NO. 74422-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DAVID MURRAY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

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# BRIEF OF RESPONDENT

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6. Whether Murray has failed to demonstrate that the trial court abused its discretion by imposing a "clearly excessive" sentence.

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

The State charged Michael Murray with three counts of felony indecent exposure based on Murray's prior conviction for

indecent liberties.[1] CP 17-18. The State alleged that Murray committed all three crimes with sexual motivation, and shortly after being released from incarceration. Id. A jury convicted Murray as charged. CP 59-64; RP 694-95.[2] The court imposed an exceptional sentence of 36 months total confinement. CP 96-104; 12/10/15RP 11-12.

## 2. SUBSTANTIVE FACTS

On March 4, 2015, S.L. was working alone at a retirement home on Seattle's First Hill setting up an event in a conference room when she noticed Murray walking around the room. RP 376, 406, 382-84. S.L. thought that Murray was a prospective resident, and that he was with another employee who was showing the room to two other potential residents. RP 383-84. S.L. left the room and went to the women's restroom. RP 385. As she was exiting the bathroom, she bumped into Murray who was trying to enter the women's restroom. RP 385. Murray looked confused and S.L. directed him to the men's restroom. RP 386. S.L. returned to

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[1] A prior sex offense conviction elevates an indecent exposure conviction from a misdemeanor to a Class C felony. RCW 9A.88.010(2)(c).

[2] The Verbatim Report of Proceedings consists of eight volumes. The first volume, dated August 12, 2015, is irrelevant to the issues raised on appeal. The last volume, dated December 10, 2015, is a transcript of the sentencing hearing and is designated as 12/10/15RP. The remaining intervening volumes contain the trial transcripts, are consecutively paginated, and designated as RP.

setting up the room and noticed that the other employee and potential residents had left. RP 387. Murray appeared a minute later and made a comment to S.L. about the weather and the beautiful view. RP 388. S.L. agreed, and Murray responded, "have a nice day" and left. RP 389. Murray did not appear confused during their exchange. RP 389.

Shortly thereafter, S.L. heard a door open and turned to see Murray peeking out and looking at her from behind a wall. RP 390-91. Murray's rain jacket was making strange "swishy noises" and his pants were down. RP 391. Murray moved into full view and stood masturbating 20 feet away from S.L. RP 391-92. At no point did Murray appear confused. RP 403.

S.L. fled the room and was waiting for the elevator when she heard the door open where Murray had been standing. RP 393-94. S.L. quickly hid in a nearby alcove. RP 394. Murray ran out of the room and got on the elevator. RP 394-95. S.L. ran down four flights of stairs, hyperventilating, to report what had happened. RP 395-96. Surveillance footage showed Murray entering the building and exiting 30 minutes later. RP 397-99. S.L. ultimately identified Murray from a photo montage. RP 400.

The next day, March 5, 2015, C.Y. was going to work at the Dexter Horton building in downtown Seattle. RP 445, 447. She walked onto the elevator, and Murray entered behind her. RP 448. After two people exited the elevator, C.Y. was alone with Murray. RP 449. C.Y. noticed that Murray had not pushed any buttons for a specific floor, and looked over at him. RP 452. Murray was standing six feet away with his penis hanging out of his pants. RP 451-52. C.Y. said nothing to Murray and quickly exited the elevator. RP 453-54. At no point did Murray appear confused. RP 461. Surveillance footage showed Murray entering the building behind C.Y. RP 456-58. C.Y. later identified Murray from a photo montage. RP 459-60.

A few days later, on March 9, 2015, L.S. was cutting a client's hair at her salon in the downtown Seattle Central Building. RP 307, 332. L.S. looked up and saw Murray standing in the hallway, staring at her, with his fly down. RP 332-33, 337. L.S. turned away and when she looked back, Murray was gone. RP 337. Over the course of the next three hours, Murray reappeared in the hallway five or six times with his fly down staring at L.S. RP 338-40.

L.S. left for lunch around 1 p.m. RP 340. When she returned, she noticed two handprints and a face print on her glass door that were not there before.[3] RP 341. L.S. started cutting the hair of a young female client, K.N., when she heard K.N. begin screaming and crying hysterically, "call 911."[4] RP 342-43. L.S. looked up and saw Murray standing 15 feet away, in the same location as before, with "his penis in his hand masturbating." RP 343-44. Murray was looking directly at L.S. and K.N. as he stroked his penis. RP 344-45.

When K.N. screamed, Murray became panicked and fled. RP 345-46. L.S. angrily chased after Murray and used her phone to take his picture. RP 346-47. L.S. told Murray he had "f—ked with the wrong woman and that he was going to get caught." RP 347. Murray appeared shocked, and ran further down the street. RP 347-48. L.S. returned to her salon and met with police. RP 349, 352.

At trial, the State introduced the testimony of three prior victims who Murray had been convicted of exposing himself to

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[3] L.S. testified that she checks to make sure her glass door is clean twice a day because "nobody wants to walk into a dirty salon." RP 341.

[4] K.N. testified that she had previously seen Murray walk past three to four times during the appointment. RP 422. Murray stopped in the hallway a couple of times and stared at her and L.S., giving K.N. a "creepy" feeling. RP 423.

under ER 404(b).[5] The first victim testified that in 2009, she was taking the bus to work when Murray sat down across the aisle from her. RP 563, 565. Although there were only two other people on the bus at the time, and plenty of open seats, Murray chose to sit next to her. RP 565. At some point she looked over and saw Murray looking at her with his pants pulled down and his penis in his hand, masturbating. RP 566. She immediately notified the bus driver and Murray was arrested. RP 567.

The second victim testified that in November 2012, she was sitting alone in an office lobby when she looked up and saw Murray staring at her while masturbating. RP 631, 633-34. She called the police and Murray was arrested nearby. RP 636, 638.

The third victim testified that in 2013, she was working at her desk at a homeless shelter in downtown Seattle when she felt a presence behind her, and turned around to see Murray with his pants unzipped and his penis in his hand. RP 556-57. She angrily ordered Murray out of her office and he left, apologizing. RP 558. Murray did not appear "confused about it or anything like that." RP 558-59. Murray was later arrested at the shelter. RP 560.

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[5] Over Murray's objection, the trial court admitted the testimony as proof that Murray knew his actions would cause reasonable affront or alarm, and proof that he acted with sexual motivation. CP 74; RP 84-94.

Murray was released from jail on February 17, 2015, two-and-a-half weeks prior to exposing himself and masturbating in front of S.L.[6] RP 477-78.

At trial, Murray pursued a diminished capacity defense, arguing that a stroke in 2008 prevented him from knowing that his actions would cause reasonable affront and alarm. RP 678, 687. Murray primarily relied on expert testimony from a forensic psychologist, Dr. Craig Beaver, who testified that due to his stroke, Murray lacked the inhibitive or reflective control that most normal people possess. RP 486, 522. Consequently, Beaver opined that Murray did not know the impact of his actions at the time that they occurred. RP 522. On cross-examination, Beaver admitted that Murray had a 20-year history of lewd behavior and indecent exposure, including two incidents in Utah *prior* to his stroke. RP 531, 540, 544, 551. The jury rejected Murray's diminished capacity defense and found him guilty as charged. CP 59-64.

At sentencing, the State sought a 48-month exceptional sentence based on the jury's finding that Murray had committed the indecent exposures with sexual motivation and the jury finding of

[6] The jury heard only that Murray had been released from jail on this date, and did not hear why Murray had been in jail. RP 477-78.

rapid recidivism. 12/10/15RP 3-4. Based on the victims' trial testimony, the State argued that Murray had a predatory pattern of stalking his victims and waiting for them to be alone or isolated before exposing himself and masturbating. 12/10/15RP 4. The State disputed Murray's claim that his behavior stemmed from his mental disorder, pointing out that Murray had similar convictions from Utah prior to his stroke. 12/10/15RP 4-5.

Murray opposed the length of the State's request, arguing that it was "wholly inappropriate" because he had sought help prior to the offenses. 12/10/15RP 9. Further, he claimed that he had "medically-based inhibitory control issues" resulting from his stroke that lessened his culpability. 12/10/15RP 9-11. Nonetheless, Murray also sought an exceptional sentence upward of 45 days allowing him additional time in jail to develop a release plan. 12/10/15RP 10.

The court concluded that the jury's findings of sexual motivation and rapid recidivism provided substantial and compelling reasons to depart from the range of 0 to 12 months for an unranked felony. CP 97. The court imposed a total of 36 months confinement to "protect the community," while recognizing that

"some medical basis" existed for Murray's problems. 12/10/15RP 11.

## C. ARGUMENT

Murray seeks reversal of his exceptional sentence, arguing that the trial court erred by imposing an aggravated sentence based on the jury's findings that he committed indecent exposure with sexual motivation and rapid recidivism. Murray, however, waived these claims by requesting an exceptional sentence and thereby conceding that the jury's findings provided substantial and compelling reasons to depart from the standard range. Additionally, because the trial court concluded that it would have imposed the same sentence based on either aggravating circumstance, Murray's sentence must be affirmed unless he successfully demonstrates that both aggravating circumstances were invalid. CP 97; State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). For the reasons discussed more fully below, Murray cannot carry this burden. This Court should affirm Murray's exceptional sentence.

## 1. MURRAY WAIVED HIS CHALLENGE TO THE IMPOSITION OF AN EXCEPTIONAL SENTENCE UPWARD BY SEEKING ONE HIMSELF.

For the first time on appeal, Murray claims that the trial court erred when it departed upward from the standard range, despite the fact that he requested such a sentence. Any error was either invited or waived. This Court should exercise its discretion not to address Murray's claim.

A defendant who invites error – even constitutional error – may not claim on appeal that the error requires a new trial. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may not request an instruction and then challenge the instruction on appeal). Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The rationale behind the doctrine is to prevent parties from misleading trial courts and thereby receiving a windfall. Id. In determining whether the invited error doctrine precluded a defendant's claim on review, courts have considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Id. at 154.

Here, Murray asked the court to impose an exceptional sentence:

> We're asking for an exceptional sentence . . . because we want there to be some additional time in the jail so that he can work with the release planning staff to come up with a release plan that ensures community protection.
>
> I'm asking the Court to impose a 365 day sentence on Counts I and II, and then a consecutive sentence of 120 days on Count III.

12/10/15RP 10. Murray's briefing omits any mention of the fact that he asked for an exceptional sentence upward.

By asking the court to depart upward from the standard range, Murray necessarily conceded that the aggravating factors provided substantial and compelling reasons justifying an exceptional sentence. Murray is precluded from setting up an error at trial and then complaining of it on appeal. See State v. Smith, 82 Wn. App. 153, 163, 916 P.2d 960 (1996) (invited error doctrine precluded defendant from seeking review of "deliberate cruelty" aggravating factor because he urged the court to impose an exceptional sentence upward and conceded the factor's existence).

Even if the alleged error was not invited, it was waived. Courts have held that "when a defendant has stipulated to an exceptional sentence, he waives his right to appellate review of the

sentence." State v. Ermels, 156 Wn.2d 529, 539, 131 P.3d 299 (2006) (citing In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 311, 979 P.2d 417 (1999)). Here, Murray did more than stipulate to an exceptional sentence; he asked for one. 12/10/15RP 10. In doing so, Murray essentially admitted that the aggravating factors provided substantial and compelling reasons to justify an exceptional sentence, and thereby waived his right to appellate review.

### 2. SEXUAL MOTIVATION IS NOT INHERENT IN THE CRIME OF INDECENT EXPOSURE.

Murray argues that the trial court erred by imposing an exceptional sentence based in part on the jury's finding that he committed the crimes with sexual motivation. He contends that "indecent exposure is a sex offense which cannot be aggravated by a finding of sexual motivation." Br. of Appellant at 24. Murray's claim fails under a plain and common sense reading of the relevant statutes.

A person commits indecent exposure if he "intentionally makes any open and obscene exposure" of "his person" knowing that such conduct is "likely to cause reasonable affront or alarm." RCW 9A.88.010(1). Although the statute does not define the

phrase "any open and obscene exposure of his or her person," Washington common law has defined it as "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Vars, 157 Wn. App. 482, 490, 237 P.3d 378 (2010) (quoting State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966)). The essence of indecent exposure is an intentional and obscene exposure of genitalia in the presence of another, regardless of whether the other person sees it. Vars, 158 Wn. App. at 491.

A court may impose an exceptional sentence if a jury finds that the defendant committed the charged crime with sexual motivation, i.e., for purposes of sexual gratification. RCW 9.94A.535(3)(f); RCW 9.94A.030(48). The aggravating circumstance of sexual motivation, however, "shall not be applied to sex offenses." RCW 9.94A.835(2). As Murray concedes, indecent exposure is not an enumerated sex offense. RCW 9.94A.030(47). Thus, sexual motivation may form the basis of an exceptional sentence for the crime of indecent exposure.

Nonetheless, Murray argues that indecent exposure is an inherently sexual offense, despite the Legislature's refusal to define

it as such. Murray primarily rests his claim on State v. Thomas, where the state supreme court held that felony murder predicated on rape is not a sex offense precluding the imposition of an exceptional sentence based on sexual motivation. 138 Wn.2d 630, 636-38, 980 P.2d 1275 (1999).

In Thomas, the court recognized that the purpose of the aggravating circumstance of sexual motivation is "to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit the *same crimes* without sexual motivation." Id. at 636 (emphasis in original). The court reasoned that sexual motivation "logically applies only to offenses that are *not* inherently sexual in nature," such as felony murder, and imposes greater culpability because the defendant committed the crime for the purpose of sexual gratification. Id. (emphasis in original).

By claiming that "indecent exposure criminalizes a sexual act," Murray essentially argues that every act of indecent exposure is inherently sexual. He is mistaken. The gravamen of indecent exposure is the intentional and obscene display of genitalia in another's presence. Vars, 158 Wn. App. at 491. Neither the statute nor the case law require that the exhibition be for the purpose of sexual gratification.

Indeed, one can easily conjure up scenarios of indecent exposure that are not sexual in nature: streaking naked across a college campus, riding a bike unclothed in a parade to celebrate the summer solstice, or standing nude outside the 2016 Republican National Convention as a political protest.[7] In each one, people intentionally and explicitly display their genitalia for a reason other than sexual gratification. Murray's claim fails because indecent exposure is not categorized as a sex offense, and does not require the more culpable mental state of acting for the purpose of sexual gratification.

### 3. MURRAY REOFFENDED WITH RAPID RECIDIVISM BY COMMITTING THREE COUNTS OF INDECENT EXPOSURE WITHIN THREE WEEKS OF BEING RELEASED FROM JAIL.

Murray argues that the trial court erred by imposing an exceptional sentence based on rapid recidivism because he sought professional help when he was released from jail to prevent him from reoffending, and therefore lacked the "disdain for the law" that the aggravating circumstance allegedly requires. Although Murray

[7] Although not widely reported, on July 17, 2016, 100 women stood naked outside the Republican National Convention to peacefully protest the Republican nominee's "hateful rhetoric" toward women. Available at http://www.huffingtonpost.com/entry/100-women-just-got-naked-together-at-the-republican-national-convention_us_578cc902e4b0867123e1bf86 (last visited Oct. 28, 2016) (*Warning:* nude photos).

claims that the "State failed to prove rapid recidivism," suggesting a sufficiency of the evidence challenge and a clearly erroneous standard of review, Murray frames the issue "[a]s a matter of law," suggesting a de novo standard of review. Br. of Appellant at 4, 28 (emphasis in original).

Under either standard, Murray's challenge fails. Substantial evidence supports the jury's conclusion that Murray committed indecent exposure with rapid recidivism given that Murray had been released from jail only three weeks prior to committing three counts of indecent exposure. Further, the "disdain for the law" referenced in the case law is not an additional element of rapid recidivism, but merely a rationale for imposing an exceptional sentence.

To prove rapid recidivism, the State must prove beyond a reasonable doubt that the defendant committed the current offense "shortly after being released from incarceration." RCW 9.94A.535(3)(t). The statute does not define the phrases "shortly after" or "released from incarceration." Courts have repeatedly held that the statute does not require the State to prove additional factors such as the similarity of the prior and current offenses, a greater disregard or disdain for the law, or heightened culpability. E.g., State v. Williams, 159 Wn. App. 298, 312-14, 244 P.3d 1018

(2011); State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010); State v. Cham, 165 Wn. App. 438, 449, 267 P.3d 528 (2011). Rather, these factors provide "merely an explanation of, and justification for" imposing an exceptional sentence based on rapid recidivism. Williams, 159 Wn. App. at 313.

On review, an appellate court will not reverse an exceptional sentence unless (1) there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence under a clearly erroneous standard, (2) the reasons provided by the sentencing court do not justify a departure from the standard range under a de novo standard, or (3) the sentence is clearly excessive or clearly too lenient under an abuse of discretion standard. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Murray argues that the State "failed to prove" that he committed indecent exposure "shortly after" release. Br. of Appellant at 28. To the extent that Murray is challenging the sufficiency of the evidence, his claim is subject to the "clearly erroneous" standard of review requiring the appellate court to affirm the jury's finding unless "no substantial evidence supports its conclusion." State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d

1192 (1997) (quoting State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991)).

Here, the State produced evidence that Murray was released from the King County jail on February 17, 2015, and that he reoffended within three weeks, committing indecent exposure on March 4, March 5, and March 9, 2015. RP 332, 408-11, 447, 477. Thus, substantial evidence supports the finding that Murray committed the current offenses "shortly after" his release from incarceration. CP 97.

Courts have affirmed exceptional sentences based on rapid recidivism with longer timeframes. See State v. Saltz, 137 Wn. App. 576, 584-85, 154 P.3d 282 (2007) (upholding exceptional sentence where the defendant reoffended 30 days after release); State v. Zigan, 166 Wn. App. 597, 605-06, 270 P.3d 625 (2012) (affirming exceptional sentence where defendant reoffended two months after release); State v. Hughes, 154 Wn.2d 118, 141-42, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (suggesting defendant's commission of the same offense against the same victim three months after his release demonstrated rapid recidivism).

Nonetheless, Murray argues that the trial court erred as a matter of law because he lacked the "disdain for the law" that rapid recidivism allegedly requires. This argument is flawed in many respects. First, as this Court previously held in Williams, rapid recidivism requires only that the defendant reoffend shortly after being released from incarceration. 149 Wn. App. at 312-14. The "disdain for the law" referenced in case law is not an additional factual element that must be found by the jury, but rather the justification for allowing imposition of an exceptional sentence based on rapid recidivism. Id. at 314. Murray does not acknowledge Williams, even though it is directly on point.

Further, it is the "'short time between release from prison and reoffense' that 'demonstrate[s] a disregard and disdain for the law.'" Id. at 311 (quoting Hughes, 154 Wn.2d at 141). As discussed above, Murray's three-week timeframe for reoffending establishes his disdain for the law. The fact that Murray sought professional help upon release bears minimally, if at all, on the question presented to the jury. Murray's effort to mitigate his culpability is more relevant to the trial court's determination at sentencing whether the short time period between Murray's release and re-offense provided a substantial and compelling reason to

depart from the standard sentencing range. While the trial court could have found that Murray's rapid recidivism was not a substantial and compelling reason to depart from the standard range because of Murray's efforts to seek professional help, it was not required as a matter of law to do so. Id. at 314; RCW 9.94A.537(6). The trial court properly imposed an exceptional sentence based on rapid recidivism under either the clearly erroneous or the de novo standards of review.

### 4. MURRAY'S VAGUENESS CHALLENGE TO THE AGGRAVATING CIRCUMSTANCE FAILS.

Alternatively, Murray claims that the trial court erred by imposing an exceptional sentence based on the rapid recidivism aggravating circumstance because it is unconstitutionally vague under the due process clause. Murray's claim fails because the sentencing guidelines are not subject to a void-for-vagueness challenge under established Washington Supreme Court precedent. Moreover, even if Murray could raise a vagueness challenge, his claim fails because the rapid recidivism aggravating circumstance was not unconstitutionally vague as applied to him, and this Court has previously upheld the aggravating circumstance

against a void-for-vagueness challenge. Williams, 159 Wn. App. at 319-20.

**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 state 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.

Murray 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). 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 Kier, 164 Wn.2d at 804 (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 Murray 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.

Murray attempts to sidestep this precedent by arguing that a due process vagueness challenge is possible in light of Johnson v. United States, despite its inapposite facts. __ U.S. __, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). In Johnson, the court struck

down a provision of the Armed Career Criminal Act as unconstitutionally vague. Id. The provision required the sentencing court to impose a mandatory minimum sentence of 15 years. See 18 U.S.C. §924(e)(1) (providing that a defendant convicted of being a felon in possession of a firearm with three prior violent felony convictions "*shall be . . . imprisoned* not less than fifteen years") (emphasis added). Thus, the sentencing enhancement provision at issue in Johnson was subject to a due process vagueness challenge because it dictated an aggravated sentence.

The aggravating circumstances listed in RCW 9.94A.535, however, do not require the trial court to impose an exceptional sentence. Rather, 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 does not mandate an exceptional sentence. RCW 9.94A.537(6). The trial court still must decide whether the aggravating circumstance is a substantial and compelling reason to impose a sentence outside the standard sentencing range.[8] Id.

[8] For example, in State v. Siers, the jury found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. 174 Wn.2d 269, 272-73, 274 P.3d 358 (2012).

Consequently, Baldwin's holding and rationale remain good law. This Court should adhere to binding precedent and reject Murray's vagueness challenge to the rapid recidivism aggravating circumstance.

**b. Alternatively, The Rapid Recidivism Aggravating Circumstance Is Not Unconstitutionally Vague As Applied To Murray.**

Even if the aggravating circumstance statute is subject to a vagueness challenge, Murray's claim fails on this record and in light of this Court's holding in Williams rejecting a due process vagueness challenge to the rapid recidivism aggravating circumstance. 159 Wn. App. at 319-20.

Statutes are presumed constitutional on review, and the party challenging the statute's constitutionality bears the burden of proving the statute's invalidity beyond a reasonable doubt. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The constitutionality of a statute is reviewed de novo. Williams, 159 Wn. App. at 319. 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 Murray'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." Id. at 182-83.

Here, the rapid recidivism aggravating circumstance is not unconstitutionally vague as applied to Murray. Murray committed

three counts of indecent exposure within three weeks of being released from the King County jail. RP 332, 408-11, 447, 477. A person of common intelligence would not have to guess that reoffending three weeks after being released from jail could lead to an exceptional sentence under RCW 9.94A.535(3)(t). See Williams, 159 Wn. App. at 320 (holding rapid recidivism aggravating circumstance was not unconstitutionally vague as applied to a defendant who committed a new crime within one day of being released from jail).

Moreover, this Court upheld the rapid recidivism aggravating circumstance against a void-for-vagueness challenge in Williams. Id. at 319-20. Murray does not acknowledge, let alone attempt to distinguish Williams, despite it being directly on point.

Instead, Murray argues that the rapid recidivism aggravating circumstance is unconstitutionally vague because it "does not give sufficient notice that a brain-injured man suffering from a medically-caused behavioral disinhibition commits 'rapid recidivism' when he first asks for help but then reoffends." Br. of Appellant at 29. Murray's argument ignores the legal framework on review. A statute is void for vagueness if an ordinary person cannot understand what conduct is prohibited, or if it lacks ascertainable

standards of guilt to guard against arbitrary enforcement. Williams, 159 Wn. App. at 320. Murray provides no authority for the proposition that a law is unconstitutionally vague if it fails to contemplate a defendant's mental condition and treatment efforts.

Given the facts presented and the case law, Murray's argument falls far short of demonstrating the statute is unconstitutional beyond a reasonable doubt.[9] Watson, 160 Wn.2d at 10; see also Eze, 111 Wn.2d 22, 28, 759 P.2d (1988) (recognizing that "the presumption in favor of a law's constitutionality should be overcome only in exceptional cases").

### 5. THE TRIAL COURT'S EXCEPTIONAL SENTENCE WAS NOT "CLEARLY EXCESSIVE."

Murray contends that the trial court abused its discretion by imposing a clearly excessive sentence, given his mental condition and efforts to seek treatment. Murray's claim fails because he cannot show that trial court's sentence is so long that it shocks the conscience.

On review, an exceptional sentence above the standard range will be affirmed unless the trial court relied on an untenable

[9] Murray's argument analogizing a finding of rapid recidivism to "a disfavored strict liability crime" is meritless given that a trial court is under no obligation to impose an exceptional sentence. Br. of Appellant at 29-30; RCW 9.94A.537(6).

ground, or imposed a sentence that "is so long that, in light of the record, it shocks the conscience of the reviewing court," such that no reasonable person would have imposed such a sentence. State v. Ritchie, 126 Wn.2d 388, 395-96, 894 P.2d 1308 (1995) (quoting State v. Ross, 71 Wn. App. 556, 571, 861 P.2d 473 (1993)); State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986).

Once the appellate court has determined that the facts support an exceptional sentence above the standard range, and that those reasons are substantial and compelling, "there is often nothing more to say." Ritchie, 126 Wn.2d at 396 (quoting Ross, 71 Wn. App. at 572). A trial court need not articulate any reasons for the length of an exceptional sentence. Id. at 392.

Here, the trial court imposed an exceptional sentence stating:

> I understand that there is some medical basis for what Mr. Murray's problems are, but it's not clear that there is any way to protect the community other than locking him up, and so while I don't think we need to go to quite the extent that the prosecutor's recommending, I do think that a substantial prison sentence is merited, and so I'll sentence Mr. Murray to 36 months in prison.

12/10/15RP 11-12. The trial court found that the sexual motivation and rapid recidivism aggravating circumstances found by the jury

constituted substantial and compelling reasons to impose an exceptional sentence above the standard range. CP 97. Thus, the trial court had tenable reasons to impose an exceptional sentence.

Murray concedes as much, arguing that "[e]ven if either of the aggravating circumstances could technically apply, sending the brain-injured Mr. Murray to prison for 36 months was clearly excessive." Br. of Appellant at 31. The only question on review is whether Murray's 36-month exceptional sentence is so long in light of the record that no reasonable person would have imposed such a sentence. Ritchie, 126 Wn.2d at 396. Given Murray's predatory pattern of stalking his victims and waiting until they were isolated to expose himself and masturbate, and the short, three-week time frame separating his release from jail for indecent exposure and him committing the same offense three more times in one week, the trial court's sentence is neither shocking, nor unreasonable. Moreover, the sentence is only 20 months longer than the sentence he requested. 12/10/15RP 10.

Murray's exceptional sentence is also reasonable in light of the sentencing framework for indecent exposure, which does not account for an offender's criminal history. The standard sentencing

range for felony indecent exposure based on a prior sex offense is 0-12 months because it is an unranked felony. State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010); RCW 9.94A.505(2)(b).

Consequently, Murray's 20-year history of committing lewdness involving a child (twice in 1994,[10] 2005), lewdness (2005), indecent exposure (2009, 2012, 2013), and indecent liberties (2010),[11] was not accounted for in his standard range.[12] CP 3, 115-232; Supp CP __ (sub 90). Arguably, the trial court's 36-month sentence appears relatively light given the two decades Murray has spent exposing himself to women and children. Further, Murray's similar convictions pre-dating his 2008 stroke, and demonstrated pattern of waiting to expose himself until his victims were alone or isolated, suggests a level of calculation and culpability that undercut his diminished capacity claim at trial, and on appeal.

Moreover, the trial court's three-year sentence does not appear "clearly excessive," given that a sexual motivation finding on

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[10] In 1994, Murray pled guilty to two counts of lewdness involving a child for lying down between two sleeping boys, while intoxicated, with his pants undone. CP 212.

[11] Murray was convicted of indecent liberties for sexually assaulting a woman at an emergency shelter while she was sleeping. Supp CP __ (sub 90).

[12] Similarly, Murray's standard sentencing range did not account for his theft-related felony convictions. Supp CP __ (sub 90).

a ranked Class C felony results in a mandatory 12-month sentencing enhancement that must be served in total confinement, and is run consecutive to the total period of confinement and any other sexual motivation enhancements. RCW 9.94A.533(8)(a)(iii). Because he was convicted of an unranked felony, Murray did not receive a mandatory 36-month sentencing enhancement that would have otherwise been added to his total term of confinement.

Murray cannot show that no reasonable judge would have imposed a 36-month sentence based on the facts presented at trial, the sentencing framework, and his criminal history, including an indecent liberties conviction and six convictions for indecent exposure in the last six years. Ritchie, 126 Wn.2d at 396. As this Court recognized over 20 years ago in Ross, and the state supreme court cited with approval in Ritchie, once a reviewing court has determined that the facts support an exceptional sentence above the standard range, and that those reasons are substantial and compelling, "there is often nothing more to say." Ritchie, 126 Wn.2d at 396 (quoting Ross, 71 Wn. App. at 572).

## D. CONCLUSION

For the foregoing reasons, the Court should affirm Murray's exceptional sentence. The State will not seek reimbursement for appellate costs should it prevail because Murray's longstanding homelessness and disability impair his likelihood of employment.

DATED this 2nd day of November, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mick Woynarowski, the attorney for the appellant, at mick@washapp.org, containing a copy of the Brief of Respondent, in State v. Michael David Murray, Cause No. 74422-4, 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 2 day of November, 2016.

Name:
Done in Seattle, Washington