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FILED
COURT OF APPEALS
DIVISION II

NO.

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STATE OF WASHINGTON
BY _____
DEPUTY

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

CHARLES BUKOVSKY, RESPONDENT
JOHN GORDON, RESPONDENT

Court of Appeals, Division I Cause No. 63815-7
Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-04227-3
No. 06-1-04228-1

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STATE OF WASHINGTON

PETITION FOR REVIEW

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STATE OF WASHINGTON
2010 JAN 14 AM 10:32

Table of Contents

A.	<u>IDENTITY OF PETITIONER</u>	1
B.	<u>COURT OF APPEALS DECISION</u>	1
C.	<u>ISSUE PRESENTED FOR REVIEW</u>	2
	1. In light of the numerous decisions of the Court holding that a defendant is precluded from challenging the trial court's failure to include a definitional instruction for the first time on appeal, did the Court of Appeals err in granting relief on this basis when defendants did not preserve this error in the trial court by objecting to the court's instructions or proposing any definitional instructions?	2
	2. Where the trial court's instructions on aggravating circumstances: 1) mirror the statutory language thereby informing the jury of all components of the circumstance; 2) indicate the State has the burden of proving the existence of the circumstance beyond a reasonable doubt; and, 3) require a unanimous jury verdict, has the constitution been satisfied?	2
	3. Did the trial court err in granting relief to a defendant on an issue that he did not raise in his direct appeal when to do so is contrary to a decision of this Court and the fundamental nature of our adversarial system, and when such action makes it appear that the appellate court is acting as an advocate or benefactor to the defendant?	2

D. STATEMENT OF THE CASE3

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED6

1. THE DECISION BELOW CONFLICTS WITH
NUMEROUS DECISIONS OF THIS COURT IN THAT IT
GRANTS RELIEF ON A NON CONSTITUTIONAL
CLAIM OF INSTRUCTIONAL ERROR THAT WAS
NOT PRESERVED IN THE TRIAL COURT.6

2. THE COURT OF APPEALS SHOULD NOT HAVE
GRANTED RELIEF TO DEFENDANT BUKOVSKY ON
AN ISSUE TO WHICH HE DID NOT ASSIGN ERROR
OR ARGUE IN HIS APPELLATE BRIEF.12

F. CONCLUSION17

Table of Authorities

State Cases

<i>Barr v. Day</i> , 124 Wn.2d 318, 333, 879 P.2d 912 (1994)	13
<i>Carducci v. Regan</i> , 230 U.S. App. D.C. 80, 714 F.2d 171, 177 (D.C. Cir. 1983).....	13
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992)	13
<i>In re Marriage of Sacco</i> , 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).....	13
<i>Peters v. Union Gap Irr. Dist.</i> , 98 Wash. 412, 413, 167 P. 1085 (1917)....	6
<i>State v. Bergeron</i> , 105 Wn.2d 1, 15-16, 711 P.2d 1000 (1985).....	9
<i>State v. Clark</i> , 124 Wn.2d 90, 875 P.2d 613 (1994), <i>overruled on other grounds by State v. Catlett</i> , 133 Wn.2d 355, 945 P.2d 700 (1997)	13
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994).....	6
<i>State v. Eckenrode</i> , 159 Wn.2d 488, 491, 150 P.3d 1116 (2007).....	8
<i>State v. Fowler</i> , 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990)	6, 8, 10
<i>State v. Hames</i> , 74 Wn.2d 721, 725, 446 P.2d 344 (1968).....	6
<i>State v. Hickman</i> , 135 Wn.2d 97, 102, 954 P.2d 900 (1998)	6
<i>State v. Hoffman</i> , 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991).....	6
<i>State v. Hudson</i> , 124 Wn.2d 107, 120, 874 P.2d 160 (1994)	13
<i>State v. Johnson</i> , 100 Wn.2d 607, 623, 674 P.2d 145 (1983), <i>overruled by State v. Bergeron</i> , 105 Wn.2d 1, 4, 711 P.2d 1000 (1985)	9, 10
<i>State v. Lord</i> , 117 Wn.2d 829, 880, 822 P.2d 177 (1991).....	7, 8, 10
<i>State v. Ng</i> , 110 Wn.2d 32, 39, 750 P.2d 632 (1988).....	6, 11

<i>State v. O’Hara</i> , 167 Wn.2d 91, 100-101, 217 P.3d 756 (2009)	7, 8, 10
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	13, 14, 15
<i>State v. Roswell</i> , 165 Wn.2d 186, 194, 196 P.3d 705 (2008).....	10
<i>State v. Salas</i> , 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).....	6
<i>State v. Schelin</i> , 147 Wn.2d 562, 576-77, 55 P.3d 632 (2002).....	8
<i>State v. Scherer</i> , 77 Wn.2d 345, 351-52, 462 P.2d 549 (1969)	6
<i>State v. Scott</i> , 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988)	7, 8, 10
<i>State v. Stearns</i> , 119 Wn.2d 247, 250, 830 P.2d 355 (1992)	7, 8, 10, 11
<i>State v. Wethered</i> , 110 Wn.2d 466, 755 P.2d 797 (1988).....	13
<i>Yakima County Fire Prot. Dist. No. 12 v. Yakima</i> , 122 Wn.2d 371, 397, 858 P.2d 245 (1993)	13

Federal and Other Jurisdictions

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d (2000).....	10, 11
<i>Ring v. Arizona</i> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d (2000).....	10, 11

Statutes

RCW 9.94A.535(3)(a)	3
RCW 9.94A.535(3)(b).....	3
RCW 9A.52.020-030	9

Rules and Regulations

Canon 2, Code of Judicial Conduct.....	15
RAP 1.2(a).....	16
RAP 10.1(g)(2).....	15
RAP 10.3(a)(3).....	14
RAP 10.3(a)(4).....	12
RAP 13.4(b)(1).....	8, 15
RAP 13.4(b)(4).....	16
RAP 2.4(a).....	12
RAP 2.5.....	8
RAP 2.5(a)(3).....	7

A. IDENTITY OF PETITIONER.

The State of Washington, Respondent below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed by Division I of the Court of Appeals on December 14, 2009, in the consolidated case of *State of Washington v. John Caldwell Gordon*, and *Charles Andrew Bukovsky*, COA No. 63815-7-I.¹ See Appendix A. The State respectfully requests the Supreme Court review the decision of the Court of Appeals vacating the exceptional sentences imposed on defendants on the grounds of instructional error for failure to define terms used in the aggravating factors when this claim was not preserved in the trial court and, also, in granting defendant Bukovsky this relief even though he did not raise this issue in his direct appeal.

¹ This case originated in Division II of the Court of Appeals under Cause number 37170-7-II, but was transferred to Division I.

C. ISSUE PRESENTED FOR REVIEW.

1. In light of the numerous decisions of this Court holding that a defendant is precluded from challenging the trial court's failure to include a definitional instruction for the first time on appeal, did the Court of Appeals err in granting relief on this basis when defendants did not preserve this error in the trial court by objecting to the court's instructions or proposing any definitional instructions?

2. Where the trial court's instructions on aggravating circumstances: 1) mirror the statutory language thereby informing the jury of all components of the circumstance; 2) indicate the State has the burden of proving the existence of the circumstance beyond a reasonable doubt; and, 3) require a unanimous jury verdict, has the constitution been satisfied?

3. Did the trial court err in granting relief to a defendant on an issue that he did not raise in his direct appeal when to do so is contrary to a decision of this Court and the fundamental nature of our adversarial system, and when such action makes it appear that the appellate court is acting as an advocate or benefactor to the defendant?

D. STATEMENT OF THE CASE.

Defendants Gordon and Bukovsky were charged with murder in the second degree; the State further alleged that two aggravating circumstances were applicable to defendants' crime. RP 665-666. The facts underlying their crime are set forth in the State's response brief filed below. For the purposes of this petition, the following facts are relevant.

In the trial court, the State alleged two statutory aggravating circumstances that the legislature stated must be found by a jury: 1) "defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim" pursuant to RCW 9.94A.535(3)(a); and, 2) "defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance" pursuant to RCW 9.94A.535(3)(b). CP 45-46, 665-66. The court instructed the jury that the State had to prove the aggravating circumstances "beyond a reasonable doubt." CP 248-286, 925-967, Instructions 32 and 33 (*see* Appendix B). The jury was instructed that to find the existence of a circumstance, it must be unanimous. CP 248-286, 925-967, Instruction 35. Neither defendant objected to the court's instructions² on the grounds that the court did not define "deliberate cruelty" or "particularly vulnerable" and neither defendant proposed any

instructions to further define these terms. RP 2145-2147; CP 123-150, 151-163, 225-238, 746-773, 774-801, 863-876.

The jury found the defendants guilty of murder and returned special verdicts finding both of the alleged aggravating circumstances applicable to defendants' crimes by answering "yes" to the following questions:

Having found defendant [name] guilty of Murder In The Second Degree, did [defendant] know or should he have known that the victim of the offense was particularly vulnerable or incapable of resistance?

and

Having found defendant [name] guilty of Murder In The Second Degree, did the [defendant's] conduct during the commission of the offense manifest deliberate cruelty to Brian Lewis?

CP 301, 971.

At sentencing, the State recommended imposition of exceptional sentences. CP 304-306, 999-1001. The court agreed with the State and found, based upon the jury's finding of two aggravating circumstances, that there were substantial and compelling reasons to impose a sentence outside the standard range. RP 2325-2334, 2339-2352. The court imposed a total sentence of 388 months on Defendant Bukovsky based upon his offender score of "2." CP 309-320. The court imposed a total

² At the time that this case was tried, there were no pattern instructions for jury determination of aggravating circumstances.

sentence of 364 months on Defendant Gordon based upon his offender score of “0.” CP 1002-1013. Each of these sentences was 144 months above the high end of the standard range. CP 542-545, 1038-1041.

On appeal, the Court of Appeals affirmed the defendants’ convictions but vacated the exceptional sentences. Defendant Gordon challenged the sufficiency of the trial court’s instructions on the aggravating circumstances claiming that they were constitutionally deficient for failing to define terms used in the aggravating circumstances. The Court of Appeals rejected the State’s arguments that these claims had been waived in the trial court due to a lack of objection or failure to propose additional instruction. *See* Appendix A. While only defendant Gordon challenged the sufficiency of the instructions on direct appeal, the court below granted both defendants relief based upon the trial court’s “failure” to provide definitional instructions on the terms “deliberate cruelty” and “particular vulnerability” used in the special verdicts pertaining to two aggravating factors alleged by the State. Appendix A, Opinion at pp. 11-25.

The State now seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT IN THAT IT GRANTS RELIEF ON A NON CONSTITUTIONAL CLAIM OF INSTRUCTIONAL ERROR THAT WAS NOT PRESERVED IN THE TRIAL COURT.

Over the decades, this court has held repeatedly that unchallenged jury instructions become the law of the case. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988); *see also State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994); *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968); *Peters v. Union Gap Irr. Dist.*, 98 Wash. 412, 413, 167 P. 1085 (1917) (declaring the law of the case doctrine to be “so well established that the assembling of the cases is unnecessary.”). Generally, an appellant cannot claim error predicated on the failure to give an instruction that was never requested. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991); *State v. Scherer*, 77 Wn.2d 345, 351-52, 462 P.2d 549 (1969).

An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994); *State v. Fowler*, 114 Wn.2d 59, 69, 785 P.2d 808 (1990). Examples of “manifest” constitutional errors in jury instructions are: 1) directing a verdict; 2) shifting the burden of proof to the defendant; 3) failing to define the

“beyond a reasonable doubt” standard; 4) failing to require a unanimous verdict; and, 5) omitting an element of the crime charged. *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988); *State v. O’Hara*, 167 Wn.2d 91, 100-101, 217 P.3d 756 (2009). Instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense and failure to define individual terms. *Id.*

The constitution requires that the jury be properly informed of the elements of the charged crime, but the failure of the trial court to *further* define one of those elements or a term used in the elements is not of constitutional magnitude. *O’Hara*, 167 Wn.2d at 105; *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). “Even an error in defining technical terms does not rise to the level of constitutional error.” *Stearns*, 119 Wn.2d at 250, citing *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991) and *Scott*, 110 Wn.2d at 689-90.

[W]e find nothing in the constitution, as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined. Because [defendant] failed to propose a defining instruction at trial, therefore, he may not raise the absence of such an instruction for the first time on appeal.

State v. Scott, 110 Wn.2d at 691. Consistent with this authority concerning instructions on the elements of crimes, this court has refused to review claims of error regarding instructions on sentencing factors when the issue was not preserved in the trial court. See *State v. Eckenrode*, 159

Wn.2d 488, 491, 150 P.3d 1116 (2007); *State v. Schelin*, 147 Wn.2d 562, 576-77, 55 P.3d 632 (2002) (Alexander, J. concurring).

Review of the decision below is appropriate under RAP 13.4(b)(1) as the decision is in conflict with numerous decisions of this Court. The decision below conflicts with this Court's decisions in *Scott, Lord, Stearns*, and *O'Hara*. The Court of Appeals failed to apply all of this Court's long standing precedent holding that failure to define a term used in an element is not a constitutional error that may be raised for the first time on appeal. As neither defendant objected to the trial court's proposed instructions nor proposed additional instructions defining either aggravating circumstance, the Court of Appeals should have found pursuant to *Scott, Lord, Stearns*, and *O'Hara* that: 1) the instructional issue was not preserved in the trial court; and, 2) was not a constitutional issue that could be raised for the first time on appeal under RAP 2.5. The court below failed to properly apply this controlling precedent of this Court and review is necessary to correct this error.

It is difficult to explain how the Court of Appeals reached its erroneous conclusion that it could review defendants' unpreserved claim of instructional error. At one point the opinion correctly articulates the applicable law by quoting *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990) for the proposition that: "The 'constitution only requires the

jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.” Appendix A, Opinion at p. 14. But in the very next sentence the Court of Appeals contradicts this statement by asserting that “failure to define every element of a charged offense is an error of constitutional magnitude,” citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled by State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). Appendix A, Opinion at p. 14-15. *Johnson* concerned whether a trial court, when instructing on the crime of burglary³, had to specifically instruct the jury on what crime a defendant was intending on committing inside the burglarized premises. While the *Johnson* court concluded that the trial court must specifically identify the crimes to inform the jury of the required element, this holding was overruled by *State v. Bergeron*, 105 Wn.2d 1, 15-16, 711 P.2d 1000 (1985) (the specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary that must be included in the information, jury instructions, or in the trial court’s findings and conclusions). The Court of Appeals characterization of the *Bergeron* decision as overruling *Johnson* on “other grounds” is in error. The court

³ The crime of burglary has as an element the “intent to commit a crime against person or property.” See RCW 9A.52.020-030.

relied upon a portion of a decision that had been overruled. Moreover, there were numerous decisions subsequent to *Johnson*, such as *Scott*, *Lord*, *Stearns*, *Fowler*, and *O'Hara* holding the failure to define a term, even a technical term, used in an element is not error of constitutional magnitude. Any review of these later decisions should have made it clear that reliance on *Johnson* was misplaced. As the Court of Appeals cited to *Scott*, *Fowler*, and *O'Hara*, it was clearly aware of these decisions. The Court of Appeals discusses the fact that in *Scott* this Court held that a defendant could not challenge the failure of the trial court to define "knowledge" for the first time on appeal. Somehow the court below could cite to this aspect of *Scott* yet still reach a result in direct conflict with the holding in *Scott*.

The Court of Appeals spends considerable time addressing the impact of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d (2000) and whether these decisions have turned sentencing factors into elements of the crime. The court below held "that aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing," while still acknowledging that this Court held in *State v. Roswell*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008), that an aggravating factor is not an element of the substantive crime. See Appendix A, Opinion at p.17-18. Apparently the court below concluded

that if you treat an aggravating circumstance as the equivalent of “an element,” then failure to further define terms contained within the aggravating circumstance is an issue of constitutional magnitude. The discussion below of the impact of *Ring* and *Apprendi* misses the point, for this Court has addressed whether: 1) the failure to define a term used in an element; or, 2) the failure to properly define a technical term, is an issue of constitutional magnitude and concluded that neither is. *State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988) (defendant could not raise claim for the first time on appeal that the trial court’s failure to define “theft” in an instruction for robbery was error); *Stearns*, 119 Wn.2d at 249-50 (defendant could not challenge court’s instruction defining “manufacture” in an unlawful possession of a controlled substance with intent to manufacture case for the first time on appeal). Although the State does not agree with the Court of Appeals conclusion as to whether an aggravating circumstance is an element of the crime, such discussion is, ultimately, irrelevant to the outcome. Even if an “aggravating circumstance” is “an element,” a defendant may not challenge the trial court’s failure to define a term used in an element for the first time on appeal under the controlling authority of this Court..

The jury below was properly informed of the components or “elements” of the aggravating circumstances as the instructions and special verdict forms mirrored the statutory language enacted by the Legislature. CP 248-286, 925-967, Instructions 32 and 33; CP 301, 971.

The instructions correctly set forth that the State had the burden of proving the existence of these circumstances beyond a reasonable doubt. CP 248-286, 925-967, Instructions 32, 33, and 35. The jury was instructed further that its decision on the special verdict form must be unanimous. CP 248-286, 925-967, Instruction 35. The constitution was satisfied by these instructions and defendants failed to preserve in the trial court the claim of instructional error asserted on appeal. The Court of Appeals erroneously granted relief on a non-constitutional issue raised for the first time on appeal contrary to this Court's controlling authority.

2. THE COURT OF APPEALS SHOULD NOT HAVE GRANTED RELIEF TO DEFENDANT BUKOVSKY ON AN ISSUE TO WHICH HE DID NOT ASSIGN ERROR OR ARGUE IN HIS APPELLATE BRIEF.

The rules of appellate procedure were designed to promote an orderly review of cases on appeal. Generally, the scope of the review of a trial court decision is determined by the content of the notice of appeal (and notice of cross appeal) and by the assignments of error in the opening brief(s). RAP 2.4(a); RAP 10.3(a)(4). An assignment of error requires a "separate concise statement of each error a party contends was made ... together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). It is well settled that an issue raised and argued for the first time in a reply brief, or in a supplemental brief after the Supreme Court

grants review, is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Yakima County Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993); *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (citing *State v. Clark*, 124 Wn.2d 90, 875 P.2d 613 (1994), *overruled on other grounds by State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997); *State v. Wethered*, 110 Wn.2d 466, 755 P.2d 797 (1988)).

Rules limiting review to issues raised by a party are consistent with the adversarial nature of our justice system. The “premise of our adversarial system . . . [is] that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” *Barr v. Day*, 124 Wn.2d 318, 333, 879 P.2d 912 (1994) (Utter, J., concurring in concurrence/dissent) (quoting *Carducci v. Regan*, 230 U.S. App. D.C. 80, 714 F.2d 171, 177 (D.C. Cir. 1983)).

This Court has addressed when the failure to fully comply with the rule governing assignments of error will preclude appellate review. *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). In *Olson*, the State had sought review of a suppression order in a criminal case; the State assigned error to the suppression order but failed to assign error to the trial court’s

accompanying order of dismissal in violation of the rules of appellate procedure. The Supreme Court found that this technical violation of the rules was not fatal to the consideration of the issue on appeal because the “nature of the [State’s] appeal [was] clear and the relevant issues [were] argued in the body of the brief and citations [were] supplied so that the court [was] not greatly inconvenienced and the respondent was not prejudiced.” *Olson*, 126 Wn.2d at 323. It went on to hold that under these circumstances there was “no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.” *Id.* In reaching this result the court examined several recent decisions addressing when a defect in the assignments of error would preclude review; the court concluded that these cases stood for “the proposition that when an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.” *Olson*, 126 Wn.2d at 321 (emphasis in original). Under this authority, the failure to assign error and raise an issue in the opening brief coupled with a failure to present any argument or authority on the issue in the body of the opening brief precludes appellate review.

The decision below conflicts with *Olson*. Bukovsky did not assign error to the court’s instructions or argue their insufficiency in his

opening brief. Nor did he adopt the argument of his codefendant on this issue under the provisions of RAP 10.1(g)(2). Under *Olson*, these omissions should have precluded appellate review of the instructional error with respect to him. This provides a basis for review under RAP 13.4(b)(1).

The Court of Appeals fully acknowledged that Bukovsky did not challenge the constitutionality of his jury instructions in his appeal. Appendix A, Opinion at p. 24. By extending the claim raised by Gordon to Bukovsky and giving him relief, the court below, essentially, acted as an advocate on his behalf. It held:

Aware of the inevitability of both a subsequent personal restraint petition by Bukovsky and its success we invoke RAP 1.2(a).... In the interests of promoting justice and facilitating a decision on the merits, we recognize that the issues and assignments of error are equally applicable to Bukovsky's case as they are to Gordon's. We hold that the exceptional sentence for Bukovsky must also be reversed.

Appendix A, Opinion at p. 25.

An appellate court should be cautious to avoid any appearance of showing partiality to, or advocating on behalf of, a particular litigant. This is contrary to the adversarial nature of our system and endangers the neutrality of the bench. Canon 2 of the code of judicial conduct states that judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

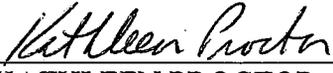
The Court of Appeals is not omniscient and cannot predict the future as to whether or not Bukovsky would have filed a personal restraint petition on this issue. Nor can it predict whether such a petition would have been timely filed. The court should not be predicting an outcome on the merits of a future claim or assume that Bukovsky would be able to meet the heightened standards applicable to obtaining relief by collateral attacks which are not applicable to a direct appeal. Having failed to challenge the court's instructions on appeal, Mr. Bukovsky should face all of these potential procedural barriers to relief. The Court below generously waived these procedural hurdles to Mr. Bukovsky's great advantage and to the detriment of the State. While the court cited RAP 1.2(a) which states that rules may be "liberally interpreted" to promote justice, the rule does not state that the rules may be completely ignored or disregarded—especially those that are fundamental to the adversarial nature of our justice system. The decision below is harmful to the administration of justice as it places the Court of Appeals into the role of a generous benefactor on Mr. Bukovsky's behalf rather than as a fair and impartial arbiter of issues raised by the litigants. Consequently, this case also presents an issue of substantial public interest that should be addressed by the Supreme Court pursuant to RAP 13.4(b)(4).

F. CONCLUSION.

For the foregoing reasons the State asks this court to grant the petition for review.

DATED: January 13, 2010

MARK LINDQUIST
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KATHLEEN PROCTOR
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WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/13/10 J. Johnson
Date Signature

FILED
COURT OF APPEALS
DIVISION II
10 JAN 13 AM 11:16
STATE OF WASHINGTON
BY _____
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APPENDIX "A"

Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63815-7-I
Respondent,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
JOHN CALDWELL GORDON,)	
)	
Appellant.)	
<hr/>		
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	
)	
CHARLES ANDREW BUKOVSKY,)	
)	
Appellant.)	FILED: December 14, 2009

APPELWICK, J. — Gordon and Bukovsky appeal their convictions for second degree felony murder. The second degree felony murder statute does not violate equal protection, nor is it ambiguous. Gordon contends the jury was deprived of constitutionally sufficient instructions on the aggravating factors of deliberate cruelty and victim vulnerability. After Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d (2000), for the purpose of instructing the jury on an exceptional sentence, aggravating factors are elements of the crime. Failure to instruct on the specific legal standard defining an aggravating factor is a manifest error affecting a constitutional right. Here, the error was not harmless as to either

the deliberate cruelty or the particularly vulnerable victim factors. We reverse the exceptional sentences and remand for further proceedings.

FACTS

Officers Brian Wurts and David Butts of the Lakewood Police Department responded to a call from the Lakewood Garden Apartments on September 5, 2006, at approximately 3:15 a.m. They observed a man, Brian Lewis, severely injured and bloody on the ground, between two vans. Lewis did not appear to be entirely conscious and was rolling from side to side. A large amount of blood was pooling beneath his body.

The paramedic who responded to the scene testified that Lewis's eyes were completely swollen shut and his upper lip was split to the bottom of his nose, exposing his upper mandible. Lewis was having problems breathing. In transit to the hospital, Lewis's heart rate declined. Lewis went into cardiac arrest about six minutes before the ambulance arrived at the hospital.

The forensic officer dispatched to the crime scene documented the scene and took measurements for a diagram. There were two vans parked side by side in the parking lot, with about four feet between them. There was blood in the area between the vans, including spatter on the wheels.

Four men were involved in the assault on Lewis: Charles Bukovsky, John Gordon, Jesie Puapuaga, and Anthony Knoefler. The altercation began when Gordon punched Shecola Thomas in the eye. Lewis confronted Gordon about hitting Thomas. According to Thomas, the verbal confrontation escalated into

physical violence when Gordon hit Lewis in the face. At that point, according to Knoefler, Lewis tried to run out from between the two vans. Lewis hit Knoefler, then Gordon punched Lewis several times, causing Lewis to fall to the ground. Knoefler kicked Lewis in the head as he tried to get up, causing him to fall to the ground again. Gordon and Bukovsky then began punching and kicking Lewis. They landed repeated blows on his chest and stomach. About thirty seconds after Lewis had fallen to the ground, Puapuaga arrived and put Lewis in a chokehold while he was still on the ground. Gordon and Bukovsky repeatedly kicked Lewis while he was in the chokehold.¹ Lewis's head was near the front tires of the two vans, between which the assault took place. Knoefler saw a car coming and thought it might be the police, prompting him to yell out. The beating stopped.

The forensic pathologist who performed the postmortem examination stated that the cause of Lewis's death was multiple traumatic injuries to the body and head. The blunt force trauma to his head caused subgaleal and subarachnoid hemorrhages to the brain. The autopsy also revealed that Lewis had been asphyxiated, which was a significant factor in his death. An expert in blood stain pattern analysis determined that nothing in the blood spatter indicated the source of the blood was from someone who was standing up.

On September 7, 2006, the Pierce County Prosecutor's Office filed an information charging Gordon with one count of murder in the second degree for

¹ Iosia Gisa joined in the fight as well, delivering several kicks to the victim's body and head. He was not mentioned in the determination of probable cause.

the assault of Brian Lewis, which caused Lewis's death. The information indicated that other codefendants, Bukovsky, Puapuaga and Knoefler, were also involved in the crime.² On the same day, Bukovsky was charged with one count of murder in the second degree for the same events.

Both Gordon and Bukovsky sought to dismiss the charges, arguing that the felony murder statute, RCW 9A.32.050(1)(b), violated equal protection when the predicate felony was assault. The court denied the motion.

The State filed an amended information in both cases on July 10, 2007, to allege two aggravating circumstances: victim vulnerability and deliberate cruelty. Counsel for both Bukovsky and Gordon objected to the court's decision to give the jury the special verdict question regarding victim vulnerability, on the grounds that it was inapplicable to the facts of the case, but counsel did not object to the special verdict question regarding deliberate cruelty. Nor did counsel propose jury instructions articulating the specific legal meaning of either aggravating factor, or object to the State's jury instructions on either aggravating factor.

The jury returned guilty verdicts for both defendants. The jury also returned special verdicts, finding that both the victim vulnerability and deliberate cruelty aggravating circumstances were applicable.

Because of the existence of the aggravating circumstances found by the jury, the State sought imposition of exceptional sentences. Based on an offender

² Knoefler entered into a plea bargain and testified against the defendants at trial. Puapuaga's trial was severed when the Washington Supreme Court granted direct discretionary review. State v. Puapuaga, 164 Wn.2d 515, 192 P.3d 360 (2008).

score of two, the court sentenced Bukovsky to 244 months on the second degree murder and 144 months for the aggravating factors, for a total of 388 months. Based on an offender score of zero, the court sentenced Gordon to 220 months on the second degree murder and 144 months for the aggravating factors, for a total of 364 months.

The court entered findings of fact and conclusions of law regarding the exceptional sentences. Some of the findings and conclusion contain statements that were not explicitly found by the jury.

Both defendants timely appealed their judgments.

DISCUSSION

I. Equal Protection

Both Gordon and Bukovsky challenge their convictions on the ground that the second degree felony murder statute, RCW 9A.32.050(1)(b), violates equal protection. The second degree felony murder statute states that a person is guilty of murder in the second degree when:

He or she commits or attempts to commit any felony, including assault, . . . and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

RCW 9A.32.050(1)(b).

Article I, section 12 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution guarantee that similarly situated persons must receive like treatment under the law. State v. Manussier, 129

Wn.2d 652, 672, 921 P.2d 473 (1996). Our supreme court has consistently construed the federal and state equal protection clauses identically and considers claims arising under them to be one issue. Id.

In analyzing equal protection claims, rational basis review applies when a statutory classification does not involve a suspect or semisuspect class and does not threaten a fundamental right. Id. at 673. When a statutory classification only affects a physical liberty interest, we apply the deferential rational relationship test. State v. Coria, 120 Wn.2d 156, 171, 839 P.2d 890 (1992) (rejecting intermediate scrutiny when physical liberty interest is involved, but no semisuspect class is affected). Under rational basis review, the challenged law must reflect a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. Manussier, 129 Wn.2d at 673. Rational basis requires only that the means employed by the statute be rationally related to a legitimate state goal, not that the means of the challenged statute be the best way of achieving that goal. Id.

A statute is presumed to be constitutional, and the party challenging it bears the burden to prove that it is unconstitutional beyond a reasonable doubt. State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). We review the constitutionality of a statute de novo. Id.

Both Gordon and Bukovsky argue that RCW 9A.32.050(1)(b) is unconstitutional as applied,³ because it impermissibly creates two groups of second degree murder defendants. Specifically, they argue that those defendants charged with second degree felony murder, who by definition do not intend to kill (RCW 9A.32.050(1)(b)), are treated more harshly than those defendants charged with second degree murder, who by definition intend to kill (RCW 9A.32.050(1)(a)). A defendant charged with second degree felony murder does not have the right to the lesser included offense instructions of manslaughter, whereas a defendant charged with second degree murder does have the right to the lesser included offense instruction of manslaughter. State v. Gamble, 154 Wn.2d 457, 466–69, 114 P.3d 646 (2005). Both appellants also highlight the amount of discretion this statutory scheme vests in the prosecutor.

The equal protection argument is controlled by State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008), review denied 164 Wn.2d 1035, 197 P.3d 1185 (2008), which presented a similar challenge to the second degree felony murder statute, as well as analogous factual circumstances. In Armstrong, the defendant challenged his conviction for second degree felony murder. Id. at 335.

³ Bukovsky argues specifically that RCW 9A.32.050(1)(b) is unconstitutional on its face. A person challenging a statute for facial invalidity must demonstrate that there is no set of circumstances in which the statute, as written, can be constitutionally applied. City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Bukovsky's facial challenge fails, as this court's decision in State v. Armstrong demonstrates that there is at least one circumstance in which the statute was applied constitutionally. 143 Wn. App. 333, 340, 178 P.3d 1048 (2008) (holding that felony murder statute satisfies rational basis review, where defendant was charged and convicted of second degree felony murder based on the predicate crime of second degree assault), review denied, 164 Wn.2d 1035 (2008). If a statute is unconstitutional on its face, the proper remedy is to render the statute totally inoperative. Moore, 151 Wn.2d at 669. The remedy Bukovsky seeks is unavailable.

The State based the charge on the predicate crime of second degree assault, where Armstrong shot the victim, and the victim died shortly after from the gunshot wounds. Id. at 335–36.

The class of persons charged with felony murder, where the predicate felony is assault, is similarly situated to the class of persons charged with intentional murder. Both classes have committed some type of assault that results in death. See id. at 339. Because the statutory classification of those who commit felony murder affects a physical liberty interest, rational basis review applies. See id.; see also State v. Coria, 120 Wn.2d at 171.

In re Personal Restraint of Andress, 147 Wn.2d 602, 616, 56 P.3d 981 (2002) held that the legislature did not intend that assault be a predicate felony in the felony murder scheme. In response, the legislature provided a statement of intent when it amended the second degree felony murder statute in 2003 to specifically include assault. See RCW 9A.32.050(1)(b) (stating that any felony, “including assault,” can serve as the predicate felony). The legislature explained its purpose was to, “[p]unish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony.” Laws of 2003, ch. 3, § 1.

The statute achieves the legislature’s express goal of punishing those who commit a homicide in the course of and in furtherance of a felony in the same manner as those who intend to kill. Armstrong, 143 Wn. App. at 340. Including assault as a predicate felony is rationally related to achieving that objective.

Manussier, 129 Wn.2d at 673. While this is certainly a harsh policy, and does vest immense discretionary power in the prosecutor, it is nevertheless a policy choice well within the province of the legislature. See Armstrong, 143 Wn. App. at 340.

Further, the equal protection challenge based on the unavailability of the lesser included offense instruction of manslaughter for those charged with felony murder is a matter courts have already settled. The court held in Gamble that because manslaughter requires proof of a mens rea element vis-à-vis the resulting death, whereas felony murder does not when second degree assault is the predicate felony, manslaughter cannot be a lesser included offense of second degree felony murder. 154 Wn.2d at 466–69; see also Armstrong, 143 Wn. App. at 341.

A rational basis exists for the distinctions the legislature made in the statute, so it does not violate equal protection.

II. Ambiguity

Gordon suggests that, under canons of statutory construction and the rule of lenity, this court should interpret the second degree felony murder statute to allow assault to serve as the predicate felony only where the assault is not also the act that causes the death.

We construe a statute by first looking at its plain language. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutes should be construed to effect their purpose, and strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided. State v. Leech, 114 Wn.2d 700, 708–09, 790 P.2d 160 (1990). We will not construe a statute to reach an absurd result, because we do not presume that the legislature intended absurd results. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983); Leech, 114 Wn.2d at 708–09.

Only if a statute is ambiguous may we resort to aids of construction, such as legislative history. State v. Fisher, 139 Wn. App. 578, 583, 161 P.3d 1054 (2007). The court's purpose in construing a statute is to ascertain and give effect to the intent and purpose of the legislature. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). If a statute is ambiguous, we apply the rule of lenity in favor of the accused. State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); State v. Stratton, 130 Wn. App. 760, 764–65, 124 P.3d 660 (2005).

Gordon urges the court to consider whether the 2003 amendment resolves the central problem the court in Andress noted. There, the court expressed concern that “[t]he ‘in furtherance of’ language is a strong indication that the legislature does not intend that assault should serve as a predicate felony for second degree felony murder.” Andress, 147 Wn.2d at 611. The court in Andress focused its analysis on the problem of the res gestae⁴ dilemma

⁴ For purpose of felony murder, a homicide is deemed committed during the perpetration of a felony if the homicide is within the “res gestae” of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and homicide. Leech, 114 Wn.2d at 706.

created by circumstances where an assault is both the predicate felony and the act that causes the death:

It is nonsensical to speak of a criminal act—an assault—that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. Therefore, if assault were encompassed within the unenumerated felonies in [former] RCW 9A.32.050(1)(b), the ‘in furtherance of’ language would be meaningless as to that predicate felony. In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

Id. at 610.

We conclude the statute is not ambiguous. But, even if we assume the statute was ambiguous and look at the legislative history of the statute as Gordon urges, we see that the res gestae issue is no longer problematic. The reasoning in Andress concerning res gestae involved statutory construction principles to derive the legislature’s intent. The 2003 amendment in response to the holding in Andress and its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony. As a result, we would reach the same conclusion.

III. Jury Instructions on Aggravating Factors

The State requested that the jury consider two aggravating factors in support of exceptional sentences for both defendants—deliberate cruelty to the victim, and particular vulnerability of the victim. Gordon argues the jury instructions on the aggravating factors were constitutionally deficient. Although they articulated the State’s burden to prove the factors beyond a reasonable

doubt,⁵ they lacked any articulation of the specific elements of each factor. A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Both factors at issue here are listed in RCW 9.94A.535(3), which provides a list of aggravating circumstances to be considered by a jury that will support a sentence above the standard range. The list includes whether “[t]he defendant’s conduct during the commission of the current offense manifested deliberate cruelty to the victim” or whether “[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)(a), (b). The statute provides no other definition of either factor.

Our Supreme Court has given specific definitions to both of these aggravating factors that are not concomitant with either a statutory definition or a commonsense meaning of the terms. “Deliberate cruelty” is “gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. . . . the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense.” State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (citation omitted). “Particular vulnerability” of the victim means both that the defendant knew of the

⁵ There are statutory criteria regarding the procedure for imposition of a sentence above the standard range passed to bring sentencing procedures into conformity with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). RCW 9.94A.537. “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” RCW 9.94A.537(3).

victim's particular vulnerability, and that this vulnerability was a substantial factor in the commission of the crime. State v. Suleiman, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006).

The special verdict form for deliberate cruelty read: "Having found defendant . . . guilty of Murder In The Second Degree, did [defendant]'s conduct during the commission of the offense, manifest deliberate cruelty to Brian Lewis?" The accompanying jury instruction to the special verdict stated that "[f]or purposes of special verdict Question One [deliberate cruelty] the State must prove beyond a reasonable doubt that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim."

The special verdict form for particular vulnerability of the victim read, "Having found defendant . . . guilty of Murder In The Second Degree, did [defendant] know or should he have known that the victim of the offense was particularly vulnerable or incapable of resistance?" The accompanying jury instruction to the special verdict stated that "[f]or purposes of special verdict Question Two [victim vulnerability] the State must prove beyond a reasonable doubt that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance."

Neither Gordon nor Bukovsky objected to the court's instructions.⁶ Nor did they propose additional instructions defining either aggravating factor. Because this issue is raised for the first time on appeal, we must first determine whether the claimed error is of constitutional magnitude. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

A. Manifest Error Affecting a Constitutional Right

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). To satisfy the constitutional requirement of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law and permit the defendant to present his theory of the case. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The “constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.” State v. Fowler, 114 Wn.2d 59, 69–70, 785 P.2d 808 (1990) (citing State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988)).

Accordingly, failure to define every element of a charged offense is an error of constitutional magnitude. State v. Johnson, 100 Wn.2d 607, 623, 674

⁶ Counsel for both Bukovsky and Gordon objected to the court's decision to give the jury the special verdict question regarding victim vulnerability on the grounds that it was inapplicable to the facts of the case. They did not specifically object to the court's instructions defining victim vulnerability or deliberate cruelty or propose their own. Absent objection or proposal of their own jury instructions, the issue has not been preserved for review. RAP 2.5(a). Nor is the objection to the special verdict question sufficient to preserve the issue of the constitutional sufficiency of the accompanying jury instructions.

P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). If the jury instructions either incorrectly define or are silent on an element of a crime, the State is impermissibly relieved of its burden to prove beyond a reasonable doubt that the defendant committed all the essential elements. State v. Williams, 136 Wn. App. 486, 492–93, 150 P.3d 111 (2007). The relevant inquiry, then, in determining whether the instructional error was one of constitutional magnitude is “whether the instruction omitted an element so as to relieve the State of its burden or merely failed to further define one of those elements.” State v. O’Hara, ___ Wn.2d ___, ¶25, 217 P.3d 756 (2009).

The State alleges the missing instructions were merely definitional, so constitutional error was not present. The State is correct that failure to give a definitional instruction is not constitutional error. See Scott, 110 Wn.2d at 690–91. For instance, in Scott, one of the defendants argued the trial court’s failure to submit a definition of “knowledge” to the jury was constitutional error. Id. at 684. Because the court could not find any authority requiring an instruction to specifically define the words therein, the court held that Brown could not raise the issue of the court’s failure to define “knowledge” for the first time on appeal. Id. at 691.

Tili's articulation of "deliberate cruelty" suggests that it is a technical legal term that must be defined if requested. 148 Wn.2d at 369; State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) ("trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of common understanding.") Similarly, Suleiman's articulation of "particular vulnerability" of the victim suggests that it, too, is a technical legal term that must be defined if requested. 158 Wn.2d at 291-92; Allen, 101 Wn.2d at 358. However, failure to define a technical word or expression does not rise to the level of a constitutional error. Fowler, 114 Wn.2d at 69-70.

However, Gordon contends that, after Apprendi,⁷ aggravating factors used to impose a sentence above the standard range are elements of the aggravated version of the crime. 530 U.S. at 494 n.19. In Apprendi, the Court considered the constitutionality of New Jersey's hate crime enhancement statute.⁸ Id. at

⁷ The central holding in Apprendi is that a jury, not a judge, must find, beyond a reasonable doubt, the facts that serve to increase the penalty for a crime beyond the statutory maximum. 530 U.S. at 490. For Apprendi purposes, the statutory maximum is defined as the sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 302-04. Before these seminal cases, the trial judge had the authority to be the fact finder for purposes of aggravating factors, obviating the need for jury instructions on their legal meaning. Now, juries are left to deliberate over whether the defendants actions satisfy the aggravating factors.

However, After Blakely, the trial court retains its discretion to determine whether the jury's findings "are substantial and compelling reasons justifying an exceptional sentence," RCW 9.94A.537(6), but the jury must determine the factual basis for the aggravating circumstances.

⁸ If a jury convicted a defendant of a second degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon, the hate crime statute allowed a judge to elevate the punishment to a level commensurate with the punishment for the crime in the first degree, based on the judge's finding that the defendant's purpose for unlawfully possessing a weapon was to intimidate his victim on the basis of a particular characteristic of the victim. Apprendi, 530 U.S. at 491-92. The statutory scheme treated the required finding of the defendant's biased purpose not as an element, but as a sentencing factor. Id.

491–94. In so doing, it provided a detailed distinction between sentencing factors and sentence enhancements:

[T]he term “sentencing factor” . . . describes a circumstance . . . that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense. On the other hand, when the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.

Id. at 494 n.19. Echoing Apprendi’s reasoning, the Court in Ring characterized Arizona’s enumerated aggravating factors as the “functional equivalent of an element of a greater offense.” 536 U.S. at 609 (quoting Apprendi, 530 U.S. at 494 n.19).

After Apprendi and Ring, the alleged error here can be fairly characterized as failing to properly instruct on an element of the aggravated crime.⁹ We hold that aggravating factors are elements of the crime for purposes of instructing the

⁹ State v. Kincaid states that aggravating factors are sentence enhancers, not essential elements of the crime itself. 103 Wn.2d 304, 307, 692 P.2d 823 (1985). There, the court held that aggravating factors do not have to be included in the “to convict” instruction for the underlying offense. Id. However, incorporated into its holding is a crucial caveat: “it is unnecessary that the aggravating circumstances . . . be set forth as elements of the offense in the ‘to convict’ instruction on the underlying murder charged; *provided, as here, the jury is otherwise properly instructed as to how the existence of any such aggravating circumstances is to be determined.*” Id. (emphasis added).

In State v. Brown, 132 Wn.2d 529, 612–613, 940 P.2d 546 (1997), the court considered Brown’s argument that the trial court’s refusal to define the phrases “in the course of,” “in furtherance of,” or “in immediate flight” violated his due process rights, because they were essential elements of the aggravators. Id. at 611. The court did not squarely reject Brown’s characterization of these phrases as elements of the aggravators. See id. at 612. Rather, it analyzed the situation as a failure to give a definitional instruction, having already concluded that the terms were expressions of common understanding. See id. at 611–612. There is no need to define words that are commonly understood. And, failure to give a definitional instruction cannot be equated with failure to instruct on an essential element. Id. at 612; Scott, 110 Wn.2d at 690.

jury on exceptional sentencing.¹⁰ We further hold that where an appellate court has further defined the legal standard of a statutory aggravating factor yet the jury instruction fails to include the legal standard, an error of constitutional magnitude is present.

A failure to adequately instruct the jury on the elements of an aggravating factor for an exceptional sentence is manifest error affecting a constitutional right that may be argued for the first time on appeal. RAP 2.5(a); State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (a trial court's failure to correctly, accurately, and completely convey the necessary legal standard in its jury instructions is an error of constitutional magnitude that is presumed prejudicial), abrogated on other grounds by State v. O'Hara, ___ Wn.2d ___, 217 P.3d 756 (2009); Williams, 136 Wn. App. at 492–93.

While the error is of constitutional magnitude, it must also be manifest. O'Hara, 217 P.3d at ¶14. “Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice. O'Hara, 217 P.3d at ¶14; State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” O'Hara 217 P.3d at ¶14

¹⁰ The State cites to State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008), for the proposition that an aggravating factor is not an element of the substantive crime, in an effort to defeat Gordon's argument based on Apprendi. The State is correct. However, nothing in our holding suggests that aggravating factors are elements of the substantive crime. Rather, for purposes of jury instructions and the Sixth Amendment, aggravating factors must be treated as elements of an aggravated form of the crime. This comports with the court's observation in Roswell, that “an aggravating factor must be treated like an element for purposes of the Sixth Amendment to the United States Constitution.” 165 Wn.2d at 194.

(alteration in original) (internal quotation marks omitted) (quoting Kirkman, 159 Wn.2d at 935). To ensure that the actual prejudice inquiry and the harmless error analysis are distinct, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” Id. at ¶15.

The error is patently obvious on the record. Gordon has made the required showing of actual prejudice by highlighting the difference between the instructions as given and the proper language that should have been included in the instructions. The practical and identifiable consequences in the trial were, as Gordon explains, that the jury was left to deliberate with a misleading and incomplete statement of the law. He need not show more.

B. Harmless Error

Because the lack of instruction is a manifest error affecting a constitutional right, we examine the effect the error had on defendant’s trial according to harmless error standard. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1998). A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The harmless error analysis ensures that criminal defendants may not obtain new trials whenever it is possible to identify a constitutional issue not raised below. Id.

We examine each aggravating factor independently, comparing its legal meaning to the instruction the jury actually had, to determine whether, beyond a reasonable doubt, the jury would have reached the same result in the absence of the error.

“Deliberate cruelty” is “gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. . . . the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense.” Tili, 148 Wn.2d at 369.¹¹ Gordon asserts that the jury instruction given did not communicate to the jury the actual legal standard. Gordon is correct.

A jury is certainly capable of understanding both words in isolation from one another, as they are words of ordinary understanding and are self-explanatory. Brown, 132 Wn.2d at 611–12. Together, they form a legal term of art, where two concepts essential to its meaning are conspicuously absent from the commonsense meaning of the words themselves.¹² Neither the concept of

¹¹ Although the Washington Pattern Jury Instructions do not create mandatory jury instructions, they are helpful in analyzing instructional error, and reflect the law as articulated in Tili. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: Criminal (3d ed. 2008) (WPIC); State v. Mills, 116 Wn. App. 106, 116 n.24, 64 P.3d 1253 (2003), reversed on other grounds, 154 Wn.2d 1 (2005). WPIC 300.10, at 705, states that, for the aggravating circumstance of deliberate cruelty, the following instruction should supplement the primary statement of the aggravating factor: “‘deliberate cruelty’ means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime [or is normally associated with the commission of the crime].” (Alteration in original.)

¹² We recognize that the jury in Tili did not decide the aggravating factor, as it was pre-Blakely. 148 Wn.2d at 369. Therefore, looking to the dictionary definitions of both words is instructive in determining how a jury might define the terms for themselves. “Deliberate” means “characterized by or resulting from slow careful thorough calculation and consideration of effects and consequences.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 596 (1993). “Cruelty” means

gratuitous violence nor the comparative element (requiring a relative assessment of the crime at hand with other crimes of that sort) is concomitant with the words themselves, either individually or as a compound term.

Without additional definition based on the articulation in Tili, the instruction on deliberate cruelty did not inform the jury of the applicable law. See State v. Edwards, 84 Wn. App. 5, 14, 924 P.2d 397 (1996). See also Maynard v. Cartwright, 486 U.S. 356, 363–64, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) (where the instruction on the aggravating factor supporting imposition of the death penalty, that the murder was “especially heinous, atrocious, or cruel,” was insufficient, because an ordinary person could honestly believe that every intentional taking of human life is especially heinous); Godfrey v. Georgia, 446 U.S. 420, 428–29, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (holding that the jury instruction was insufficient and reversing, where the instruction stated that the death penalty should be imposed if the murder was “outrageously or wantonly vile, horrible and inhuman,” as almost anyone could characterize any murder as satisfying that standard).

The jury was not required to consider whether the defendants’ conduct was inflicted on Lewis as an end in itself, or whether the cruelty went beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense. Therefore, we find it impossible to conclude, beyond

the “disposition to inflict pain or suffering or to enjoy its being inflicted.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 546 (1993).

a reasonable doubt, that the jury would have reached the same conclusion with proper instruction.

In Suleiman, the court explained that, in order to justify an exceptional sentence based on victim vulnerability, the jury must find both that the defendant knew of the victim's particular vulnerability, and that this vulnerability was a substantial factor in the commission of the crime.¹³ 158 Wn.2d at 291–92; see also State v. Gore, 143 Wn.2d 288, 317–318, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

Gordon asserts that, without an instruction to the jury that the vulnerability and incapability had to be a significant reason for the commission of the crime, the jury's findings are fatally flawed. Gordon is again correct. The commonsense meaning of "particular vulnerability" reflects only part of its legal meaning.¹⁴ A jury would readily understand the concept of vulnerability.

¹³ WPIC 300.11, at 706, reflects the rule in Suleiman, suggesting the definition of particularly vulnerable victim be: "A victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of (name of crime). The victim's vulnerability must also be a substantial factor in the commission of the crime."

¹⁴ For example, courts have upheld a finding of victim vulnerability when the victim was of small stature. See, e.g., State v. Sweet, 138 Wn.2d 466, 482, 483, 980 P.2d 1223 (1999). Courts have also found that very young victims or elderly victims are particularly vulnerable. See, e.g., State v. Jacobsen, 95 Wn. App. 967, 979-80, 977 P.2d 1250 (1999) (where the victim was a five year old); State v. Scott, 72 Wn. App. 207, 217, 866 P.2d 1258 (1993) (where victim was a 78 year old who suffered from Alzheimer's disease), aff'd, State v. Ritchie, 126 Wn.2d 388 (1995). In State v. Hicks, 61 Wn. App. 923, 931, 812 P.2d 893 (1991), the court explained that a sleeping victim is particularly vulnerable due to inability to resist before being attacked, rejecting the defendant's argument that all sleeping persons are vulnerable, and therefore no "particular" vulnerability existed. The legal meaning of particular vulnerability comports with a commonsense understanding. However, whether the vulnerability is a substantial reason for the commission of the crime does not comport with its ordinary meaning.

Courts have also found that victims can become particularly vulnerable or incapable of resistance if a defendant renders the victim unconscious during the course of the crime. In State v. Baird, the court found the victim became particularly vulnerable or incapable of resistance, because the defendant rendered her unconscious during the crime. 83 Wn. App. 477, 487–88, 922 P.2d 157 (1996). Similarly, in State v. Ogden, Ogden hit the victim, who was not particularly

However, without instruction, a jury would not consider whether the vulnerability is a substantial reason for the commission of the crime. The instruction given here did not allow the jury to deliberate over this element. The instruction on the victim vulnerability factor was deficient under Suleiman.

We likewise find it impossible to conclude, beyond a reasonable doubt, that the jury would have reached the same conclusion had its deliberations been framed by this additional inquiry. The error here was not harmless. We reverse the exceptional sentence.¹⁵

IV. Findings and Conclusions Regarding the Exceptional Sentence

Gordon argues that the trial court violated RCW 9.94A.535 and RCW 9.94A.537 by making its own factual findings and relying on them in imposing the exceptional sentences. Because this issue may arise again in further proceedings, we address it.

After Blakely, the trial court retains its discretion to determine whether the jury's findings "are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). But, the jury must determine the factual basis for the aggravating circumstances, and the trial court is "left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial

vulnerable at the beginning of the attack, rendering the victim unconscious. 102 Wn. App. 357, 367, 7 P.3d 839 (2000). While we note the similarity of the facts here to the facts in Ogden and Baird, we are nevertheless unable to sustain the exceptional sentence absent proper jury instruction as required by Suleiman.

¹⁵ Because we reverse the exceptional sentence based on the instructional issue, we do not reach the following issues Gordon and Bukovsky raised: ineffective assistance of counsel and whether the sentences were clearly excessive.

and compelling to warrant an exceptional sentence.” Suleiman, 158 Wn.2d at 290–91.

The legislature amended our statutes to conform to Blakely. Nevertheless, RCW 9.94A.535 still requires that “[w]hen a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” The trial court comported with this requirement, through its findings and conclusions regarding the exceptional sentence. However, in finding of fact 7, the court listed evidence that “supported the jury’s verdict and that also supports the court’s conclusions of law.” The evidence it listed was not established as having been found beyond a reasonable doubt through special verdict, which contained only a yes/no question about whether each aggravating factor existed. Conclusions of law 9–13 also contain findings of fact not found by the jury beyond a reasonable doubt. To the extent the trial court went beyond the findings made by the jury, it erred.

V. Sufficiency of the Evidence

Bukovsky asks this court to review the sufficiency of the evidence to support the exceptional sentence. Though he did not challenge on appeal the constitutionality of the jury instructions,¹⁶ the jury deliberated on Bukovsky’s

¹⁶ Bukovsky did argue that, because the evidence did not support a conclusion that Lewis was particularly vulnerable, it was error for the trial court to send the special verdict on that aggravating factor to the jury. However, neither the objection on the record nor the brief appellate argument on this point is similar enough to Gordon’s constitutional argument to satisfy the requirements of RAP 10.3(4), (6).

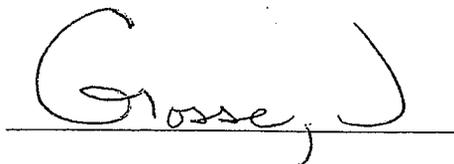
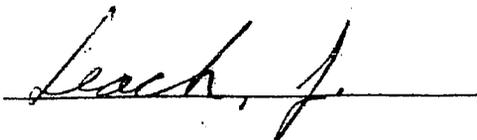
verdict with identical instructions as it did on Gordon's. The same instructional defects are present; the constitutional violation is the same.

Aware of the inevitability of both a subsequent personal restraint petition by Bukovsky and its success, we invoke RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands."). In the interest of promoting justice and facilitating a decision on the merits, we recognize that the issues and assignments of error are equally applicable to Bukovsky's case as they are to Gordon's. We hold that the exceptional sentence for Bukovsky must also be reversed. We decline to evaluate the sufficiency of the evidence under the jury instructions we have held to be constitutionally defective.

We vacate the exceptional sentences of both defendants and remand for further proceedings.



WE CONCUR:



APPENDIX “B”

Jury Instructions 32 & 33

INSTRUCTION NO. 32

For purposes of special verdict Question One the State must prove beyond a reasonable doubt that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim.

INSTRUCTION NO. 33

For purposes of special verdict Question Two the State must prove beyond a reasonable doubt that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance.