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STATE OF WASHINGTON

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COA No. 52447-0-I
Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROBINSON,

Petitioner.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

William Robinson was the appellant in COA No. 52447-0-I, decided April 9, 2007.

B. COURT OF APPEALS DECISION

Mr. Robinson seeks review of the decision issued April 9, 2007, in which the Court of Appeals, Division One, concluded that “harmless error” analysis applied to error committed by the trial court under Blakely v. Washington, 542 U.S. 296, 124 U.S. 2531, 159 L. Ed. 2d 403 (2004), in imposing an exceptional sentence based on facts not found by a jury. Appendix A (decision).

C. ISSUE PRESENTED FOR REVIEW

Whether harmless error analysis can apply to the Sixth Amendment and Article 1, §§ 21 and 22 error in Mr. Robinson’s sentencing.

D. STATEMENT OF THE CASE

William Robinson entered guilty pleas to three counts vehicular assault on March 19, 2003. CP 7-30.

Attached as part of the defendant’s statement on plea of guilty is the document entitled, “Felony Plea Agreement.” CP 27. The plea agreement contains the following language, including a stipulation in which Mr. Robinson waived his statutory right to

demand a bench hearing in which sentencing facts would have to be determined by the judge under a "preponderance of the evidence" standard pursuant to RCW 9.94A.530:

REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing: The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary as amended and attached to plea [and] The facts set forth in Appendix C[.]"

* * *

OTHER: St. will file no other charges.

CRIMINAL HISTORY AND OFFENDER SCORE: . . .

The State makes the sentencing recommendation set forth in the State's sentence recommendation.

CP 27. The defendant's plea included an acknowledgment that the State would proffer a "recommendation" that Mr. Robinson be given exceptional sentences above the standard range, of 60, 60 and 20 months on the respective counts. CP 27, 30. And in his statement of defendant on plea of guilty, the defendant acknowledges that the "prosecuting attorney will make the following recommendation to the judge: "Ct I and II 60 months Ct III 20 months," CP 7-30 (statement of defendant, at pp. 4-5). The document entitled "State's Sentence Recommendation" states that the "State recommends that the defendant be sentenced to" concurrent terms of 60, 60 and 20 months incarceration on the three respective counts. CP 30. The

document also references the Court to arguments in support of the State's hoped-for exceptional sentence in the State's "Supplemental Brief." CP 30.

At sentencing, the trial court imposed exceptional sentences of 96, 60 and 60 months. CP 60-67 (judgment and sentence, filed May 5, 2003, at p. 2); CP 68-70 (findings in support of exceptional sentence, at pp. 1-2). Pursuant to his express reservation of rights in the plea agreement, the defendant appealed his exceptional sentences, arguing that they were illegal under the case of Blakely v. Washington. CP 71 (notice of appeal). The Court of Appeals disagreed, in a decision issued September 12, 2005.

Mr. Robinson sought review and on January 3, 2007, this Court remanded to the Court of Appeals for reconsideration in light of State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006), and State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006).

Thereafter, on April 9, 2007, the Court of Appeals affirmed Mr. Robinson's exceptional sentences, holding that the facts stipulated to by Mr. Robinson established at least one of the aggravating factors (particular vulnerability), and rejecting Mr. Robinson's arguments that harmless error analysis could not apply to his case:

Robinson argues on remand that because he pled guilty and was not afforded a jury trial, this court should not engage in speculation as to what a fictional jury would have concluded. Further, at the time of his guilty plea, there was no procedure available in our law for a jury to try issues of aggravating factors which might justify exceptional sentences. However, harmless error analysis always involves an inquiry into the hypothetical. The analysis here asks whether the evidence presented at a hypothetical jury trial would have resulted in the enhanced sentence beyond a reasonable doubt. Robinson suggests that in a jury trial, he would have contested, not stipulated, to the facts contained in his guilty plea, and that there is no way of knowing what evidence a jury would have heard. However, Robinson has never sought to withdraw his guilty plea; he only seeks resentencing within the standard range. We therefore assume that the same stipulated facts contained in his plea agreement would have been submitted to a jury.

Appendix A (decision).

E. ARGUMENT

1. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted in the present case under RAP 13.4(b)(3) because the question whether harmless error analysis can apply to the constitutional error occurring in Mr. Robinson's case presents a "significant question of law under the Constitution of the State of Washington or of the United States," specifically, the Washington Constitution's Article 1, § 21 and § 22, and the federal constitution's Sixth Amendment right to jury trial. Furthermore,

review is warranted under RAP 13.4(b)(1) because the Court of Appeals decision is in conflict with decisions of this Court, as argued infra.

2. HARMLESS ERROR ANALYSIS IS IMPOSSIBLE WHERE IT INVOLVES AN INQUIRY THAT CANNOT TAKE PLACE UNDER STATE LAW.

On remand, the State of Washington argued that Mr. Robinson's case, which involves error under the Washington Constitution's Article 1, § 21 and § 22, and the federal constitution's Sixth Amendment right to jury trial,¹ is subject to "harmless error"

¹The Washington Constitution, Article. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. Art. 1, § 21. Section 22 provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

Wash. Const. Art. 1, § 21. And the Sixth Amendment to the federal constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

analysis on remand under authority of Recuenco v. Washington, 548 U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Supplemental Brief of Respondent on Remand, at p. 5. Arguing that errors under Blakely v. Washington, 542 U.S. 296, 124 U.S. 2531, 159 L. Ed. 2d 403 (2004), can be harmless beyond a reasonable doubt, the State contended that in Mr. Robinson's case there was uncontroverted "evidence" such that the "verdict" would have been the same even had the error not occurred. Supplemental Brief of Respondent on Remand, at pp. 7-8. However, State law makes Recuenco largely irrelevant.

Recuenco's holding is narrow: Failing to submit a sentencing factor to a jury, which is no different than failing to submit any other element to the jury, is not structural error. Stated conversely, some Blakely errors can be harmless as a matter of federal constitutional law.

What Recuenco did not, and could not, reach is whether such an error is or can ever be harmless based on state law. Recuenco, 126 S. Ct. at 2551 ("Thus, we need not resolve this open question of Washington law."); Id. at 2551 n.1 ("Respondent's argument that, as

Assistance of Counsel for his defence.

United States Constitution, Amend. 6.

a matter of state law, the Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), error was not harmless remains open to him on remand”).

Importantly, in the first place, the doctrine of harmless error applies where, in a jury trial, the trial court fails to instruct the jury on an element of the offense charged, but where the reviewing court can conclude beyond a reasonable doubt that the evidence adduced at trial would have resulted in the defendant's jury finding that element proved beyond a reasonable doubt: State v. Linehan, 147 Wn.2d 638, 653-54, 56 P.3d 542 (2002) (stating that a jury instruction that relieves the State of its burden to prove all of the elements of the crime is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same result absent the error). Mr. Robinson's case did not involve a jury trial and the State has provided no authority stating how, if at all, the doctrine of harmless error can be applied to circumstances of a guilty plea.

Specifically, when applied to an element omitted from, or misstated in, a jury instruction, the constitutional harmless error doctrine will save the jury verdict of guilty only where that element was supported by uncontroverted evidence that was actually

produced at the actual trial to the jury in question. State v. Brown, 147 Wn.2d 330, 341, 344, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). It makes little sense to speculate as to what the defendant's "jury" would have decided, or whether "uncontroverted" evidence supported the elements upon which that jury was not instructed, when there was no jury, and where the evidence on which the State now relies are admissions by the defendant that would by definition not have been made, or gone uncontroverted, in an actual jury trial

Furthermore, it would have violated state law to submit aggravating factors to the jury to be determined beyond a reasonable doubt at the time of Mr. Robinson's trial. The harmless error question posed in Recuenco -- whether, if properly instructed, "a jury" would have found the requisite aggravating factors beyond a reasonable doubt -- could not have been answered in practice, even if harmless error doctrine applies to guilty pleas. When Mr. Robinson was convicted, it would have violated state law to submit the question of aggravating factors to the jury. The question of harmless error does not arise here because Hughes makes clear there simply was no procedure under which aggravating factors

could have been constitutionally submitted to a jury for its determination beyond a reasonable doubt in the first place. A reviewing court cannot utilize harmless error review to sustain a sentence by imagining what would have happened in a previous proceeding that would have been illegal in the first place. Even if Blakely errors may be harmless under other circumstances, they cannot be harmless here.

It follows from this Court's holding in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), that the logic that precluded remand for re-sentencing under a judicially substituted regime also precludes the appellate courts from speculating as to what a jury might have done in Mr. Robinson's case. Not only was there no jury in Mr. Robinson's case, but even had there been, it would not have been permitted to decide the question of aggravating factors. Therefore to indulge the fiction that such a procedure existed, much less what the result of such a hearing would have been, would be to "create such a procedure out of whole cloth [and] usurp the power of the legislature." See Hughes, 154 Wn.2d at 151-52.

3. MR. ROBINSON'S "REAL FACTS" STIPULATION DOES NOT CONTAIN THE FACTS NECESSARY TO DETERMINE WHETHER THE AGGRAVATING FACTORS WERE SATISFIED.

The "real facts" stipulation in the present case contains no evidence of a yardstick to show what the "typical" injuries or impact of the offenses charged against Mr. Robinson normally are, and a theoretical jury's determination of these aggravating factors would necessarily require such evidence. The trial court's findings and conclusions list the following aggravating factors in support of the sentence as follows:

1. The facts are far more egregious than the typical vehicular assault under the driving under the influence prong.
2. The victims were all particularly vulnerable and the defendant knew or should have know of that vulnerability.
3. The lack of liability insurance makes the financial consequences of the vehicular assault significantly greater for the victim.
4. The effects of Zachery Moss's injury is significantly more serious than in the usual vehicular assault, even if the injury is viewed under the "serious bodily injury" level.
5. The increased mental anguish and psychological harm suffered by the three children and their mother in witnessing their family being hurt is a substantial and compelling factor distinguishing this vehicular assault from other vehicular assaults.

CP 69-70. The argument offered by the Respondent is that the defendant's "jury" could do but one thing when faced with the real

facts stipulation in this case, i.e., could only find that these aggravating factors were proved beyond a reasonable doubt. Supplemental Brief of Respondent on Remand, at pp. 7-8.

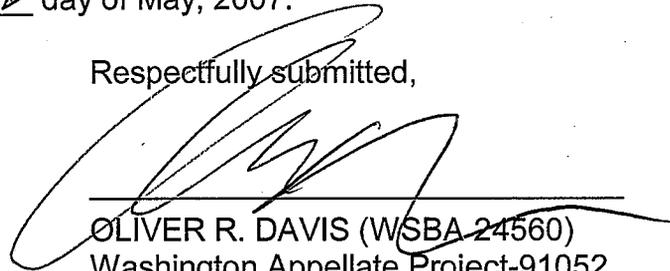
However, in discussing the former exceptional sentence statutes, the Washington courts noted that the judicial process of determining whether aggravating factors in support of an exceptional sentence were satisfied involved a process of comparison to the typical offenses of their kind. The standard to be satisfied in any exceptional sentence case was whether the defendant's conduct was more egregious than typical. See, e.g., State v. Perez, 69 Wn. App. 133, 138, 847 P.2d 532, review denied, 122 Wn.2d 1015 (1993). Yet none of the facts set forth in the Real Facts stipulation describe the typical harm, injuries or impact that normally occurs in vehicular assault cases. Even if the Real Facts stipulation can be considered as evidence before a theoretical jury, there is no evidence, much less uncontroverted evidence, that any of the factors was established.

B. CONCLUSION

Mr. Robinson asks this Court to accept review, reverse his exceptional sentences and remand for standard range sentences.

DATED this 8 day of May, 2007.

Respectfully submitted,



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Attorneys for Petitioner

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 WILLIAM T. ROBINSON,)
)
 Appellant.)
 _____)

DIVISION ONE

No. 52447-0-1

UNPUBLISHED OPINION

FILED: April 9, 2007

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APR - 9 2007

Washington Appellate Project

BAKER, J. — Our Supreme Court remanded this matter to this court for reconsideration of our opinion in light of State v. Suleiman¹ and State v. Hagar.² We affirm Robinson’s sentence, because the judicial fact finding in violation of Blakely v. Washington³ was harmless error.

Both Suleiman and Hagar acknowledge that under Washington v. Recuenco,⁴ Blakely error is subject to a constitutional harmless error analysis.⁵ A harmless error under the constitutional standard occurs if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the

¹ 158 Wn.2d 280, 143 P.3d 795 (2006).

² 158 Wn.2d 369, 144 P.3d 298 (2006).

³ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004).

⁴ ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d. 466 (2006).

⁵ Suleiman, 158 Wn.2d at 294-95; Hagar, 158 Wn.2d at 373 n.2.

absence of the error.⁶ A constitutional error is presumed prejudicial and the burden is on the State to prove that it is harmless.⁷

Robinson argues on remand that because he pled guilty and was not afforded a jury trial, this court should not engage in speculation as to what a fictional jury would have concluded. Further, at the time of his guilty plea, there was no procedure available in our law for a jury to try issues of aggravating factors which might justify exceptional sentences. However, harmless error analysis always involves an inquiry into the hypothetical. The analysis here asks whether the evidence presented at a hypothetical jury trial would have resulted in the enhanced sentence beyond a reasonable doubt. Robinson suggests that in a jury trial, he would have contested, not stipulated, to the facts contained in his guilty plea, and that there is no way of knowing what evidence a jury would have heard. However, Robinson has never sought to withdraw his guilty plea; he only seeks resentencing within the standard range. We therefore assume that the same stipulated facts contained in his plea agreement would have been submitted to a jury. Therefore, we proceed with the harmless error analysis based on the record below.

The trial court ruled that each aggravating factor, standing alone, is sufficient to support the enhanced sentence. Therefore to sustain the sentence, the State need only demonstrate that one of the three factors would have been found by a jury beyond a reasonable doubt.⁸

⁶ State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

⁷ Guloy, 104 Wn.2d at 425 (citing State v. Stephens, 93 Wn.2d 186, 190-191, 607 P.2d 304 (1980)).

⁸ State v. Hughes, 154 Wn.2d 118, 134, 110 P.3d 192 (2005).

One of the factors supporting Robinson's enhanced sentence was the finding that his victims were particularly vulnerable. This aggravating factor justifies an exceptional sentence if the State shows (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability was a substantial factor in the commission of the crime.⁹ Our Supreme Court has upheld a finding of particular vulnerability when the victim was a pedestrian pushing her bicycle along the shoulder of the road.¹⁰

Although he did not stipulate to the aggravating factor of particularly vulnerable victims, he did stipulate to all of the facts underlying that finding. All three victims were undisputedly pedestrians, which is sufficient for a finding of vulnerability under Nordby. In fact, the victims here were even more vulnerable than the Nordby victim. First, two of the three victims were children ages 8 and 12. Second, they were standing on a sidewalk with a curb, not on the shoulder of the road where they might be more alert to passing traffic.

The stipulated facts prove beyond a reasonable doubt that Robinson knew or should have known that these victims were particularly vulnerable when he drove his vehicle onto the sidewalk. Their particular vulnerability was certainly a substantial factor in the crime: had they been in another car, they might have been able to swerve and avoid Robinson, or might have been afforded some protection by their car's safety

⁹ Suleiman, 158 Wn.2d at 291-92.

¹⁰ State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). Despite the fact that the victim in Nordby was only 15 years old, the court found that her status as a pedestrian alone supported a finding of particular vulnerability. Nordby, 106 Wn.2d at 516 n.1.

systems. Were the trial court, on remand to submit the aggravating factors to a jury, on this record, Robinson's sentence would have been the same.

AFFIRMED.

Baker, J.

WE CONCUR:

Ajda, J.

Columan, J.

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

STATE OF WASHINGTON,)	
)	COA NO. 52447-0-1
Respondent,)	
)	
v.)	
)	
WILLIAM ROBINSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

1. THAT ON THE 8TH DAY OF MAY, 2007 A COPY OF **APPELLANT'S PETITION FOR REVIEW** WAS SENT TO THE PARTIES INDICATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] KING COUNTY PROSECUTING ATTORNEY
W554 KING COUNTY COURTHOUSE
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[X] WILLIAM ROBINSON
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COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2007 MAY -8 PM 4:17

SIGNED IN SEATTLE, WASHINGTON, THIS 8TH DAY OF MAY, 2007

x *Ann Joyce*