

69239-9

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NO. 69239-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

GARY SHAWN MOBLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald Eaton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it based appellant's exceptional sentence above the standard range on victim vulnerability.

2. There is no evidence to support the sentencing court's finding of fact 8 that the victims in this case were particularly vulnerable.¹

Issue Pertaining to Assignments of Error

Appellant pled guilty to vehicular assault after he struck a vehicle with three people inside. In seeking an exceptional sentence, the State alleged, and the sentencing court found, that the victims were particularly vulnerable because they were inside a vehicle. Washington law, however, indicates that those in a vehicle are actually less vulnerable to this crime. Should this Court remand for resentencing where the trial court erroneously relied on this aggravating circumstance when imposing an exceptional sentence?

B. STATEMENT OF THE CASE

Gary Mobley pled guilty to three counts of vehicular assault (counts 1-3) and one count of reckless driving (count 4). CP 20-38;

¹ The court's written findings and conclusions in support of the exceptional sentence are attached to this brief as an appendix.

1RP² 18-22. Count 1 was based on an incident in November 2011 where Mobley struck an individual with his car, hitting the individual's leg and causing him to fall down. CP 20; 1RP 21. Counts 2-4 were based on an incident in February 2012 in which Mobley drove his car into an SUV with three people inside, causing the SUV to roll over and seriously injuring the driver, Aaron Stewart. CP 6-8.

Mobley's standard range was 15-20 months on each of the three vehicular assaults. CP 25. But Mobley agreed to an exceptional sentence of at least 93 months on count 2, the assault in which Stewart was the victim. CP 28, 30; 1RP 11-12. For the felony offenses, the San Juan County Prosecutor's Office recommended a standard-range 20-month sentence on counts 1 and 3 and an exceptional 108-month sentence on count 2 based on several aggravating factors. Supp. CP ____ (sub no. 116, Statement of Prosecuting Attorney).

At sentencing, the State called witnesses to establish a factual basis for its recommendation, including two deputies from the San Juan County Sheriff's Office who investigated the case. 2RP 17-23, 44-48. According to their information, Mobley had romantic

² This brief refers to the verbatim report of proceedings as follows: 1RP – June 29, 2012; 2RP – July 23, 2012.

relationships with two women – Tisha Hasme and Melanie Murphy. 2RP 22-23. Mobley was known to use and sell methamphetamine, and Aaron Stewart had recently become one of his suppliers. Scotty Royal, Mobley's cousin, had introduced the two men. 2RP 25.

On the night of February 15, 2012, Stewart and Royal traveled to Orcas Island, where Mobley lived. 2RP 26. Mobley left his residence to sell methamphetamine while Stewart and Melanie Murphy stayed behind and used drugs. 2RP 26. Meanwhile, Mobley had heard that Royal was having sex with Tisha Hasme and, while out that evening, Mobley found Royal and confronted him. Whatever Mobley said to Royal, it caused Royal to immediately begin efforts to leave the island. 2RP 27.

Mobley then went to Tisha Hasme's residence. Hasme accused him of sleeping with Melanie Murphy and ended their relationship. 2RP 29. Mobley returned to his home and suspected that Murphy and Stewart may have had sex in his absence. 2RP 30. His suspicions were not allayed when Murphy told him she was leaving the island with Stewart. 2RP 30. Mobley slapped Murphy and threw her out of his house. 2RP 31.

Stewart and Murphy left in Stewart's SUV and picked up Royal. 2RP 31-32. As the vehicle came to a stop at an intersection,

Mobley appeared in his car and blocked their path, demanding that Murphy get out of Stewart's vehicle. 2RP 33. Murphy refused and Mobley intentionally rammed the SUV head-on. 2RP 33-34, 98. Stewart was able to drive around Mobley's car and sped off with Mobley in pursuit. At one point, Mobley hit the SUV from behind, and the vehicles reached speeds as great as 85 miles per hour. 2RP 34-35, 98-100.

Eventually, Stewart attempted to turn his SUV around with the apparent intent to drive to the sheriff's office. As Stewart began his turn, however, Mobley rammed the SUV, causing it to flip over. 2RP 36-37, 102-106. Royal exited the SUV and ran away. 2RP 37. Mobley's car was rendered inoperable and he hid in the woods before turning himself in. 2RP 37-38. Mobley did not have motor vehicle insurance at the time. 2RP 42.

An examination of Stewart's SUV revealed that the front seats were not original to the vehicle and not properly fastened to the floor. 2RP 90. There were no bolts in the rear mounting brackets. 2RP 9. The front of the driver's seat was mounted using wood bolts, which had failed. 2RP 94-96. And the driver's seatbelt was not functional, either. 2RP 92-94. Stewart suffered serious injuries to his spinal cord, resulting in tetraplegia – paralysis of all four limbs – and will

require extensive care his entire life. 2RP 9-17.

The State argued a 108-month exceptional sentence was warranted on count 2 for several reasons, including the fact Stewart's vehicle contained "three people who were vulnerable." 2RP 146. The court agreed. 1RP 169-171. The court's decision was based, in part, on a finding that the three people in the SUV were particularly vulnerable: "they had no way to escape, no way to get away from [Mobley] other than to outrace him and hopefully get to -- as it turned out the decision was the sheriff's office as the only safe place they could think to get to. So these people were particularly (inaudible) which also is a basis for an exceptional sentence." 2RP 166-167. The court imposed standard range 20-month sentences on counts 1 and 3 and 364 days (with 275 days suspended) on count 4. 2RP 167-168.

The court subsequently entered written findings and conclusions identifying the aggravating factors supporting the exceptional sentence. After finding that Stewart's injuries constitute "great bodily harm" and substantially exceed the level of injury necessary for vehicular assault, that Mobley had no insurance on his car, and that the three people in Stewart's vehicle were "particularly vulnerable," the court entered the following conclusions of law:

- A. The exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history, and in promoting respect for the law by providing punishment which is just. This factor is sufficient, by itself, to justify an exceptional sentence above the standard range;
- B. The stipulation of the defendant that justice is best served by the imposition of an exceptional sentence outside the standard range was made voluntarily and knowingly.
- C. Aaron Stewart's injuries constitute "great bodily harm" which substantially exceed the level of bodily harm necessary to satisfy the elements of the offense of vehicular assault, i.e. "substantial bodily harm."
- D. Defendant had no insurance on his car
- E. The occupants in Mr. Stewart's vehicle were particularly vulnerable
- F. The stipulation of the parties for an exceptional sentence would in itself be sufficient to impose an exceptional sentence

CP 52.

Mobley appealed. CP 53.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT BASED MOBLEY'S EXCEPTIONAL SENTENCE ON AN AGGRAVATING CIRCUMSTANCE NOT PRESENT IN THIS CASE.

A particularly vulnerable victim can serve as an aggravating circumstance where "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). Moreover, a victim's vulnerability must be a substantial factor in commission of the crime. State v. Gordon, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (citing State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006)).

Typically, the State must prove this circumstance to a jury beyond a reasonable doubt. RCW 9.94A.535(3) ("Such facts should be determined by procedures specified in RCW 9.94A.537."); RCW 9.94A.537(3) ("The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. . . ."). Here, of course, Mobley agreed the court could decide which aggravating circumstances had been established. 1RP 12.

Regardless of the fact finder, however, the record must support the finding on a circumstance. RCW 9.94A.585(4). Because this is a factual inquiry, the finding will be upheld unless

clearly erroneous. State v. Hale, 146 Wn. App. 299, 307, 189 P.3d 829 (2008). A finding is clearly erroneous if not supported by substantial evidence, meaning evidence sufficient to persuade a fair-minded person of its truth. State v. Wilson, 96 Wn. App. 382, 387, 980 P.2d 244 (1999), review denied, 139 Wn.2d 1018 (2000).

There is not substantial evidence in the record to support the court's finding that the individuals in Stewart's SUV were particularly vulnerable. Prior case law makes it clear that, for vehicular assault, those inside a vehicle are *less* vulnerable to an outside threat, not more.

In State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), the Supreme Court of Washington examined a finding of particular vulnerability in a vehicular assault case where the defendant intentionally struck the victim while she was walking her bicycle along the shoulder of a road. Nordby, 106 Wn.2d at 515. In upholding the finding, the Court distinguished the situation from one in which the victim is inside another vehicle:

The trial court . . . considered that the victim here was a pedestrian pushing her bicycle alongside the road. Unlike a potential victim in a second automobile, she had no opportunity to evade [the] car once Nordby swerved it toward her. Nor was she afforded the additional protection against injury that a second automobile might provide for a driver or passenger of

that automobile. . . .

Id. at 518.

More than a decade later, in State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996), the Supreme Court again contrasted a protected occupant of a vehicle with a pedestrian victim; only the latter is particularly vulnerable to being struck. Cardenas, 129 Wn.2d at 10-11; see also State v. Morris, 87 Wn. App. 654, 666-668, 943 P.2d 329 (1997) (victims on bicycles just as vulnerable as pedestrians because they also do not enjoy advantages of victims in vehicles), review denied, 134 Wn.2d 1020, 958 P.2d 317 (1998); State v. Thomas, 57 Wn. App. 403, 408, 788 P.2d 24 (contrasting situation where victim is inside a vehicle and upholding victim vulnerability where defendant sped through parking lot and hit unsuspecting pedestrian), review denied, 115 Wn.2d 1003, 795 P.2d 1155 (1990), overruled on other grounds, State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).

Thus, because Stewart was inside an SUV when struck by another vehicle, he was not particularly vulnerable. Instead, he enjoyed greater protections afforded by the vehicle and had a greater chance of evading Mobley's car than someone on a bicycle or on foot. There is no evidence supporting the court's finding that

those inside Stewart's SUV were particularly vulnerable.

In response, the State may be tempted to point out that Stewart's vehicle – with its wood seat fasteners, missing bolts, and inoperable seatbelts – provided less protection than most vehicles. While factually accurate, the State must prove beyond a reasonable doubt that “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” RCW 9.94A.535(3)(b) (emphasis added). There is no evidence Mobley knew about the condition of the bolts or belts.

Remand is necessary if it is uncertain whether the trial court would have imposed the same sentence in the absence of the inappropriate finding. Cardenas, 129 Wn.2d at 12. It is uncertain here.

Mobley stipulated to an exceptional sentence, and the court concluded that this stipulation “would in itself be sufficient to impose an exceptional sentence.” CP 52 (emphasis added). Thus, there was little doubt the court would impose an exceptional sentence in this case. But it is not at all certain the court would have imposed precisely the same exceptional term in the absence of its particular vulnerability finding. The court mentioned particular vulnerability during its oral ruling. 2RP 167. The court expressly

entered a written finding on particular vulnerability. CP 52 (finding 8). And the court expressly entered a written conclusion that those inside Stewart's SUV were particularly vulnerable. CP 52 (conclusion E).

This situation is unlike, for example, Cardenas, where the Supreme Court felt confident the sentencing court would impose precisely the same exceptional term even without all of the aggravating circumstances found. In that case, the sentencing court expressly stated that any one of the circumstances, standing alone, would justify the chosen sentence and the one circumstance the sentencing court identified as the primary reason for the sentence length remained. Cardenas, 129 Wn.2d at 12. This is not true in Mobley's case.

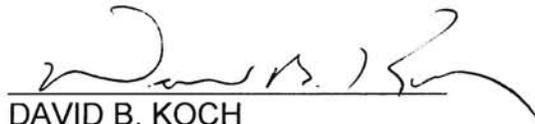
D. CONCLUSION

This Court should remand for resentencing without consideration of the "particularly vulnerable" aggravating circumstance.

DATED this 15th day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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APPENDIX

Superior Court of Washington
County of

State of Washington, Plaintiff,

vs.
GARY SHAWN MOBLEY
Defendant.

No. 12 1 05006 3

Findings of Fact and Conclusions of Law for
an Exceptional Sentence
(Appendix 2.4 Judgment and sentence)
(Optional)
(FNFL)

The court imposes upon the defendant an exceptional sentence [X] above [] within [] below the standard range based upon the following Findings of Fact and Conclusions of Law:

I. Findings of Fact

1. The defendant and the state stipulated that justice is best served by the imposition of an exceptional sentence outside the standard range;
2. Aaron Stewart was injured when the defendant intentionally rammed his car into Mr. Stewart's car, causing it to roll;
3. As a result of the injuries caused by defendant's actions, Mr. Stewart was hospitalized for approximately four months, during which time he underwent multiple surgeries;
4. As a result of the defendant's actions, Aaron Stewart suffered permanent injury to his body and is paralyzed from his chest down and has no use of his legs and ~~his~~ arms;
5. Because of his injuries, Aaron Stewart cannot provide for his daily and normal needs and will require constant medical attention for the remainder of his life;
6. Aaron Stewart's injuries constitute "great bodily harm" which substantially exceed the level of bodily harm necessary to satisfy the elements of the offense of vehicular assault, i.e. "substantial bodily harm".

*D. Defendant had no insurance on his car
E. People in Mr Stewart's car were particularly vulnerable*

II. Conclusions of Law

A. The exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history, and in promoting respect for the law by providing punishment which is just. This factor is sufficient, in itself, to justify an exceptional sentence above the standard range:

B. The stipulation of the defendant that justice is best served by the imposition of an exceptional sentence outside the standard range was made voluntarily and knowingly.

C. Aaron Stewart's injuries constitute "great bodily harm" which substantially exceed the level of bodily harm necessary to satisfy the elements of the offense of vehicular assault, i.e. "substantial bodily harm".

*D. Defendant had no insurance on his car
E. The occupants in Mr Stewart's vehicle were particularly vulnerable*

Dated: 7/23/12

F. The stipulation of the parties for an exceptional sentence would in itself be sufficient to impose an exceptional sentence

Judge/Print Name: Donald E. Eaton

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WSBA No. 8654
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Print Name: L. Delany

Defendant
Print Name: Gary Mobley

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69239-9-1
)	
GARY MOBLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MARCH 2013.

X *Patrick Mayovsky*

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