the "victim's injuries" and making no mention of the defendant's intent or conduct); Gordon, 172 Wn.2d at 678-80 (rejecting the defendants' challenge to the aggravating circumstance instruction for the first time on appeal because the statute did not contain the definitional language that the defendants claimed should have been included).

b. The Trial Court's Aggravating Circumstance Instruction Properly Stated The Law.

Even if Wilcox could seek review of the aggravating circumstance instruction, his claim fails under the statute and case law. Wilcox argues that the trial court erred by failing to instruct the jury that the State must prove that his conduct, as well as

Jennings's injuries, substantially exceeded the level required to prove second-degree assault. Wilcox is incorrect.

RCW 9.94A.535(3)(y) provides that the trial court may impose an exceptional sentence if the jury finds beyond a reasonable doubt that "*[t]he victim's injuries* substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." (Emphasis added). As written, the statute focuses solely on the seriousness of the victim's injuries and makes no reference to the defendant's intent or conduct. The Legislature amended the exceptional sentence statute to include the "substantially exceeds" aggravating circumstance following Blakely,[8] with the explicit intent of codifying "existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances." Laws of 2005, ch. 68, § 1.

The Washington Supreme Court recognized in State v. Stubbs, 170 Wn.2d 117, 131, 240 P.3d 143 (2010), that the "substantially exceeds" aggravating circumstance set forth in RCW 9.94A.535(3)(y) codified the "serious injury" aggravating circumstance at common law. The court noted that the aggravating

[8] In Blakely, the United States Supreme Court held that a defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any fact, other than a prior conviction, used to impose a sentence higher than the standard range. 542 U.S. at 305.

circumstance arose out of its jurisprudence establishing that "'*particularly severe injuries* may be used to justify an exceptional sentence,' but only if they are 'greater than that contemplated by the Legislature in setting the standard range.'" Id. at 124 (quoting State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996)) (emphasis added).

The court acknowledged that RCW 9.94A.535(3)(y) created a "somewhat different test" than previously articulated in the case law, by directing the trier of fact to measure the victim's actual injuries against the minimum injury that would satisfy the elements of the offense. Id. at 128-29. Nonetheless, the court explained that the leap between statutory categories of harm, such as "the jump from 'substantial bodily harm' to 'great bodily harm,'" would necessarily satisfy the "substantially exceeds" aggravating circumstance. Id. at 130. Significantly, in summarizing and discussing multiple cases applying the aggravating circumstance at common law, the Stubbs court focused repeatedly on the seriousness of the victims' injuries, and never suggested that the defendant's conduct played any role in the analysis. Id. at 124-31.

Subsequent Washington Supreme Court decisions analyzing the "substantially exceeds" aggravating circumstance have taken the same tack of evaluating the seriousness of the victim's injuries without consideration of the defendant's conduct causing them. See State v. Pappas, 176 Wn.2d 188, 193, 289 P.3d 634 (2012) (holding that the victim's permanent and severe brain injury substantially exceeded the level of harm required to prove vehicular assault); Duncalf, 177 Wn.2d at 297 (holding that the victim's likely permanent impairment of his lower jaw substantially exceeded the level of harm required to prove second-degree assault).

Here, the trial court correctly instructed the jury that "in order prove the victim's injuries substantially exceeded substantial bodily harm the State must prove the victim suffered great bodily harm." CP 49. The court hewed to the example in Stubbs, and required the jury to determine whether Jennings's injuries amounted to "great bodily harm," the next category of harm higher than that required to prove second-degree assault. 170 Wn.2d at 130; RCW 9A.36.011 (first-degree assault statute); RCW 9A.36.021 (second-

degree assault statute). The court's instruction accurately stated the law.[9]

Wilcox mistakenly argues that "[a]t common law, the aggravating factor contained in RCW 9.94A.535(3)(y) was known as the 'conduct more egregious than typical' aggravating factor." Br. of Appellant at 13. Wilcox's claim directly conflicts with Stubbs, which recognized that RCW 9.94A.535(3)(y) codified the "serious injury" aggravating circumstance. 170 Wn.2d at 131. Further, pre-Blakely, courts frequently treated the "serious injury" and "conduct more egregious than typical" aggravating factors as separate and distinct. See State v. Sweet, 138 Wn.2d 466, 483, 980 P.2d 1223 (1999) (upholding defendant's exceptional sentence based on multiple aggravating factors, including the victim's "severe injury" and the defendant's "more egregious than typical" conduct); State v. Jacobson, 92 Wn. App. 958, 964-65, 965 P.2d 1140 (1998) (upholding defendant's exceptional sentence based on his "more

[9] The trial court, however, increased the State's burden of proof by requiring it to prove the next level of statutory harm, specifically "great bodily harm," when RCW 9.94A.535(3)(y) only requires that the State prove that the victim's injuries substantially exceeded the level of harm required to prove the charged offense. See State v. Pappas, 176 Wn.2d 188, 192-93, 289 P.3d 634 (2012) (recognizing that "injuries can 'substantially exceed' one category of harm without reaching the severity of the next category").

egregious than typical" conduct); State v. Flake, 76 Wn. App. 174, 183-84, 883 P.2d 341 (1994) (upholding defendant's exceptional sentence based on the "seriousness and effect" of the victim's injuries); State v. Wilson, 96 Wn. App. 382, 387-89, 980 P.2d 244 (1999) (same).

Wilcox appears to rest his argument on the following paragraph in State v. Wilson:

> As a general rule, the ***seriousness of a victim's injuries*** cannot be used to justify an exceptional sentence if that factor has been considered in defining the crime itself." *State v. Tunell*, 51 Wn. App. 274, 279, 753 P.2d 543 (1988), *overruled on other grounds by State v. Batista*, 116 Wn.2d 777, 808 P.2d 1141 (1991). But "the effects on the victim may be used to justify an exceptional sentence if they are significantly more serious than in the usual case." *Tunell*, 51 Wn. App. at 279, 753 P.2d 543; *accord 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.' ") (citation omitted). Therefore, this court's review of ***this particular aggravating factor*** is limited to determining whether there is sufficient evidence in the record to persuade a fair-minded person that P.G.'s ***injuries were substantially greater or significantly more serious than typical*** for a second degree assault case. *See Jacobson*, 92 Wn. App. at 970-71, 965 P.2d 1140 (discussing appellate review of the

> "conduct more egregious than typical" aggravating factor under *State v. Solberg*, 122 Wn.2d 688, 705, 861 P.2d 460 (1993)).

96 Wn. App. at 387-88 (emphasis added). Nowhere in this paragraph, however, did the Wilson court suggest that the "serious injury" aggravating factor also takes into account the "conduct more egregious than typical" aggravating factor. Rather, the bulk of the paragraph is focused on the "serious injury" aggravating factor, and the unassailable principle that a victim's injuries must be substantially "more serious than typical" for an exceptional sentence to be justified. Id. at 388.

Wilcox relies on two cases cited by Wilson, State v. Jacobson, 92 Wn. App. 958, 970-71, 965 P.2d 1140 (1998), and State v. Flake, 76 Wn. App. 174, 183, 883 P.2d 341 (1994), to advance his claim. Jacobson analyzed the "clearly erroneous" standard of appellate review for exceptional sentences, while Flake considered whether the seriousness of the victim's injuries warranted an exceptional sentence. Neither case stands for the

proposition that Wilcox alleges, that RCW 9.94A.535(3)(y) codified the "conduct more egregious than typical" aggravating factor.[10]

Wilcox's reliance on State v. Pappas, 176 Wn.2d 188, 289 P.3d 634 (2012), is also misplaced and to some extent, puzzling. Wilcox appears to argue that the language in Pappas recognizing that a victim's "injuries can 'substantially exceed' one category of harm without reaching the severity of the next category," somehow supports his claim that the State was required to prove that his conduct was more egregious than typical. Brief of Appellant at 14-15 (quoting Pappas, 176 Wn.2d at 192) (emphasis added). Wilcox's reliance on this quote is perplexing because it does not reference a defendant's conduct, and in fact is taken from a paragraph focused entirely on explaining how a victim's injuries can

[10] Although Flake contains a one-sentence quotation from State v. Warren, 63 Wn. App. 477, 820 P.2d 65 (1991), that could be read to suggest that the "conduct producing the harm, and the harm produced" are linked under the "serious injury" aggravating circumstance, a careful review of the three cases cited as authority reveals that this reading would be incorrect. The first case, State v. Armstrong, 106 Wn.2d 547, 723 P.2d 1111 (1986), held that the seriousness of the victim's injuries did not support an exceptional sentence because the injuries fell within the definition of the crime. Id. at 550 ("grievous bodily harm" encompassed first- and second-degree burns). The second case, State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989), reached the same result, relying on Armstrong. Id. at 225 ("grievous bodily harm" included very substantial and serious injuries). The final case, State v. Tunell, 51 Wn. App. 274, 753 P.2d 543 (1988), upheld an exceptional sentence because the physical and psychological injuries suffered by the victims were "significantly more serious than in the usual case." Id. at 280. None of these cases suggest that the "serious injury" aggravating circumstance at common law took into account the egregiousness of the defendant's conduct.

"substantially exceed" a category of harm for purposes of imposing an exceptional sentence.

Lacking support in the statute or case law, Wilcox's challenge should be rejected. The trial court's aggravating circumstance instruction properly stated the law.

3. THE PROPER REMEDY IS REMAND FOR RETRIAL ON THE AGGRAVATING CIRCUMSTANCE.

If the trial court erroneously instructed the jury regarding the "substantially exceeds" aggravating circumstance, then the remedy is remand for retrial on the aggravating circumstance with properly worded instructions. See State v. Thomas, 150 Wn.2d 380, 385, 208 P.3d 1107 (2009) (holding that the trial court properly impaneled a jury for retrial on the aggravating factors after a death penalty sentence was reversed for instructional error on the aggravating factors); RCW 9.94A.537(2), (4) (authorizing the superior court to impanel a jury to consider aggravating circumstances previously relied upon by the superior court to impose an exceptional sentence).

Wilcox wrongly cites Stubbs as authority for his proposition that the remedy is remand for resentencing within the standard range. In Stubbs, the only possible remedy was resentencing

within the standard range because the court held that an exceptional sentence could not be imposed as a matter of law. 170 Wn.2d at 119-20 (holding that the "substantially exceeds" aggravating circumstance does not apply to first-degree assault). Thus, any instructional error requiring the vacation of Wilcox's exceptional sentence is remedied by retrial on the aggravating circumstance with proper instructions.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Wilcox's exceptional sentence.

DATED this 15th day of January, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 1511 3rd AVE, STE 701, Seattle, WA, 98101-3635, containing a copy of the Brief of the Respondent, in State v. Hugh Edwin Wilcox, Cause No. 71620-4, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 15 day of January, 2015.

Name
Done in Seattle, Washington