

81650-6

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

NO. 25475-5-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TROY DEAN STUBBS,

Defendant/Appellant.

STATE'S BRIEF

TONY KOURES
WSBA#18457
P. O. Box 5070
Newport, WA 99156
(509) 447-4414
Deputy Prosecuting Attorney

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FACTS

On October 04, 2005, at about 3:00 a.m. the defendant stabbed Ryan Goodwin in the back and lower neck. RP 180, 194, 213, 221, 257, 258, 293, 294, 544, 547. The knife, a 5" folding knife with a 4" blade, was nearly completely embedded into the spine of Ryan Goodwin. RP 557, 699, CP 106 #'s 6 and #11. When the defendant stabbed Ryan Goodwin with the knife, it severed his spinal cord. RP 149. Ryan Goodwin is now paralyzed and numb from his waist down and has limited use of his arms for life. RP 153,154,161. He is confined to a wheelchair. RP 174.

At the time, Ryan Goodwin was living with his girlfriend Holly Stigall. RP 57, 124, 374. They were living in a motor home which was parked in Cusick at her cousin's house. RP 57, 58, 312, 375. On October 03, 2005, she and the defendant's wife, Kelly Stubbs decided to celebrate Holly's birthday, which was the next day. RP 61. They had been smoking meth all day. RP 61. At approximately 10:00 p.m. they decided to go to Newport to buy some alcohol. RP 61. After purchasing alcohol in Newport they went to her aunt's house where they met up with her cousin Lance Newman and his sister. RP 621, 643. According to Holly they smoked more meth and drank the alcohol they bought until approximately 1:00 a.m. RP 65. Holly, Kelly and Lance decided to go to Holly's brother's house and party some more. RP 64, 239. Her brother lived in Cusick, actually just a

short walking distance from the motor home. RP 58. (Ryan Goodwin was in the motor home sleeping since he earlier decided not to party with Holly and Kelly Stubbs. RP 299). When they got to the house they woke Holly's brother Dennis and his wife Stacie up. RP 65. The celebration then continued. RP 65, 358, 645, 646. Kelly Stubbs went to get her husband, according to Holly Stigall RP 66. Kelly Stubbs testified that the defendant was already there. RP 646. In any event the defendant was present at the Stigall residence. Holly, Kelly and the defendant smoked more meth at the party. RP 66. Holly went back to the motor home at approximately 2:00 a.m. RP 66, 649. She was alone with Ryan Goodwin for approximately one hour. RP 66 & 67. Then at about 3:00 a.m. Lance, Dennis, Kelly and the defendant showed up at the motor home. RP 67. They went there to get Holly and Ryan so they could party over at Dennis' house. RP 67 & 68. Kelly Stubbs testified they planned on going out to shoot a deer. RP 649. Holly and Kelly left first while Lance and the defendant stayed, apparently with the understanding that they would leave with Ryan shortly to go to the party. RP 67, 246, 299.

According to Lance the defendant was walking around the motor home when Ryan Goodwin got upset and told him I don't want you here because things will come up missing. RP 133, 247, 248. Then the defendant walked up to where Lance and Ryan were. RP 300. Lance and Ryan were

sitting on his bed in back of the motor home, Ryan was blowing (making) a glass pipe with a torch while sitting next to Lance. RP 133, 250. When the defendant got up to them he said, "Look that's the biggest fucking spider I've ever seen!" RP 134, 251, 256, 300. Troy was looking behind them and both Lance and Ryan Goodwin turned to look. RP 134, 251, 256, 300. Ryan Goodwin took off the cap he was wearing and prepared to swat the spider. However, there was no spider. RP 134. The defendant stabbed Ryan Goodwin in the back of the neck, as they were looking for the spider. RP 134, 251. He grabbed Lance Newman and said, "Lets fucking go, now!". RP 135, 252. Ryan Goodwin was paralyzed and could not move his legs. RP 197, 554. He asked the men for help but they ran out the door. RP 136, 252.

Ryan Goodwin initially lied to the police about blowing a glass pipe. RP 189. He told them that one of the persons, either Lance or the defendant, threw a lit propane torch onto the bed. RP 170. He said the blankets caught fire and he put out the fire with his forearms. RP 136. However, one week before trial, Ryan Goodwin admitted he was blowing the glass pipe. RP 133, 139. He was on probation at the time and thought the Department of Corrections would put him into prison in a wheelchair if they knew the truth about the pipe. RP 139. He was showing Lance Newman how make a pipe when the defendant distracted him and stabbed him in the back. RP 134,

251. The torch fell on the blankets and caught fire. RP 136. Ryan Goodwin actually put the fire out with his forearms since he could not move away from it. RP 136. Ryan Goodwin was treated for burns to both arms. RP 137.

The defendant and Lance Newman ran to Dennis Stigall's house. RP 68, 253. On the way the defendant told Lance to not say a "fuckin" word. RP 251. About 30 seconds later they got to Dennis' house. RP 258. Defendant and Lance sat down. RP 69, 320, 359. Everyone at the party observed that both men were extremely nervous. RP 69, 359, 656. Defendant was staring at Lance and both were sweating. RP 69, 319. Neither man was talking about what happened, the atmosphere was tense. RP 359, 360, 656.

A few minutes later (2 ½ to 3 minutes) Ryan Goodwin called Holly's cell phone. RP 70, 254, 320, 360. Stacie Stigall answered it, Ryan Goodwin told her that Troy Stubbs shot him in the back and he couldn't move. RP 360. Stacie immediately handed Holly the phone and Ryan told her he was shot by Troy Stubbs and that he was bleeding to death and couldn't move. RP 70, 360, 361.

They all went over to the motor home (on foot) and discovered Ryan Goodwin laying in the bed with the knife sticking out the middle of his lower neck right at the spine. RP 73, 324, 557.

Ryan Goodwin also called his mother immediately after calling Holly and told her he was bleeding to death because, "Troy shot him and that he loved her." RP 70, 141. Ryan Goodwin then hung up and called 911 at about 4:00 a.m.. RP 141. His mother actually told him to call 911 before they got off the phone. RP 141. He told the dispatcher that he had been stabbed and couldn't move. RP 544. Ryan was essentially paralyzed from the neck down, he had only 30% use of one arm and 70% in the other. RP 153 – 156. Everything from his chest down was totally immovable. RP 153 – 156. He was very worried that he was going to bleed to death. RP 141, 544 – 546. He was on the phone with the dispatcher for several minutes. RP 173, 544 – 557. The dispatcher immediately asked who assaulted him, Ryan Goodwin initially told dispatcher that he "didn't know, but I need help". RP 544 – 546. However a few seconds later he identified his attacker as Troy Stubbs. RP 547. The dispatcher inquired as to Ryan Goodwin's injuries. RP 547. The phone call to 911 got cut off and Ryan Goodwin called again. RP 540. However, during this phone call, third parties, including Kelly Stubbs, actually got on the phone with dispatch. RP 566.

Ryan Goodwin testified unequivocally that the defendant is the person who stabbed him. RP 135. He specifically testified he saw the defendant move towards him and saw his hand come down on him. RP 135. He said the defendant distracted Lance and him with the spider comment and

stabbed him while he was looking back. RP 134. Lance Newman corroborated that the defendant was the person who stabbed Ryan Goodwin, after distracting them with the spider comment. RP 293, 294.

Once police and medical personnel arrived at the scene of the crime Ryan Goodwin was removed from the motor home and transported to Sacred Heart hospital by helicopter. RP 174. From there he was transported to Harborview hospital in Seattle. RP 443. The knife was still in his back. RP 45. Medical personnel removed the knife and closed the wound. RP 443. The spinal cord however could not be reattached, (once severed a spinal cord injury becomes permanent). RP 149. In addition to severing the spinal cord the knife punctured a lung causing it to collapse. RP 150. The other lung also collapsed from complication of a central line. RP 150.

Dr. Vivian Moise of Spokane testified on behalf of Ryan Goodwin. RP 148. Her specialties are rehabilitation medicine and spinal cord injury medicine. RP 146. She has been practicing medicine for 20 years. RP 146. Spinal cord injuries account for approximately 50% of her practice. RP 148. She testified that Ryan Goodwin had a complete spinal cord injury. RP 153. She indicated that Ryan Goodwin suffered about 50% loss of strength in the left arm and about 2/3 loss in the left arm or hand. RP 155. His bladder has quit working and he is permanently catheterized. RP 149. His bowel

movements must be stimulated by his finger since he has lost all muscle control. RP 162. This can take 40 – 60 minutes a day. RP 163.

From the chest down Ryan Goodwin is 100% paralyzed. RP 155. All his breathing muscles in the diaphragm are permanently paralyzed. RP 155. The diaphragm muscles account for ½ of muscles which control breathing. RP 155. Loss of the diaphragm muscles put Ryan Goodwin in a high risk category for pneumonia – the leading cause of death for people with spinal cord injuries. RP 155.

Mr. Goodwin is also completely numb from the chest down. RP 154. He has partial feeling in his arms. RP 154. The numbness causes an autonomic nervous disorder called autonomic dysreflexia. RP 159. The disorder is related to pain the nervous system detects. RP 156. However, Ryan Goodwin would feel absolutely no sensation. RP 156. So a pin prick, hot coffee, bedsores, sore joints, and full bladder or in other words, anything which would be typically painful can set his autonomic nervous system to fire too much. RP 158. The autonomic nervous system is the system which controls the muscles of which we have no conscious control over. RP 157. When it senses pain in a person such as Ryan Goodwin it results in high or even low blood pressure. RP 157. Such an episode could be deadly. RP 159.

Ryan Goodwin's life expectancy is 17 years less than a normal person. RP 165. Some of the things that could cause Ryan Goodwin's early death are infections (bladder and kidney, which occur in 100% of people who use catheters), pneumonia and colon problems. RP 167. Ryan Goodwin has lost 100% of his normal sexual intimacy capabilities. RP 164.

On the day of trial, Ryan Goodwin had a seizure (autonomic dysreflexia) episode and was hospitalized while waiting to testify. RP 128.

On June 26, 2006, the court, with the Honorable Judge Baker presiding, heard several pretrial motions. One of the pretrial motions made by the state was to seek authorization to submit an aggravating factor to the jury. Specifically the state sought to submit the factor pursuant to RCW 9.94A.535(3)(y). It states that an aggravating factor supporting an exceptional sentence may be based on the fact that "a victim's injuries substantially exceed the level of bodily harm necessary to satisfy the offense."

The Honorable Judge Baker held that the factor was not vague and that it was clear the legislature intended to do away with the idea of what is a typical first degree assault since a jury has no frame of reference for it. RP 22. She indicated that a jury did have the frame of reference to determine whether injuries substantially exceed the level of bodily harm necessary to satisfy the offense. RP 22. The Judge indicated the instruction qualifying a

defendant for an exceptional sentence did not allow a jury to base its finding on a bare minimum threshold. RP 24 – 25. According to the judge, the test would have been vague if the jury instruction said only “exceed”, the threshold was “substantially exceeds”. RP 24 – 25.

ISSUES

1. Did the trial court properly submit an aggravating factor to the jury? The aggravating factor specifically found in RCW 9.94A.535(3)(y); did the injuries suffered by Ryan Goodwin substantially exceed the level necessary to satisfy the elements of assault in the first degree?
2. Did the sentencing court properly include juvenile felony convictions to establish a standard range?

EXCEPTIONAL SENTENCE

GENERAL RULE

The defendant argues that the exceptional sentence imposed by the trial court was improper. He states that the seriousness of the victim’s injuries can not be used to justify the exceptional sentence since that factor (serious injury) was considered in defining the crime. Washington Courts have addressed the issue several times in the recent past. Before 2005 the “general rule” was that the seriousness of a victim’s injuries could not be used to justify an exceptional sentence if the factor has been considered in

the crime itself. State v. Wilson, 96 Wn. App. 382, 980 P.2d, 244 (1999). However, courts have taken exception to the general rule when the effects on the victim were significantly more serious than the usual case. Wilson at 388. The test was whether the conduct produced the harm and if so was the harm produced more serious than that involved in the typical crime. Wilson at 388. In Wilson the reviewing court held that the trial court properly imposed an exceptional sentence on an Assault in the Third Degree conviction based on the seriousness of the injuries to the victim.

The court in State v. George, 67 Wn. App. 217, 834 P. 2d 664 (1992), review denied, 120 Wn. 2d 1023, 844 P. 2d. 1018, overruled on different grounds by State v. Ritchie, 126 Wn. 2d 388, 844 P. 2d 1308 (1995) upheld an exceptional sentence on an Assault in the First Degree conviction despite the fact great bodily injury was an element of the crime (a 77 year old victim was left in semi-vegetative state after a brutal attack). However, in State v. Cardenas, 129 Wn. 2d 1, 914 P. 2d 57 (1996), the court declined to impose an exceptional sentence in a vehicular assault case based on the victim's serious bodily injuries and disapproved of the rationale in George. The Cardenas court held that an exceptional sentence should not be imposed because of the severity of the injury where it is an element of the crime.

The trial court in *State v. Bourgeois*, 72 Wn. App. 650, 866 P. 2d 43 (1994), overruled on different grounds, *Bourgeois*, 133 Wn. 2d. 389, 945 P. 2d 1120 (1997), rejected an exceptional sentence based on the seriousness of injuries to a victim in an Assault in the First Degree case. (The victim suffered a gunshot wound to the abdomen and had portions of pancreas, colon and spleen removed.)

The *Bourgeois* court distinguished its decision from the decision in *George*, in that the *George* court also contended the injuries there were held to be deliberate and gratuitous. The *Bourgeois* court pointed out that the gunshot wounds were not atypical of injuries inflicted by firearms. They held the state did not establish that the injuries inflicted were far greater than necessary to establish Assault in the First Degree. *Bourgeois* at 663. However, the court hinted at the possibility a court may consider the seriousness and permanence of the injuries if they were not typical of those suffered by victims in Assault in the First Degree cases. *Bourgeois* at 663.

In *State v. Cowen*, 87 Wn. App. 45, 939 P. 2d 1249 (1997), the defendant was convicted of attempted murder, however, the reviewing court reversed the conviction based on faulty jury instructions. The court also reviewed the possibility of an exceptional sentence based on the severity of the victim's injuries. The victim was shot several times, his

spinal cord was severed (at an unknown location) and his colon was injured requiring a bag to empty his stool. The victim would remain paralyzed from the point at which the bullet hit him and suffered from chronic pain. Cowen, 87 Wn. App. at 56. The court held that the legislature contemplated a wide range of injuries including none at all in Attempted Murder cases. Cowen, 87 Wn. App. at 56. They concluded that since the injuries were permanent and serious that the trial court was authorized to impose an exceptional sentence (if reconvicted) even though the legislature already contemplated very serious injuries. Cowen, 87 Wn. App. at 56. The controlling issue in Cowen was the fact that the court considered the injuries atypical. The court held that the dictum in St. v. Warren, 63 Wn. App. 477, 820 P. 2d 65 (1991) was not controlling. The Warren court in upholding an exceptional sentence in an Assault in the Third Degree case said that when a victim was shot five times necessitating several hours of surgery and weeks of hospitalization, it was typical of Attempted Murder in the First Degree. Warren, 63 Wn. App. at 479. The Cowen court said the injuries were more serious in their case since the victim would remain paralyzed and in extreme pain and unable to perform bodily functions, thus establishing atypical injuries. Cowen, 87 Wn. App at 56.

The general rule should not apply in this case. The exception should apply here since the victim suffered an injury atypical of a knife wound, injuries much more serious than the typical Assault in the First Degree. The injuries inflicted on Ryan Goodwin were so egregious that they exceed the level of injury contemplated by the definition of great bodily harm. The state's position is that prior case law has left the door open for exceptional sentences in Assault in the First Degree convictions as charged in this case. The threshold is very high, however it has been met with the devastating and permanent injuries Ryan Goodwin will live with for the rest of his life.

Great bodily harm is defined as "bodily injury that creates a probability of death, or which causes serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." WPIC 2.04. The definition does not contemplate the severity of injuries suffered by Ryan Goodwin, because the definition only refers to the loss of any bodily part or organ not multiple bodily functions or organs. In this case Ryan Goodwin's skin is numb from the neck down (skin is one organ), he lost the use of both legs permanently, he lost most of the use of his arms, he lost 50% of his lung capacity, he must manually stimulate bowel movements, his life expectancy is shorter, his body shuts down when he feels pain (autonomic

dysreflexia) a condition caused by the numbness which could kill him and many other conditions about which Dr. Moise testified. RP 157 – 164. Hypothetically a more fitting definition in this case would be grievous bodily injury – bodily injury which creates probability of death, or which results in loss of multiple organs permanently or paralysis of a substantial portion of a persons bodily functions resulting in a substantial loss in the quality of life which may also decrease the life expectancy or create sudden death in the victim during the victims life.

Since the definition of great bodily harm in this case is inadequate or insufficient to account for such grievous bodily harm, the position of the state is that pre-2005 case law would allow a court to sentence a defendant to an exceptional sentence in the very worst of the worst of cases, since injuries such as those suffered by Ryan Goodwin are not necessarily included in the elements of Assault in the First Degree.

LEGISLATIVE INTENT

The Supreme Court of Washington has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. *State v. Pillatos*, 159, Wn. 2d 459, 150 P. 3d 1130 (2007). It is the function of the legislature not the judiciary to alter the sentencing process. *Pillatos*, 159 Wn. 2d at 469.

To ascertain legislative intent, a court will first turn to the plain language of the statute. *State v. Reding*, 119 Wn. 2d 685, 690, 835 P. 2d 1019 (1992). *State v. Glas*, 147 Wn. 2d 410, 54 P. 3d 147 (2002). The court's primary objective is to ascertain and give effect to the intent of the legislature. *State v. Radan*, 143 Wn. 2d 323, 21 P. 3d 255 (2001). If a statute is unambiguous (as it is here) it is not subject to judicial interpretation and its meaning is derived from the statute alone and the court is to assume the legislature meant exactly as it says. *State v. Chester*, 133 Wn. 2d 15, 21, 940 P. 2d 1374 (1997), *Glas*, 147 Wn. 2d at 415, *Radan*, 143 Wn. 2d at 330, *State v. Keller*, 143 Wn. 2d 267, 19 P. 3d 1030 (2001).

Courts may not add language to a clear statute even if the court(s) believe the legislature intended something else but failed to express it adequately. *Glas*, 147 Wn. 2d at 417 citing *Chester*, 133 Wn. 2d at 21.

The case which changed how exceptional sentences are to be applied, *Blakely v. Washington*, 542 U. S. 296, 302, 311, 124 S. Ct. 2531, 159 L. Ed. 2d (2004), recognized that there is clearly a difference between elements of a crime and sentencing factors. Sentencing factors are appropriate when they describe a circumstance which may be either aggravating or mitigating in character that support a specific sentence within the statutory range. *Apprendi v. New Jersey*, 530 U. S. 466, 498,

120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Apprendi court did suggest that the additional factor which opened the door to an enhanced sentence was equivalent to an element. Apprendi, 530 U. S. at 466, 467, 478, 480, 483, 486. Courts have been struggling with the question of whether enhancing factors are elements of a crime since the 1840's. Apprendi, 530 U. S. at 501.

Clearly, the statute has afforded a defendant even more due process rights in that the legislature has designed an exclusive list of aggravating factors which must be proven beyond a reasonable doubt. Nevertheless, the void for vagueness doctrine does not apply to this procedure since it is purely a sentencing scheme.

In Jones v. U. S., 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed 2d 311, a defendant was convicted of carjacking, the defendant's sentence was enhanced for causing "serious bodily injury," (a victim was hit in the head with a pistol which caused bleeding from the ear and suffered a perforated eardrum with numbness and permanent hearing loss).

The enhancement portion of the Jones sentence was found by a judge by a preponderance of the evidence, of course the issue was whether it should have been pled and proved beyond a reasonable doubt to a jury. The Jones court held that any fact that serves as a basis for increasing penalty ranges are basically element(s) of a crime and must be charged

and proven to a jury beyond a reasonable doubt. Jones, 526 U. S. at 232. The types of facts the court was considering were seriousness of injuries, death, force, violence and intimidation. Jones, 526 U. S. at 232. However, the court stated they were concerned with statutes that were unclear about whether it treats a fact as an element or penalty aggravator. Jones, 526 U. S. at 234. They looked at legislative intent. While the federal statutes regarding enhancements in Jones were unclear as to legislative intent, the statute is clear in the case at hand. The Washington legislature definitely wanted to treat the aggravator at issue as a sentencing factor not an element of the crime. One need only look at the clear language of the statute to determine the legislative intent. They specifically listed exclusive circumstances as aggravating factors to support a sentence outside the standard range.

The legislature has enacted an exclusive list of what it has deemed aggravating factors. The legislature specifically intended that juries make the determination beyond a reasonable doubt that “a victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the element of the offense.” RCW 9.94A.535(3)(y). The Honorable Judge Baker is correct in her plain reading of the statute that the test for imposing exceptional sentences is not comparing the injuries to a typical crime but whether the injuries “substantially exceed” the level necessary

to satisfy the element of Assault in the First Degree. This is the only way to present such a factor to the jury.

The factor is unambiguous and not subject to interpretation. The legislature made no exception as to what crimes the factor may or may not be applied to. The legislature is the only body which may alter the sentencing process. The court's function is to give effect to the plain language of the statute.

VOID FOR VAGUENESS ATTACK AS SENTENCING DIRECTIVE

A statutory sentencing regime is not susceptible to a vagueness attack. *State v. Baldwin*, 150 Wn. 2d 448, 458, 78 P. 3d 1005 (2003). The void for vagueness doctrine should have application only to laws that proscribe or prescribe conduct, it is analytically unsound to apply the doctrine to laws that merely provide directives to consider when imposing sentences. *Baldwin*, 150 Wn. 2d at 458, citing *State v. Jacobsen*, 92 Wn. App. 958, 965 P. 2d 1140 (1998), quoting *U. S. v. Wivell*, 893 F. 2d 156, 159 (8th circ. 1990).

A vagueness analysis encompasses two due process concerns; first they must be specific enough that citizens have fair notice of what conduct is proscribed and second the law must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution, *Baldwin*, 150 Wn. 2d at 458 citing *Papchristou v. City of Jacksonville*, 405 U.S. 156, 168,

92 S. Ct. 839, 316 Ed. 2d 110 (1972). Clearly both prongs of the vagueness test focus on laws that are related to conduct. *Baldwin*, 150 Wn. 2d at 458.

Here, the defendant puts at issue a sentencing statute. Specifically he argues that RCW 9.94A.535(3)(y) is vague and thus void. In *Baldwin* the defendant was arguing exactly what Mr. Stubbs is arguing here. He argued that the exceptional sentencing scheme did not provide explicit standards to protect against arbitrary application in theft cases. The exceptional sentence scheme in effect at the time *Baldwin* was sentenced included a provision that allowed a sentencing court to impose an exceptional sentence if these were “substantial and compelling” reasons to justify it. *Baldwin*, 150 Wn. 2d at 458. Former RCW 9.941.120. Additionally, former RCW 9.94A.390 provided a list of mitigating and aggravating factors a court could use. *Baldwin*, 150 Wn. 2d at 458. However, the list was only illustrative. *Baldwin*, at 150 Wn. 2d 458. RCW 9.94A.390.

The law regarding how exceptional sentences are imposed has changed pursuant to the ruling in *Blakely v. Washington*, 540 U. S. 1174, 124 S. Ct. 1493, 158 L. Ed. 2d 75, (2004). See RCW 9.94A.537. The *Blakely* court held that (most) factors which justify exceptional sentences must be submitted to a jury and proved beyond a reasonable doubt.

Therefore, the Washington legislature enacted a new sentencing procedure which became effective on April 15, 2005. They listed an exclusive set of factors which can support an exceptional sentence and required that they be proved to a jury beyond a reasonable doubt. RCW 9.94A.535, RCW 9.94A.537. The aggravating circumstance at issue here is RCW 9.94.535(3)(y); “Do the victim’s injuries substantially exceed the level of harm necessary to satisfy the offense?”

Clearly, the statute has afforded a defendant even more due process rights in that the legislature has designed an exclusive list of aggravating factors which must be proven beyond a reasonable doubt. Nevertheless, the void for vagueness doctrine does not apply to this procedure since it is purely a sentencing scheme.

VAGUENESS ATTACK AS ELEMENT

Defendant argues that RCW 9.94.535(3)(y) is unconstitutionally vague as opposed to being void for vagueness, “Since it operates as an element of a higher offense.” His argument essentially remains the same as in the prior section. The state is prepared to address the argument if the factor is considered an element of the crime by this court.

Defendant quotes *U. S. v. Wivell*, 893 F. 2d 156 (1990), in support of his argument. *Wivell* is premised on the vagueness doctrine as addressed in the preceding section of this brief. *Wivell*, 893 F. 2d at 159.

Wivell challenged a portion of the federal sentencing guidelines as unconstitutionally void on its face as it applied to him. Wivell, 893 F. 2d at 159. The argument was flatly rejected since the guidelines are not susceptible to a vagueness attack. Wivell, 893 F. 2d at 159. Nonetheless due process requires that a statute give a person of ordinary intelligence fair notice of proscribed conduct or as a matter of due process discourage arbitrary and erratic arrests and convictions. Wivell, 893 F. 2d at 159.

A statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. State v. Worrell, 111 Wn. 2d 537, 540, 761 P. 2d 56 (1988). A criminal statute is not impermissibly vague merely because some set of facts could exist wherein all its possible applications cannot be specifically anticipated. Worrell, 111 Wn. 2d at 543. Impossible standards of specificity are not required. Worrell, 111 Wn. 2d at 540.

The first step in any challenge is to determine if the statute in question is to be examined as applied to the particular case or to be reviewed on its face. State v. Coria, 120 Wn. 2d 156, 163, 839 P. 2d 890 (1992). A facial vagueness challenge to a statute is a challenge that its terms are so loose and obscure they can not be clearly applied in any context. Spokane v. Douglas, 115 Wn. 2d 171, 182, 795 P. 2d 693 (1990). In 1975 the U. S. Supreme court held that it is well established

that vagueness challenges to statutes which do not involve first amendment freedoms must be examined in light of the facts on hand. State v. Worrell, 111 Wn. 2d. 537, 541, 761 P. 2d 56 (1988). Citing U. S. v. Mazurie, 419 U. S. 544, 550, 42 L. Ed. 706, 95 S. Ct. 710 (1975). The defendant in this case presents his challenge without reference to the facts in his case, however he is not asserting that the statute in question implicates constitutionally protected conduct. (Not that he really could in this case.)

The defendant in this case argues that the term "substantially exceeds" is vague.

It is the position of the state that the statute is not susceptible to a challenge for vagueness as an element of the crime. Even if it is considered an element the statute is not ambiguous in that it appraises a person that inflicting grievous injury upon another person would subject them to a stiffer sentence upon conviction. The statute does not forbid conduct in terms so vague that persons of common intelligence must guess at its meaning. In the case at hand the injuries were so grievous that anyone with common sense would have some inclination that the injuries to Ryan Goodwin would clearly qualify him for an exceptional sentence under the new sentencing statute. Additionally the term provides the jury

with ascertainable standards to prevent arbitrary enforcement of the aggravating factor.

VAGUENESS ATTACK AS JURY INSTRUCTION

In *Godfrey v. Georgia*, 446 U. S. 420, 423, 100 S. Ct. 1749, 641 Ed. 2d 398 (1980) the U. S. Supreme Court struck down a statute which provided that a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible, or inhumane, that it involved torture, depravity of mind, or an aggravated battery to the victim. The court focused on the words outrageously, or wantonly vile, horrible and inhumane. They stated that the terms were so vague that they failed to adequately channel the sentencing decision patterns of the jury. *Godfrey*, 446 U. S. at 428. “In fact the jury’s interpretation of the terms could only have been the subject of pure speculation.” *Godfrey*, 446 U. S. at 428.

In *Tuilaepa v. California*, 512 U. S. 967, 972, 114 S. Ct. 2630, 129 L. Ed 2d (1994), the court reviewed a death penalty imposition providing that an aggravating circumstance (supporting the death penalty) may be included in the definition of the crime or a sentencing factor. The aggravating circumstance may not be unconstitutionally vague. *Tuilaepa*, 512 U. S. at 972. “Because the proper degree of definition of eligibility and selection factors often is not susceptible of mathematical precision our

vagueness review is quite deferential.” Tuilaepa, 512, U. S. at 972. The Tuilaepa court was clear in that they relied on the basic principal that an aggravating factor is not unconstitutional if it has some common sense meaning that juries should be capable of understanding. Tuilaepa, 512 U. S. at 973.

The petitioner in Tuilaepa challenged for vagueness three sentencing factors (age of defendant, defendant’s prior criminal history and circumstances of the crime) upon which a jury found to support a death penalty sentence. Tuilaepa, 512 U. S. at 975. The court denied the challenge since all the factors required an answer to a question with a factual nexus to the crime or the defendant, so as to make rationally reviewable process for imposing a death sentence. Tuilaepa, 512 U. S. at 973.

In State v. Elmore, 139 Wn. 2d 250, 290, 985 P. 2d 289 (1999). The court summarily rejected an argument that the word “significant” was vague as used in jury instructions in a death penalty case. In that case the jury was to consider as a mitigating factor “whether the defendant has or does not have a significant history of prior convictions.” The court found the term “significant” not to be unconstitutionally vague or infirm. Elmore, 139 Wn. Ed at 290.

In State v. Saunders, 132 Wn. App. 592, 599, 132 P. 3d 743 (2006), the defendant argued that the elements of Assault in the Third Degree were unconstitutionally void, because the elements included substantial pain and considerable suffering. The terms were used in the definition and context of bodily harm. The court rejected the argument holding that the statute was not void for vagueness because it provides notice of the proscribed conduct and possesses ascertainable standards to prevent arbitrary enforcement. Saunders, 132 Wn. App. at 599. They held the term qualified the definition of bodily harm. Saunders, 132 Wn. App. at 594.

The term “substantially exceeds,” is not ambiguous or vague since it denotes ascertainable standards for an exceptional sentence. The aggravating factor is used in relationship with the definition of great bodily harm, it provided the jury in this case with a standard which to analyze and compare.

The aggravating factor in question properly provides a channel for a jury to make a specific finding. In addition the jury is asked to answer a question with a factual nexus to the crime. The defendant appears to be making an argument that requires a jury to make a finding on the aggravating factor with mathematical precision. Case law on both the federal and state level is clear that such precision is not required. The

courts are looking for a rational basis for finding an aggravating factor which would support an exceptional sentence. In this case the jury determined that the injuries caused by the defendant *substantially exceeded* the level necessary to establish great bodily harm beyond a reasonable doubt. Definitely based on the horrible injuries Ryan Goodwin suffered and is still suffering from the finding is justified.

JUVENILE CONVICTIONS

The defendant argues that his felony convictions should not count against him in establishing a standard range sentence. The sentencing court found that the two felonies (Burglary in the Second Degree and Arson in the Second Degree) counted as a point. CP 116, RP 51 The defendant was facing a standard range of 186 – 240 months, including the deadly weapon enhancement. CP 111. In 2006 our Supreme Court heard an identical argument in *State v. Weber*, 159 Wn. 2d 252, 149 P. 3d 646 (2006). They held that juvenile adjudications do not fall under the prior convictions exception in *Apprendi v. New Jersey*, supra and are not facts that a jury must find under *Blakely v. Washington*, supra. *Weber*, 159 Wn. 2d at 257. The sentencing court therefore correctly included the juvenile convictions in establishing the standard range.

CONCLUSIONS

1. Pre – 2005 case law did not clearly prohibit an exceptional sentence in Assault in the First Degree cases with injuries so grievous as those inflicted on Ryan Goodwin.

2. In 2005 the Washington State legislature enacted a procedure in which exceptional sentences are to be imposed. In the case at hand RCW 9.94.A.535(3)(y) provides that an aggravating factor may be based on injuries if they substantially exceed the level necessary to satisfy the elements of the crime. The language in the statute is clear and unambiguous. The legislature did not limit the crimes with which the statute applies to. The court is to assume the legislature meant exactly as it says, its meaning should be derived from the statute alone. The decision by the trial court was correct in that the factor should have been submitted to the jury and found by a reasonable doubt.

3. A sentencing statute is not subject to a void for vagueness attack.

4. The term “substantially exceeds” is not vague. It provides the jury with ascertainable standards, when it is used in conjunction with great bodily harm. The term “substantial” has been held to be unambiguous in defining elements of a crime in Washington in the context of bodily harm. Federal courts have also upheld enhancing factor(s) when they provide ascertainable standards in which a jury may base its decision. Factors were vague in death penalty cases, when they essentially forced juries to speculate

or guess at their meaning with words such as vile, depraved, and horrible. Those types of words do not properly channel a jury, however the term substantially exceeds does. Mathematical precision is not required, the term “substantially exceeds” is not vague.

5. The factor in question is clearly a sentencing factor and should not be considered an element. However if it is subjected to the two part constitutional challenge applied to conduct related criminal laws, this statute is not vague. The argument by defendant under this section is essentially the same as the preceding sections. The answer or response to the argument also remains the same. A facial challenge to such a statute is a challenge which implies that the terms in question are so loose and vague a person with common sense can not apply them in any context. That is just not true here. A person with common sense can apply the terms “substantially exceeds” and not be confused as to what it means. The statute gives proper notice to anyone of the proscribed conduct. Moreover, it provides the legal system with ascertainable standards which prevent arbitrary enforcement by law enforcement.

Specifically, this case is more properly analyzed by its specific facts since the defendant does not argue that his conduct should have been constitutionally protected. As stated earlier the grievous injury the defendant

caused Ryan Goodwin should put any defendant on notice that his conduct would subject him to an enhanced sentence.

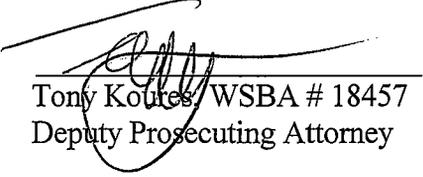
6. The defendant has not proven beyond a reasonable doubt that RCW 9.94.A.535(3)(y) is unconstitutional.

7. Washington State law is clear that juvenile convictions should count in determining standard range sentences.

8. The defendant's motion for remand on sentencing should respectfully be denied.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6th day of June, 2007, at Newport, Washington.


Tony Koures, WSBA # 18457
Deputy Prosecuting Attorney

RESPONSE TO ADDITIONAL GROUNDS FOR REVIEW

The defendant has provided this court with a statement for additional grounds for review. Basically they are two bases for his argument; first he argues that the evidence to convict him was insufficient and second he argues the jury panel was improperly selected.

Additional grounds #2, #3, and #5 pertain to the selection of the jury. The grounds are general statements in that his attorney was ineffective in challenging prospective jurors and that his jury was biased. Moreover, defendant argues specifically that one juror couldn't hear and another had a migraine. A specific objection to preserve the issue for appeal must be made before the appeals court will consider its merits. *St. v. Smith*, 155 Wn. 2d 496, 120 P. 3d 559 (2005). To establish ineffective assistance of counsel defendant must prove that his counsel's performance was deficient and that prejudice resulted. *St. v. McFarland*, 127 Wn. 2d 322, 899 P. 2d 1251 (1995). There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of professional judgment. *St. v. Glenn*, 86 Wn. App. 40, 935 P. 2d 679 (1997), review denied, 134, Wn. 2d 1003, 953 P. 2d 96 (1998). Only in egregious circumstances central to the state's case will the failure to object evidence

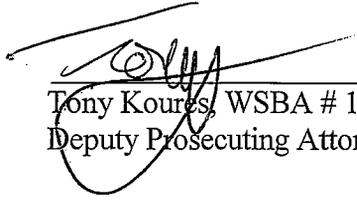
constitute ineffective assistance. St. v. Neidigh, 78 Wn. App. 71 895 P. 2d 423 (1995).

Defense counsel exercised all of his peremptory challenges. Cp 102. Defense counsel made at least five (5) challenges for cause all of which were granted. (See minutes of clerk attached as part of this brief.) Defense counsel is presumed to have rendered adequate assistance. To complain now without a record that establishes the defendant himself was not satisfied with the jury shows exactly the opposite. The defendant accepted the jury and took his chances with them. The defendant has not established grounds for ineffective assistance of counsel.

Grounds #1 and #4 relate to the sufficiency of the evidence. When considering facts in a challenge to sufficiency of the evidence, a court will draw all inferences from the evidence in favor of the state and against the defendant. Smith, 155 Wn. 2d at 500. A reviewing court will reverse a conviction for insufficient evidence only where no trier of fact could find all elements of the crime were proved beyond a reasonable doubt. Id. St. v. Selinas, 119 Wn. 2d 192, 82d P. 2d 1068 (1992). Based on the facts presented from the victim, an eyewitness, and several other witnesses it was reasonable to infer the defendant was guilty of Assault in the First Degree. RP generally.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 5th day of June, 2007, at Newport, Washington.



Tony Koures, WSBA # 18457
Deputy Prosecuting Attorney