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NO. 65348-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS A. PAPPAS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

The crime of vehicular homicide can be committed by causing substantial bodily harm. The evidence in this case showed that the defendant's driving caused great bodily harm. Based on this evidence, the jury found that the victim's injury substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. Does this finding support the imposition of an exceptional sentence?

II. STATEMENT OF THE CASE

On the night of August 12, 2008, Melanie Thielman attended a meeting with the defendant, Nicholas Pappas. The defendant invited her to ride on his motorcycle, a Honda 900 RR. 1 RP 238. This is a sport race bike that is capable of rapid acceleration. 1 RP 117; 2 RP 146-47. As they left, another attendee heard the defendant shift into third gear. 1 RP 127. In *second* gear, the motorcycle can go as fast as 70-80 miles an hour, and no *slower* than 20 miles an hour. 3 RP 143-44.

The defendant's drive took them onto Marine View Drive, a windy road with a 25 mile per hour speed limit. 1 RP 150. He encountered a car that was driving at the speed limit or a little slower. On a curve that was a no-passing zone, the defendant

decided to pass. He accelerated to 50-60 miles per hour. He drove off the road into a utility pole. Both the defendant and Ms. Thielman were flung from the motorcycle. 1 RP 66-68, 157-61; 2 RP 155-60.

As a result of this collision, Ms. Thielman suffered a severe brain injury. 3 RP 4-8. She has very little control over the left half of her body. She can't eat unless food is put in her mouth. She can't bathe herself. She needs assistance going to the bathroom. She can barely talk. 2 RP 174-79; 1 RP 103-04. She will require care for the rest of her life. 3 RP 12. Any improvement in her condition will probably be marginal and minimal. 3 RP 14.

A jury found the defendant guilty of vehicular assault, based on operating a motor vehicle with disregard for the safety of others. 1 CP 122-23. In a special verdict, the jury found that the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. 1 CP 121.

The standard sentencing range is 1-3 months. 1 CP 18. Based on the jury finding of an aggravating factor, the court imposed an exceptional sentence of 18 months' confinement. 1 CP 19, 27-28.

III. ARGUMENT

AN EXCEPTIONAL SENTENCE IS JUSTIFIED IF A CRIME REQUIRES THE INFLECTION OF SUBSTANTIAL BODILY HARM AND THE STATE PROVES THAT THE VICTIM SUFFERED GREAT BODILY HARM.

The defendant challenges the trial court's imposition of an exceptional sentence. The standards for reviewing such a sentence are set out in RCW 9.94A.585(4):

To reverse a sentence, which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Here, the jury found that the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. 1 CP 121. The judge relied on this finding in imposing the exceptional sentence. 1 CP 28. The defendant does not contend that the finding was unsupported by the evidence, nor does he claim that the sentence was excessive. The sole issue is thus whether this jury finding justifies a sentence outside the standard range. The legal justification for an exceptional sentence is reviewed de novo. State v. Stubbs, ___ Wn.2d ___, 240 P.3d 143, 146 ¶ 8 (2010).

Under the original version of the Sentencing Reform Act (SRA), there was conflicting authority on whether exceptional injury was a valid non-statutory aggravating factor for vehicular assault. In two cases, this court approved imposition of exceptional sentences based on this factor. The court held that “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.” State v. Flake, 76 Wn. App. 174, 183, 883 P.2d 341 (1994); State v. Quiros, 78 Wn. App. 134, 142, 896 P.2d 91, review denied, 127 Wn.2d 1024 (1995).

The Supreme Court, however, rejected this analysis:

Although particularly severe injuries may be used to justify an exceptional sentence, the injury must be greater than that contemplated by the Legislature in setting the standard range. The offense of which [the defendant] was convicted, vehicular assault, contains the element of serious bodily injury. . . [The victim’s] injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries suffered cannot justify an exceptional sentence.

State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (citations omitted). This opinion seems to say that exceptional injury could

not be a valid non-statutory factor if the crime included severity of injury as an element.

In 2005, the Legislature amended the SRA to abolish non-statutory aggravating factors. In so doing, it codified most of the previously-recognized factors. The new statutory list included the following factor: "The victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y).

In adopting this factor, the Legislature repudiated Cardenas. It can no longer be claimed that severity of injury is an improper aggravating factor whenever the crime requires some level of bodily harm. Rather, even if some level of bodily harm is necessary to satisfy the elements of the offense, an exceptional sentence is available when the victim's injuries substantially exceeded that level. The Legislature thus adopted the analysis of Flake and Quiros: an exceptional sentence is proper if the victim's injuries are "significantly more serious than what is typically involved in the crime."

The Supreme Court discussed the impact of this amendment in Stubbs. The appellant's brief does not mention this case.¹ In Stubbs, the court considered the application of the "severe injury" aggravating factor to the crime of first degree assault. That crime (as charged in Stubbs) involves the infliction of great bodily harm. The court held that the aggravating factor could not be used because "the legislature has not defined a level of harm greater than 'great bodily harm.'" Stubbs, 240 P.3d at 148 ¶ 15.

In so holding, the court acknowledged that the Legislature had modified the analysis of Cardenas:

[RCW 9.94A.535(3)(y)] creates a somewhat different test than we have employed in the past. Instead of looking at the bodily harm element of the offense to see if the victim's injuries fit within the definition of that element, the statute asks a jury to find that "the victim's injuries substantially exceed the level of bodily harm *necessary* to satisfy the *elements* of the offense." In other words, it directs the trier of fact to measure the victim's actual injuries against the minimum injury that would satisfy the definition of, in this case, "great bodily harm" to see if they "substantially exceed" that benchmark.

Stubbs, 240 P.3d at 148 ¶ 16 (court's emphasis).

¹The opinion in Stubbs was issued four days before the date of the appellant's brief.

The court held that this test could not be satisfied by applying an alternative definition of “great bodily harm” that was more egregious than some other definition:

One case of “great bodily harm” ... is not qualitatively different than another case. Such a leap is best understood as the jump from “bodily harm” to “substantial bodily harm,” or from “substantial bodily harm” to “great bodily harm.” That is what is meant be “substantially exceeds.”

Id. at 149 ¶ 18.

The situation in the present case is precisely the one contemplated by Stubbs. To prove the crime of vehicular assault, the State was required to prove that the defendant’s driving caused “substantial bodily harm.” RCW 46.61.522.

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

RCW 9A.04.110(4)(b).

The evidence showed that the victim’s injuries went far beyond this, to the level of “great bodily harm.”

“Great bodily harm” means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

RCW 9A.04.110(4)(c).

The evidence showed that the victim has lost the ability to care for herself. She has almost no voluntary control of the left side of her body. 2 RP 176-78. These disabilities constitute “loss or impairment of the function of any bodily part or organ.” Had these conditions endured for merely a few days, they would have constituted substantial bodily harm: “a temporary but substantial loss or impairment of the function of any bodily part or organ.” Instead, her condition will probably never improve to more than a minimal degree. 3 RP 13. The evidence thus showed that she has suffered great bodily harm: “a significant permanent loss or impairment of the function of any bodily part or organ.”

When a crime only requires substantial bodily harm, and the State proves great bodily harm, this shows that “the victim’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.” Under RCW 9.94A.535(3)(y), this is a valid aggravating factor. The trial court properly imposed an exceptional sentence on the basis for this factor.

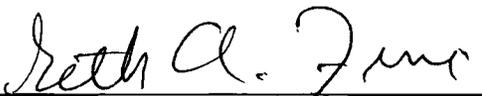
IV. CONCLUSION

For the reasons stated above, the exceptional sentence should be affirmed. Since the defendant has not challenged his

conviction for vehicular assault, that conviction should be affirmed
in any event.

Respectfully submitted on December 9, 2010.

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