

NO. 84240-0

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

CHARLES BUKOVSKY, RESPONDENT
JOHN GORDON, RESPONDENT

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SUPREME COURT
STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-04227-3

No. 06-1-04228-1

Court of Appeals, Division I No. 63815-7

SUPPLEMENTAL BRIEF OF RESPONDENT
Petitioner

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A. ISSUES PRESENTED FOR REVIEW.

1. Did the Court of Appeals incorrectly hold that the trial court's failure to give definitional instructions for terms used in the aggravating circumstances – despite the fact that none were requested or proposed - constituted error of constitutional magnitude when that holding conflicts with controlling authority from this Court?
2. In light of the numerous decisions of this Court holding that a defendant is precluded from challenging for the first time on appeal the trial court's failure to give a definitional instruction, did the Court of Appeals err in granting relief on this basis?
3. Did the Court of Appeals act contrary to a decision of this Court –as well as to the fundamental nature of our adversarial system - by granting relief to a defendant on a non-constitutional issue that he did not raise or argue in his appeal?

B. STATEMENT OF THE CASE.

A jury found Defendant Gordon and Defendant Bukovsky guilty of murder in the second degree and further found that two aggravating circumstances were applicable to defendants' crime. Defendants, along with two other men, severely beat Brian Lewis, and then left him to die in a parking lot; the victim was pronounced dead in the ambulance that was

transporting him to the hospital. *See* Opinion below, at pp 2-3. A statement of the facts providing additional information about the nature their crime can be found in the State's response brief filed below. The trial court imposed an exceptional sentence¹ on each defendant based upon the jury's finding of two aggravating circumstances. RP 2325-2334, 2339-2352; CP 309-320, 1002-1013.

On appeal, the Court of Appeals affirmed the convictions of both defendants but reversed their exceptional sentences finding that the trial court had erred in not giving instructional definitions for the terms "deliberate cruelty" and "particularly vulnerable" that were used in the special verdict forms for the aggravating circumstances. Moreover, the Court of Appeals reversed the sentences on *both* defendants even though only Defendant Gordon has challenged the instructions on appeal. In reaching its decision, the Court of Appeals rejected the State's argument that this instructional issue was a non-constitutional claim that had not been properly preserved for review as neither defendant had proposed instructions defining these terms nor taken exception to the court's instructions for failing to define these terms.

The State successfully petitioned for review of this decision.

¹ Each of these sentences was 144 months above the high end of the standard range. CP 542-545, 1038-1041.

C. ARGUMENT.

1. THIS COURT SHOULD REVERSE THE COURT OF APPEALS AS ITS DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT; THE COURT BELOW SHOULD NOT HAVE CONSIDERED A NON-CONSTITUTIONAL CLAIM OF INSTRUCTIONAL ERROR THAT WAS NOT PRESERVED IN THE TRIAL COURT.

It is a well settled principle of law in Washington 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), *disapproved on other grounds in State v. Blair*, 117 Wn.2d 479, 487, 816 P.2d 718 (1991)); RAP 2.5(a)(3).

This Court has articulated several examples of “manifest” constitutional errors in jury instructions, such as: 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). Conversely, this Court’s examples of instructional errors that do not fall within the scope of RAP 2.5(a)(3) include: 1) failure to instruct on a lesser included offense; and, 2) failure to define individual terms. *Id.*

While the constitution requires that the jury be properly informed of the elements of the charged crime, 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).

In the trial court below, the State proposed instructions and special verdict forms for the two statutory aggravating circumstances which must be found by a jury; the State had alleged: 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 instructions 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 were 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. The court ultimately imposed an exception sentence on each defendant using the jury's findings of aggravating circumstances. CP 309-320, 542-545, 1002-1013, 1038-1041.

On appeal, only Defendant Gordon assigned error to the sufficiency of the instructions regarding the aggravating circumstances, alleging that the instructions were deficient for failing to define "deliberate cruelty" or "particularly vulnerable." *See* Appellant Gordon's Opening [COA] brief at p.1. Defendant Bukovsky did not challenge the instructions on appeal nor adopt the arguments made by Gordon. *See* Appellant Bukovsky's Opening [COA] brief at pp.1-2. The Court of Appeals rejected the State's argument that any claim of instructional error had not been properly preserved for review and granted both Gordon and Bukovsky relief on this issue by vacating the exceptional sentences that

had been imposed by the trial court. Opinion below at pp. 14-23, 24-25 (attached as Appendix A to the petition for review).

The Court of Appeals disregarded long standing principles of this Court regarding non-constitutional challenges to jury instructions raised for the first time on appeal and improperly granted relief on alleged instructional error which had not been properly preserved for review. This Court should reverse the court below and reinstate the trial court's exceptional sentences.

As noted in the petition for review, 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 to the Petition for Review, 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).² Appendix A to the Petition for Review, Opinion at p. 14-15. The Court of Appeals 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 spent 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

² *Johnson* concerned whether a trial court, when instructing on the crime of burglary, had to specifically instruct the jury on what crime a defendant was intending on committing inside the burglarized premises. While the court in *Johnson* 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.

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,” apparently finding that this holding was not in conflict with this Court’s holding 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 to the Petition for Review, Opinion at p.17-18. It would seem that the Court of Appeals concluded that if an aggravating circumstance is the equivalent of “an element,” then failure to further define terms contained within the aggravating circumstance is an issue of constitutional magnitude. The Court of Appeals’ discussion of the impact of *Ring* and *Apprendi* misses the point. 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 that an aggravating circumstance is “an element of the crime” for the purpose of instructions, ultimately, such a discussion is irrelevant to the proper outcome under this

controlling authority of this Court. As noted above, this Court has held that a defendant may not challenge for the first time on appeal a trial court's failure to define a term, even a technical term, which is used in an element. *State v. Ng*, 110 Wn.2d at 44; *Stearns*, 119 Wn.2d at 250.

The jury below was properly informed of the components of the aggravating circumstances as the instructions and special verdict forms mirrored the statutory language enacted by the Legislature. *Compare* RCW 9.94A.535(3)(a) and (b) with Instructions 32 and 33, CP 248-286, 925-967, and the special verdict forms, CP 301, 971. The Legislature did not specifically define the terms "deliberate cruelty" or "particularly vulnerable." *See* RCW 9.94A.030 and .535. When no statutory definition is provided, words in a statute should be given their common meaning, which may be determined by referring to a dictionary. *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 842-43, 64 P.3d 15 (2003). Thus, neither "deliberate cruelty" or "particularly vulnerable" reach the status of constituting "technical terms" with a specific statutory meaning. As a matter of law there was no need to define them further as the jury would employ a common dictionary meaning. 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. Both defendants failed to preserve any non-constitutional error for appellate review. 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.

This Court should find that defendants challenge to the jury instructions is non-constitutional in nature and, as such, had to be preserved in the trial court in order to be raised on review. As neither defendant properly preserved the claim raised on appeal in the trial court, it is not appealable. This Court should reverse the Court of Appeals and reinstate the defendants' exceptional sentences.

2. THIS COURT SHOULD REVERSE THE COURT OF APPEALS AS IT GRANTED RELIEF TO DEFENDANT BUKOVSKY ON AN ISSUE THAT HE DID NOT RAISE ON APPEAL.

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 in his opening brief. *See* Bukovsky’s Opening brief at pp.1-2. 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.

The Court of Appeals fully acknowledged that Bukovsky did not challenge the constitutionality of his jury instructions in his appeal.

Opinion at p. 24, Appendix A to the Petition for Review. 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 to the Petition for Review, Opinion at p. 25.

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 of Appeals 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, Defendant 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.

D. CONCLUSION.

For the foregoing reasons the State asks this court to reverse the Court of Appeals decision vacating the exceptional sentences and affirm the judgment and sentences entered in the trial court.

DATED: October 28, 2010.

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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.

to D.C. Arnold & Sell

10/28/10
Date
[Signature]
Signature

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