

No. 41823-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JAMES MUSTARD,

Appellant.

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

The Honorable Leila Mills

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A
REASONABLE DOUBT THAT MS. ANDREWS WAS
PARTICULARLY VULNERABLE

Mr. Mustard contends the State failed to prove beyond a reasonable doubt that Ms. Andrews was particularly vulnerable based solely upon her age. Mr. Mustard noted that prior to the 2005 amendment of RCW 9.94A.535, "advanced age" was a specific factor that proved a victim particularly vulnerable."¹ Former RCW 9.94A.390(2)(b).² The current version deleted the specific factors, thus requiring the State to prove that where the victim was of advanced age, that age made the person particularly vulnerable. Merely being of an advanced age does not necessarily prove a victim was particularly vulnerable.

In response, the State contends the Legislature, in amending RCW 9.94A.535 in 2005, the Legislature did not intend to restrict the current "common law aggravating circumstances." Brief of Respondent at 48. Yet, the State ignores a critical element of

¹ RCW 9.94A.535(3)(b) states: "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance."

² Former RCW 9.94A.390(2)(b) stated: "The defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."

statutory construction, that where the Legislature omits language from a statute, intentionally or inadvertently, courts cannot read back into the statute the language that was omitted. *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981). Thus, by omitting the specific factors from the particularly vulnerable aggravating factor, the Legislature required the State to prove beyond a reasonable doubt, why particular factor made the victim particularly vulnerable.

As noted in his opening brief, the quantum of evidence produced by the State established that Ms. Andrews was 87 years-old, lived on Puget Drive in Manchester with her 92 year-old husband, and cared for her adult son who was living with his parents. RP 318, 340-42. According to the testimony of the medical examiner, Ms. Andrews was five feet five inches, and weighed approximately 105 pounds. RP 466. The State did not present any other evidence other than this to establish Ms. Andrews was *particularly* vulnerable or incapable of resistance. There is nothing about an 87 year-old woman who was five feet five inches tall that is particularly vulnerable without more. There was nothing presented by the State to establish Ms. Andrews' age was a substantial factor in the commission of the crime. In fact, in its

brief in response on appeal, the State does not try to show why Ms. Andrews' age alone made her particularly vulnerable, instead relying solely on the cases decided prior to the 2005 amendment that held that age alone was sufficient to prove particular vulnerability.

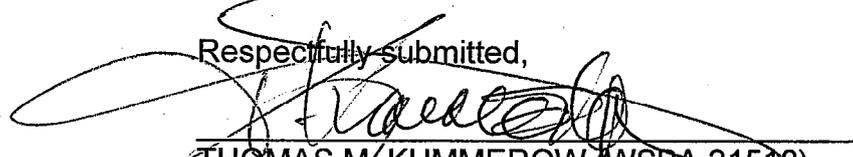
Without any additional evidence to establish Ms. Andrews's age was a substantial factor in the commission of her murder, the State failed to prove the enhancement. Mr. Mustard's exceptional sentence must be reversed and remanded for resentencing to a standard range sentence.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Mustard requests that this Court either reverse his convictions and remand for a new trial, or reverse the exceptional sentence and remand for resentencing to a standard range sentence.

DATED this 14th day of November 2011.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION TWO**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 41823-1-II
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Appellant.)	

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Court of Appeals Case Number: 41823-1

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