73350-8

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Court of Appeals
Division I
State of Washington

No. 73350-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

PETERSON BARZIE,

Appellant.

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

The Honorable Laura C. Inveen

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# REPLY BRIEF OF APPELLANT

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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 erroneous instruction defining "prolonged period of time" was not harmless.**

The jury was instructed the phrase "prolonged period of time" meant "more than a few weeks." CP 104 (Supplemental Instruction No. 3). This instruction was an improper judicial comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). A judicial comment on the evidence is presumed prejudicial and is harmless only if the record affirmatively shows no prejudice could have occurred. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

The State concedes error, but nonetheless contends the error was harmless, on the grounds the abuse allegedly spanned eight years. Br. of Resp. at 15. This contention is contrary to the prosecutor's argument to the jury and unsupported by the record. First, at the aggravator hearing, the prosecutor argued to the jury, "Your question is whether or not this went on for longer than a few weeks." RP 786. Second, Ms. Sasu testified she met Mr. Barzie in 2005 and their relationship was tumultuous. RP 406-07, 411-13, 418-21, 421-24, 425-28, 429-34, 435-38. Ms. Sasu was uncertain of some dates, but she testified they broke up for various periods of time in 2009, sometime between 2010 and August 2013, and finally ended the relationship in November 2013. RP 427-28, 428-29, 435, 448. The

incident in question occurred eleven months after the end of their relationship.

Given the prosecutor's emphasis of the improper jury instruction and the sporadic nature of their relationship, the record does not affirmatively show no prejudice could have occurred. The instructional error requires reversal.

**2. The existence of "substantial and compelling reasons" to support an exceptional sentence is a question of fact that must be submitted to a jury.**

Where as here, a defendant exercises his right to jury trial, the State must submit to the jury any fact upon which it seeks to rely for imposition of an exceptional sentence. *Blakely v. Washington*, 542 U.S. 298, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). An exceptional sentence may be imposed only after a finding 1) the offense involved an enumerated aggravating circumstance, and 2) the aggravating circumstance constituted a substantial and compelling reason to depart from the standard range. RCW 9.94A.535; 9.94A.537(3), (4), (6). Because the standard range is only increased upon finding both an aggravating circumstance and substantial and compelling reasons, both findings must be submitted to a jury to comply with *Blakely*.

In *Hurst v. Florida*, the Supreme Court invalidated Florida's two-step capital punishment scheme in which first, a jury made an advisory recommendation for life or death; a recommendation of death required a finding of at least one aggravating circumstance beyond a reasonable, but the circumstance was not specified by the jury. __ U.S. __, 136 S.Ct. 616, 620, __ L.Ed.2d __ (2016). Second, a judge made the final determination after finding whether mitigating and aggravating circumstances existed and whether mitigating circumstances outweighed aggravating circumstances. *Id.* The Court ruled the scheme violated of the constitutional right to trial by jury and due process. *Id.* at 621. The Court noted, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619.

Washington's two-step sentencing scheme similarly violates a defendant's right to jury trial and due process. Unlike the Florida scheme, the SRA requires a jury finding of aggravating circumstances. However, similar to Florida, the SRA provides an exceptional sentence cannot be imposed without the additional finding that substantial and compelling reasons justify the sentence. An exceptional sentence does not flow automatically from the finding of an aggravating circumstance alone.

The State argues *Hurst* addressed only the factual finding of aggravating circumstances. Br. of Resp. at 22. This is incorrect. *Hurst* did not distinguish between finding the existence of aggravating circumstances and the finding the weight to be given those circumstances.

In *Kansas v. Carr*, the Court ruled a judge is not required to instruct a jury that that mitigating circumstances need not be proved beyond a reasonable doubt in a capital case. __ U.S. __, 136 S.Ct. 633, 642-44, __ L.Ed.2d __ (2016). The Court distinguished between the determination of mitigating circumstances, known as the "selection phase," and the determination of aggravating circumstances, known as the "eligibility phase." *Id.* at 642. However, a jury was charged with making findings on both the mitigating and aggravating circumstances. Thus, the case has no bearing on the issue here, that is, whether a defendant's right to jury trial and due process is violated by a judicial finding that substantial and compelling reasons justify imposition of an exceptional sentence above the standard range. The State's reliance on *Carr* is misplaced.

A jury finding that substantial and compelling reasons justify a sentence above the standard range would not divest the court of its discretion to impose a particular sentence, as implied by the State. Br. of Resp. at 20. A judge has authority to impose any sentence it deems

appropriate within the parameters of the SRA and as authorized by a jury's findings. RCW 9.94A.505; *Blakely*, 542 U.S. at 313.

Because the SRA authorizes imposition of an exceptional sentence only after both a finding of an aggravating circumstance and a finding the circumstance is substantial and compelling, both steps must be submitted to a jury. Mr. Barzie's exceptional sentence based on a judicial finding of substantial and compelling reasons must be reversed.

B. CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Barzie requests this Court reverse his exceptional sentence and remand for sentencing within the standard range.

DATED this 23rd day of February 2016

Respectfully submitted,

s/ *Sarah M. Hrobsky*

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