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COURT OF APPEALS  
STATE OF WASHINGTON  
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NO. 63929-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DAVID LANGE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HEAVEY

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether appellant David Lange waived his vagueness challenge to the jury instruction on the aggravating circumstance because he did not object to the instruction or request a clarifying instruction.

2. Whether Lange has failed to establish that the jury instruction on the aggravating circumstance was unconstitutionally vague.

3. Whether Lange's claim that the trial court failed to support its exceptional sentence with written findings of fact and conclusions of law is without merit given that the court signed the findings at the sentencing hearing and they are now filed.

**B. STATEMENT OF THE CASE**

In the summer of 2008, appellant David Lange and Donna Oakley met and began a sexual relationship. RP 91-92, 122.<sup>1</sup> Oakley was homeless and moved in with Lange, who resided in an abandoned trailer in Auburn. RP 91-94. Sometime later, after the trailer was towed away, they broke up. RP 95.

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<sup>1</sup> The report of proceedings consists of 4 volumes. The first three volumes are consecutively paginated and are referred to as "RP." The last volume, the transcript of the sentencing hearing, is referred to as "RP(7/2/09)."

On the evening of January 16, 2009, Oakley and her friend Cher Martin were drinking beer in a park when Lange approached and asked to talk with Oakley. RP 96-98. Oakley and Martin went with Lange back to an area where he was using a tarp as shelter. RP 98-99. Lange indicated that he wanted to have sex with Oakley, but she declined. RP 100. Lange and Martin proceeded to "go at it" while Oakley watched. RP 100, 125. At some point, after Martin indicated that she did not want to have sex anymore, Oakley intervened and told Lange to get off Martin. RP 100-02, 126. In response, Lange grabbed Oakley by her foot and dragged her outside the tarp. RP 102-03. He struck her with a closed fist multiple times in the face. RP 103-04, 131.<sup>2</sup>

Martin came outside and told Lange to leave Oakley alone. RP 105. Oakley and Martin walked away and slept in an abandoned house that night. RP 105-08, 164-65. When Oakley woke up the next morning, she felt great pain in her face and her eyes were swollen shut. RP 105-06, 112. Martin called the police.

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<sup>2</sup> At trial, Martin denied having sex with Lange. RP 163-64. She testified that after she and Oakley went to Lange's tarp, they went to sleep. RP 159-61. When she then woke up, she heard Oakley and Lange arguing about sex, and saw him pull her out of the tarp. RP 159-63.

RP 109, 167. An officer responded, observed that Oakley's face was severely injured and called for medical aid. RP 146-48.

As the officer was talking to Oakley, Lange walked by and Oakley pointed him out. RP 151. When the officer contacted him, Lange claimed that Oakley had started it. RP 151. He stated that she slapped him first and that he slapped her back twice. RP 151-52.

Later that day, Oakley went to the hospital and learned that Lange had caused a complex fracture to her cheekbone and eye socket and had broken her nose. RP 110-11, 181-82. There were fractures in four or five locations, and her cheekbone and eye socket were pushed in. RP 183-85. The doctor inserted a titanium plate into her face, secured by seven screws, in order to keep the bones in place. RP 111, 186-87. A week later, Oakley's face was still swollen and she still felt pain, though she was improving. RP 189.

The State charged Lange with second-degree assault. CP 4. The State also alleged an exceptional sentence aggravating circumstance: that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. CP 4.

Trial occurred in June of 2009. Lange testified that Oakley became jealous when he was having sex with Martin and attacked him. RP 208-09. He denied punching her and stated that he slapped her on the chin in order to calm her down. RP 212-13, 232. He insisted he could not have caused the injuries to her face. RP 221.

Lange did not object to the court's instruction pertaining to the aggravating circumstance. RP 252. A jury convicted Lange as charged and found the aggravating circumstance. CP 9, 11; RP 283-87. The court imposed an exceptional sentence of 15 months. RP(7/2/09) 5. This appeal follows.

**C. ARGUMENT**

**1. THE COURT SHOULD REJECT LANGE'S VAGUENESS CHALLENGE TO THE JURY INSTRUCTION FOR THE AGGRAVATING CIRCUMSTANCE.**

The jury found that Oakley's injuries substantially exceeded the element of "substantial bodily harm" required for second-degree assault. Lange does not challenge the sufficiency of the evidence supporting this special verdict. Rather, he challenges his exceptional sentence on the basis that the jury instruction on the

aggravating circumstance was unconstitutionally vague.<sup>3</sup> Lange has waived this claim because he did not challenge the instruction below or propose any clarifying instructions. Even if the claim is not waived, it has no merit. The jury instruction was worded virtually identically to the statute, and, as Lange acknowledges, the words used in the instruction were reasonably clear. The instruction properly asked the jury to decide whether Oakley's injuries substantially exceeded the element of "substantial bodily harm" required for second-degree assault. The instruction was not unconstitutionally vague.

a. Lange Has Waived His Challenge To The Jury Instructions.

Lange did not object or take exception to the jury instruction on the aggravating circumstance. He never proposed any additional or clarifying instructions. The Washington Supreme Court has repeatedly held that a criminal defendant who believes a

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<sup>3</sup> Lange does not claim that the statute setting forth this aggravating circumstance is unconstitutionally vague, and, instead, challenges only the jury instruction. Brief of Appellant at 1. In a case involving the same aggravating circumstance pending at the Washington Supreme Court, *State v. Stubbs*, 144 Wn. App. 644, 184 P.3d 660 (2008), *rev. granted*, 165 Wn.2d 1035 (2009), the defendant has challenged both the statute and jury instruction as vague.

jury instruction is unconstitutionally vague or unclear has a ready remedy -- proposal of a clarifying instruction -- and that the failure to propose further definitions precludes review of this claim of error. This Court should hold that Lange's challenge is waived.

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 claimed on appeal that the term "unlawful force" in the jury instructions was unconstitutionally vague. The Court held 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) (holding that 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 vagueness challenge to a jury instruction when he did not object to the instruction at trial).

Anticipating this issue, Lange argues that he can raise his vagueness challenge for the first time on appeal because it involves an error of constitutional magnitude. Brief of Appellant at 9-10. However, the cases that he cites are inapposite; none involves a vagueness challenge to an instruction. In State v. Haberman, 105 Wn. App. 926, 930-37, 22 P.3d 264 (2001), the court incorrectly gave outdated jury instructions for the crime of malicious harassment, including "to convict" instructions, based upon the previous version of the crime. In State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196, 199 (2005), the defendant contended that the trial court used an erroneous definition for the "in a reckless manner" element. Neither decision suggests that a defendant may raise a vagueness challenge for the first time on appeal.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id. Lange does not address this standard or attempt to satisfy it. Accordingly, the Court should decline to review his challenge to the jury instruction.

b. The Instruction Was Not Unconstitutionally Vague.

Even if Lange's vagueness challenge is not waived, the Court should reject it and affirm his exceptional sentence. Lange argues that the trial court should have further defined the aggravating circumstance and that the failure to do so left the jury incapable of determining whether Oakley's injuries substantially

exceeded the level of bodily harm necessary for second-degree assault. This claim is without merit.

The aggravating circumstance at issue, set forth in RCW 9.94A.535(3)(y), authorizes the imposition of an exceptional sentence upon a jury's finding, 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." The special verdict form repeated the statutory language and provided:

We, the jury, return a special verdict by answering as follows:

Question: Did the injuries of Donna Oakley sustained during the commission of the crime of Assault in the Second Degree as charged substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree?

CP 11.

Here, this instruction, in conjunction with the other jury instructions, provided the jury with sufficient guidance to decide whether the aggravating circumstance was present. The jury instructions informed the jury that the level of harm necessary for second-degree assault was "substantial bodily harm." CP 21. The instructions further defined "substantial bodily harm" as "bodily injury that involves a temporary but substantial disfigurement, or

that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." CP 22. The special verdict form then asked the jury to consider whether Oakley's injuries substantially exceeded the "substantial bodily harm" required for second-degree assault.

Lange acknowledges that the words used in the instructions are "reasonably clear." Brief of Appellant at 10. Indeed, the appellate courts have rejected vagueness challenges to the term "substantial," which is used in a variety of criminal statutes and corresponding jury instructions.<sup>4</sup> Instead, he argues that without additional instructions, the jury "did not have the expertise or experience to determine whether the injuries in this case were substantially beyond what is *average* for second-degree assault." Brief of Appellant at 9 (emphasis added).

The premise of Lange's argument -- that the injuries must substantially exceed the *average* injuries for the crime -- is incorrect and inconsistent with the plain language of the statute. The statute

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<sup>4</sup> See State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) (rejecting claim that phrase "interferes substantially with his liberty" was unconstitutionally vague); State v. Saunders, 132 Wn. App. 592, 599, 132 P.3d 743 (2006) (rejecting vagueness challenge to the element of "substantial pain" in third-degree assault), rev. denied, 159 Wn.2d 1017 (2007); State v. Billups, 62 Wn. App. 122, 129, 813 P.2d 149 (1991) (holding that the term "substantial step" was not unconstitutionally vague).

does not require that the injuries substantially exceed the *average* injuries for the crime. It provides an objective measurement -- that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y). The legislature enacted this aggravating circumstance after the United States Supreme Court held that a jury finding was constitutionally required for an aggravating circumstance.<sup>5</sup> When drafting this language, the legislature, aware that a jury would be making any necessary findings, used this objective measurement, rather than requiring the jury to attempt to compare the injuries with those occurring in other cases.<sup>6</sup> Here, the jury was not required to find that Oakley's injuries were greater than average for a victim of second-degree assault.

Though his vagueness challenge is directed only to the jury instruction, Lange cites caselaw relating to vagueness challenges

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<sup>5</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

<sup>6</sup> In contrast, the "major economic offense" aggravating circumstance, set forth in RCW 9.94A.535(3)(d)(ii), requires a consideration of whether the "current offense involved attempted or actual monetary loss substantially greater than typical." This aggravating circumstance was enacted prior to the Blakely decision, at a time when judges, not juries, found aggravating circumstances.

to criminal statutes.<sup>7</sup> Under the Due Process Clause, a statute is void for vagueness if (1) it 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). A statute fails to provide the required notice if it forbids the doing of an act in terms so vague that persons 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). However, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his or her actions would be classified as prohibited conduct. Id. at 7. Because Lange's challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to his conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

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<sup>7</sup> As Lange acknowledges, the Washington Supreme Court has 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." State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003).

Here, the aggravating circumstance is not unconstitutionally vague when considered in the context of Lange's actions. Lange was on notice that his actions were criminal when he violently attacked Oakley and hit her with such force that he pushed in her cheekbone and eye socket and broke them in four or five locations. He was on notice that he risked an exceptional sentence when he caused such injuries.

Lange insists that, absent a further instruction narrowing the scope of the aggravating circumstance, "the class of defendants exposed to the exceptional sentence is virtually all of them." Brief of Appellant at 13. This claim ignores the limitations set forth in the plain language of the aggravating circumstance. The only defendants subject to the aggravating circumstance are those who cause injury to the victim that *substantially exceeds* "substantial bodily harm." This is not an easily satisfied standard, and the statute clearly requires a degree of injury much greater than that required for the underlying crime. Lange's claim that all defendants convicted of second-degree assault are somehow subject to this aggravating circumstance is meritless.

Finally, Lange cites several decisions of the United States Supreme Court dealing with vagueness challenges under the

Eighth Amendment. Brief of Appellant at 14-15. 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 (7<sup>th</sup> Cir. 1996) (holding that Eighth Amendment vagueness inquiry does not apply to non-capital cases), overruled on other grounds by Owens v. United States, 387 F.3d 607 (7<sup>th</sup> 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 Lange 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. The aggravating circumstance challenged here certainly had a core meaning that a jury could understand.

This Court should reject Lange's challenge to the jury instruction on the aggravating circumstance and affirm his exceptional sentence.

**2. THE TRIAL COURT HAS ENTERED THE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

Finally, Lange claims that the trial court erred by failing to enter written findings of fact and conclusions of law concerning the exceptional sentence and asks the court to remand for entry of the findings. In fact, at the sentencing hearing, the court signed the findings of fact and conclusions of law for the exceptional sentence. RP(7/2/09) 7. The findings were inadvertently not filed, and this error has now been corrected. Supp. CP \_\_\_ (Sub. No. 60 and 61).

**D. CONCLUSION**

For the reasons cited above, this Court should affirm Lange's exceptional sentence.

DATED this 23<sup>d</sup> day of April, 2010.

Respectfully submitted,

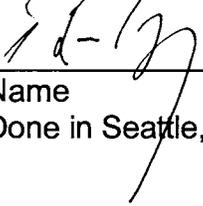
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DAVID LANGE, Cause No. 63929-3-I, 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.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

04-23-10  
\_\_\_\_\_  
Date