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Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN J. STORMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

1. The court erred in imposing an exceptional sentence based on an aggravating circumstance for which the evidence is insufficient.

II. ISSUE PRESENTED

1. Viewing the evidence in the light most favorable to the State, was the evidence sufficient to support the jury's finding that Ms. Blumer's injuries substantially exceeded the level of harm required for vehicular assault?

III. STATEMENT OF THE CASE

A. Procedural history.

The defendant was charged by amended information in the Spokane County Superior Court on February 13, 2014 with vehicular homicide of Kevin Smith, with an allegation of the "multiple offenses" aggravating circumstance (Count I); vehicular assault of Ronald Martel, with the "multiple offenses" aggravating circumstance (Count II); vehicular assault of Lynn Blumer including the aggravating circumstances of "multiple offenses" and the victim's injuries substantially exceeding the level of bodily injury necessary to satisfy the elements of vehicular assault (Count III); failure to remain at the scene of an accident – fatality

(Count IV); and driving while license suspended – third degree (Count V) for events occurring on February 10, 2013.¹ CP 56-57.

The jury found the defendant guilty on counts one through four. CP 64-71; (2/18/14) RP 183–185. The jury also found by special interrogatory that Ms. Blumer’s injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. CP 70; (2/18/14) RP 185.

The trial court found substantial and compelling reasons to impose an exceptional sentence upward of 448 months (37.33 years) based upon multiple current offenses of the defendant going unpunished and Ms. Blumer’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of vehicular assault. CP 70, 96, 123.² The court ran counts one, two, and three consecutive to each other to arrive at the sentence. CP 96.

This appeal timely followed.

¹ The defendant pleaded guilty to the driving while license suspended charge before trial. CP 62.

² The trial court found that the aggravating factors either independently or jointly supported an exceptional sentence upward. CP 123.

B. Substantive facts.

On February 10, 2013, at approximately 12:25 p.m., Officer Erin Raleigh of the Spokane Police Department was on patrol when he observed the defendant's vehicle westbound on Gordon Avenue in northeast Spokane. (2/11/14) RP 12, 16. Officer Raleigh began to follow the vehicle because the vehicle's license plate did not match the vehicle. (2/11/14) RP 12, 21. The defendant's vehicle accelerated at a high rate of speed away from the officer. (2/11/14) RP 12. Ultimately, while still travelling at a high rate of speed and after failing to stop at a stop sign, the defendant's car struck a Ford ranger pickup broadside driven by Mr. Smith at Empire and Perry.³ (2/11/14) RP 14-15, 28, 29, 36, 43-44, 48, 56, 57; (2/12/14) RP 6; (2/12/14) RP 105; (2/13/2014) RP 75. The defendant ran from the crash site. (2/11/14) RP 14-15, 28, 29, 36, 37-38, 43-44, 48, 56, 57; (2/12/14) RP 6, RP 105; (2/13/2014) RP 75.⁴ Mr. Smith's pickup was traveling the speed limit on a thru street. (2/11/14) RP 55, 62.

³ The medical examiner found Mr. Smith died at the scene from fractures to the base and vault of the skull with brain lacerations due to blunt impact to the head. (2/11/14) RP 58; (2/12/14) RP 149.

⁴ After the defendant's Honda struck the pickup, the pickup went airborne, spinning, striking, and, sheering a utility pole, causing the pole to fall to the ground in a residential back yard. (2/11/14) RP 36, 48, 70 (2/12/14) RP 12, 105. Witnesses estimated the defendant's vehicle at 80 mph to 90 mph when it struck the pickup. (2/11/14) RP 37, 52. A police department reconstructionist estimated the defendant's pre-impact speed at 45 to 47 mph. (2/13/2014) RP 77. Onlookers also took part in the

After the collision, two unconscious passengers (Martel and Blumer)⁵ were trapped inside the defendant's vehicle. (2/11/14) RP 17.⁶ Both passengers were extricated from the defendant's vehicle⁷ by the fire department. (2/11/14) RP 18; (2/12/14) RP 18.

apprehension of the defendant after he ran from the scene. (2/11/14) RP 37-38. Witnesses described the defendant's car as a "blur" when it entered the intersection and stated it sounded like a "rally" car. (2/11/14) RP 25, 42, 48. The scene was described as "out of a movie." (2/11/14) RP 49. Debris was spread for approximately one block. (2/12/14) RP 13. Approximately fifteen to twenty SPD officers responded to the scene. (2/12/14) RP 15.

⁵ The victims inside the Honda were identified by law enforcement as Ronald Martel and Lynn Blumer. (2/11/14) RP 72.

⁶ Officer Raleigh stated Mr. Martel appeared to be turning gray at the scene as if he was dying. (2/11/14) RP 17-18. Mr. Martel arrived at the hospital in critical condition with multiple rib fractures and a bruising, collapsed lung. (2/12/14) RP 126, 128. Officer Raleigh described Ms. Blumer's body as contorted inside the vehicle with severe injuries and labored breathing. (2/11/14) RP 17-18. A different witness described the victims in the Honda as turning blue and there was a lot of blood – they both appeared as if they were going to die. (2/11/14) RP 58, 71. The officer described the collision scene as "very traumatic and graphic and violent, and it's a collision scene I haven't forgot about and probably won't be able to forget about for a long time." (2/11/14) RP 26.

⁷ Corporal Michael Carr, SPD collision reconstructionist, observed significant front-end damage to the Honda. The damage was located on the passenger side with the front passenger side tire/rim missing and eventually located down the roadway. (2/12/14) RP 104. Damage was also observed over the entire hood and the front and rear passenger side of the car. (2/12/14) RP 135, 137. The front tire/rim of the Honda snapped off as it struck the curblin – the vehicle's collision with the curblin was described as "violent." (2/13/14) RP 64-66.

After apprehension and while in a patrol car, the defendant was sweating profusely and he continually moved his limbs and body parts. (2/12/14) RP 45. The defendant's blood was drawn at the hospital. (2/12/14) RP 50-52. A Drug Recognition Expert from the Washington State Patrol (WSP) observed the defendant exhibited several physical signs consistent with stimulant use.⁸ (2/12/14) RP 74-75.

Dr. Mark Bauer, an emergency room physician at Sacred Heart Medical Center, treated Ms. Blumer upon her admission after the collision. (2/18/14) RP 85. Upon entry to the hospital, Ms. Blumer was unresponsive and had difficulty breathing with signs of a head injury. (2/18/14) RP 85.

Dr. Mark Gordon was a physician at St. Luke's Rehabilitation Hospital in Spokane. (2/12/14) RP 83. The hospital generally treats patients with brain injury, spinal cord injury, and stroke. (2/12/14) RP 83. Dr. Gordon treated Ms. Blumer after her release from Sacred Heart. (2/12/14) RP 83-84. Ms. Blumer was admitted into the hospital on

⁸ After the defendant's blood was analyzed at the WSP crime lab, it was ultimately determined the defendant had ingested methamphetamine before the crash. (2/13/14) RP 21, 23-24. Amphetamines excite the central nervous system and the brain. (2/13/14) RP 23. The defendant's blood had methamphetamine at a level of 0.73 milligrams per liter, and amphetamine at a level of 0.077 milligrams per liter. (2/13/14) RP 24. Medicinal levels are 0.02 to 0.05 milligrams per liter. (2/13/14) RP 25.

March 26, 2013, and she presented with a traumatic brain injury.

(2/12/14) RP 84-85.⁹

Dr. Mark Gordon, in general, described traumatic brain injury as follows:

The hallmark of traumatic brain injury is something that we call in medical terms diffuse axonal injury. Axons are part of the nerve cells that make up the brain and along the axons, the chemicals that are transported that basically make our brains work, in a traumatic brain injury those nerve cells are, for lack of a better term, stretched and sometimes the sheer forces are applied to them so that they are damaged and they cannot transport the chemicals that we need for the brain to work as well. So that's the hallmark of a traumatic brain injury.

(2/12/14) RP 84.

Dr. Gordon explained how traumatic brain injury affects a person's day-to-day function as follows:

In general, things such as memory, concentration, problem solving, are significantly impaired with diffuse axonal injury. Any function in the brain can actually be impaired since the entire brain can be affected by diffuse axonal injury, but there are certain hallmark features that we see in a typical traumatic brain injury and, again, they tend to involve higher levels of functioning, such as the executive functioning that make us human and that make us be able to function on a day-to-day basis.

(2/12/14) RP 84.

⁹ The brain is an organ. (2/12/14) RP 87.

Specifically, with regard to Ms. Blumer's injuries, the doctor stated:

Well, she presented again with the traumatic brain injury which I just described, the features of. She also had a clavicular fracture. One of the things that she exhibited upon admission was something we call aphasia or the inability to speak because of left parietal lobe involvement from the injury. That did progressively improve during her stay in St. Luke's and she also had initially significant dysphasia or impairment of the swallowing muscles and she needed to be fed through a tube initially.... [T]he expressive aphasia is basically described as word-finding issues, so she had a degree of expressive aphasia and then also something we that call receptive aphasia where she was unable to understand the information being spoken to her and therefore would reply in ways that weren't necessarily proper.

(2/12/14) RP 84-85.

With regard to Ms. Blumer's communication and problem solving skills:

[E]xpressive aphasia is basically described as word-finding issues, so she had a degree of expressive aphasia and then also something we that call receptive aphasia where she was unable to understand the information being spoken to her and therefore would reply in ways that weren't necessarily proper.... [S]he had severe impairments in problem solving and memory. In fact, [the hospital] rate[s] [a patient] with a certain rating scale and she required total assistance with problem solving and memory upon admission. By the time of discharge she had improved -- I believe at the time of discharge she required moderate assistance for problem solving and memory on an ongoing basis as she left St. Luke's to go to outpatient therapy.

(2/12/14) RP 86.

With regard to the significance and continuing nature of Ms. Blumer's injury, Dr. Gordon opined:

[S]ometimes it's difficult to generalize a brain injury or any other neurological injury, but typically a severe injury, a person will have ongoing lingering deficits for at least a year and sometimes -- sometimes permanently.

(2/12/14) RP 87.

Ms. Blumer was discharged on an outpatient basis from St. Luke's on April 13, 2013. (2/12/14) RP 86.

Ms. Blumer testified approximately one year after the collision. She had no memory of the crash and very little recall of her time in rehabilitation. (2/13/14) RP 39-40. Her memory before the collision was normal. (2/13/14) RP 40. After the collision, she stated on the stand: "It's really bad." (2/13/14) RP 40. She explained: "I'll forget like if something happened yesterday, I won't remember unless it's really important. Then I might remember three days instead, yeah." (2/13/14) RP 40. At the time of trial, she was still experiencing physical pain from the collision. (2/13/14) RP 41.¹⁰

Cpl. Carr stated he had investigated approximately one-thousand collisions, and typically, with regard to vehicular assault collisions, he

¹⁰ The jury and court also had the opportunity to observe Ms. Blumer's manner and delivery of speech at the time of her testimony.

generally observed fractured fingers and wrists, fractured leg bones, facial lacerations, requiring stiches and staples to close, and some neck injuries. (2/18/14) RP 87-88. In his experience, Cpl. Carr opined it takes approximately six weeks for a fracture to heal. (2/18/14) RP 88.

IV. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE UNDER COUNT THREE BASED ON MS. BLUMER'S INJURY SUBSTANTIALLY EXCEEDING THE LEVEL OF BODILY HARM NECESSARY TO COMMIT THE CRIME.

Standard of review.

To reverse an exceptional sentence, an appellate court must find 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 that “the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4);¹¹ *State v. Pappas*, 176 Wn.2d 188, 191-92, 289 P.3d 634, 635 (2012). The legal sufficiency of a sentence is reviewed de novo. *Pappas*, 176 Wn.2d 188, 191-92.

¹¹ RCW 9.94A.585(4) states: “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.”

If a jury returns a special verdict on the aggravating circumstances, a trial court may sentence the defendant up to the maximum term allowed for the underlying conviction if it finds the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence. RCW 9.94A.537(6). Whenever the court imposes a sentence outside the standard range, it “shall set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535.

This court will review “a jury's verdict on an aggravating factor for substantial evidence just as [it does] when evaluating the sufficiency of the evidence supporting the elements of a crime.” *State v. DeLeon*, 185 Wn. App. 171, 212, 341 P.3d 315 (2014). Challenges to the sufficiency of the evidence are reviewed in the light most favorable to the State. *State v. Hachenev*, 160 Wn.2d 503, 512, 158 P.3d 1152 (2007), *cert. denied*, 552 U.S. 1148 (2008).

The defendant essentially argues the evidence was not sufficient in that it did not constitute “great bodily harm,” and, consequently, Ms. Blumer’s injuries did not substantially exceed what is necessary to prove the crime. *See*, Appellant’s Br. at 4-5.

RCW 9.94A.535(3)(y) allows a trial court to impose an exceptional sentence when considered and found by a jury if “[t]he victim's injuries substantially exceed the level of bodily harm necessary to

satisfy the elements of the offense.” *See, Pappas*, 176 Wn.2d at 197 (“A trial court can impose an exceptional sentence under RCW 9.94A.535(3)(y) when the jury finds that the ‘victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense,’ and the court is satisfied that this is a ‘substantial and compelling reason’ to justify an exceptional sentence.”)

After sentencing in the present case, the trial court entered findings of fact and conclusions of law regarding its imposition of an exceptional sentence upward. CP 123. With respect to Ms. Blumer’s injuries, the trial court made the following finding of fact number six:

After presentation of the evidence, the defendant was found guilty on all counts and the jury found the State had proven beyond a reasonable doubt the aggravating circumstance that the victim’s injuries substantially exceeding the level of bodily harm necessary to satisfy the elements of vehicular assault under Count III.

CP 123.

In *Pappas*, 176 Wn.2d at 197, our Supreme Court held that an injury substantially exceeding the level of bodily harm necessary to satisfy the elements of vehicular assault can be an aggravating factor justifying an exceptional sentence.

Under the vehicular assault statute,¹² RCW 46.61.522, an element of that crime is that the victim suffer “substantial bodily harm,” which has the same meaning as in RCW 9A.04.110. Substantial bodily harm is defined as:

- (a) “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).

Great bodily harm is defined as:

- (b) “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).

Contrary to the defendant’s argument that the victim must suffer “great bodily harm” for the trial court to impose an exceptional sentence, the Supreme Court in *Pappas* squarely addressed and dismissed this claim noting that RCW 9.94A.535(3)(y) requires a comparison of the victim’s injuries against the minimum necessary to satisfy the elements of the

¹² The vehicular assault statute requires only that the defendant cause substantial bodily injury to another while driving under the influence, recklessly, or with disregard for the safety of others. RCW 46.61.522(1).

offense. The court explained that, “[w]hile the jump between statutory categories of harm necessarily meets the ‘substantially exceed’ test, injuries can ‘substantially exceed’ one category of harm without reaching the severity of the next category.” *Pappas*, 176 Wn.2d at 192 (emphasis added); *State v. Duncalf*, 177 Wn.2d 289, 296, 300 P.3d 352 (2013). Consequently, the statute “[o]nly requires that the injuries ‘substantially exceed,’ rather than a requirement to meet a higher category of harm.” *Pappas*, 176 Wn.2d at 193; *Duncalf*, 177 Wn.2d at 296.

In this case, the jury was instructed as to the definition of “substantial bodily harm” and was asked by special verdict whether Ms. Blumer’s injuries substantially exceeded the level of bodily harm necessary to satisfy that harm element. It found this aggravating factor beyond a reasonable doubt.¹³ This was the *only* finding necessary for the trial court to impose an exceptional sentence. *See, Duncalf*, 177 Wn.2d at 296.

Substantial evidence supported the jury's finding that Ms. Blumer’s injuries substantially exceeded the level of harm required for vehicular assault, and the trial court based the exceptional sentence on this finding. The vehicular assault statute only requires there be evidence that the

¹³ The jury found by special interrogatory that “... Lynn Blumer’s injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm.” CP 70; (2/18/14) RP 185.

bodily injury cause a temporary but substantial loss or impairment of the function of any bodily part or organ, or a fracture of any bodily part. There was testimony in the present case that injuries typically associated with vehicular assault generally involve simple fractures or a sprain.

Because this case involved more than the typical fracture or sprain of a body part, the jury's finding was amply supported by the testimony of Dr. Gordon who attended to Ms. Blumer's rehabilitation. Notwithstanding Ms. Blumer's fractured collar bone and facial lacerations, Dr. Gordon remarked that typically with regard to the brain injuries as suffered by Ms. Blumer, a person will have ongoing lingering deficits for at least a year and sometimes permanently. Upon Ms. Blumer's discharge from St. Luke's, she still required moderate assistance for problem solving and memory on an ongoing basis during outpatient therapy. The defense did not controvert Dr. Gordon's testimony.

The jury's finding was also supported by Ms. Blumer testimony that, as a result of the crash and resultant brain injury, she could not remember day-to-day activities a year after the collision unless they were important.

Ms. Blumer's long-standing loss of memory and problem-solving substantially exceed the injuries typical of vehicular assault. Viewing the evidence in the most favorable light to the State, there was sufficient

evidence supporting the jury's determination. Accordingly, the defendant's argument has no merit and the imposition of an exceptional sentence upward should be affirmed by this court.

V. CONCLUSION

For the reasons stated above the defendant's exceptional sentence based upon multiple current offenses of the defendant going unpunished and Ms. Blumer's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of vehicular assault should be affirmed.

Dated this 16 day of December, 2015.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 16, 2015, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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12/16/2015

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