

SUPREME COURT NO. 84240-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN C. GORDON and CHARLES A. BUKOVSKY

Respondents.

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SUPREME COURT
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Brian Tollefson, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT BUKOVSKY

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. Where the State seeks an exceptional sentence, the elements of an aggravating circumstance are functionally equivalent to the elements of a charged crime. Did the failure to require that the State prove all elements of the aggravating circumstances alleged in Bukovsky's case, like the failure to require proof of all elements of a charged crime, create a manifest constitutional error properly raised for the first time on appeal under RAP 2.5(a)(3)?

2. Did the Rules of Appellate Procedure authorize the Court of Appeals to vacate Bukovsky's exceptional sentence where, although his appointed counsel failed to formally join in his co-respondent's successful challenge to the sentence, factually and legally both respondents' sentences suffer from identical constitutional infirmities?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Trial Proceedings

The Pierce County Prosecutor's Office charged John Gordon and Charles Bukovsky with second degree felony murder predicated on assault. CP 1-2, 553-554. In order to seek exceptional sentences, the charges were amended to include two aggravating

circumstances under RCW 9.94A.535(3): that both men manifested deliberate cruelty to the victim and that both men knew or should have known the victim was particularly vulnerable or incapable of resistance. CP 45-46, 665-666.

The Court of Appeals opinion accurately summarizes the State's evidence at trial. Gordon and Bukovsky were two of several men who assaulted the victim, Brian Lewis, after Lewis attempted to intervene in a dispute between Gordon and a woman. Gordon and Bukovsky repeatedly punched and kicked Lewis in the head, chest, and stomach. Another individual also choked Lewis. Lewis died en route to the hospital from consequences of blunt force trauma and asphyxiation. State v. Gordon, 153 Wn. App. 516, 522-523, 223 P.3d 519 (2009).

Jurors were given little guidance on the aggravating circumstances. For deliberate cruelty, they were simply instructed:

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.

CP 282. Similarly, for particular vulnerability, jurors were simply instructed:

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.

CP 283.

Neither these instructions, nor any others, provided jurors with all of the elements of the State's proof for these aggravating circumstances. Rather, jurors were merely given special verdict forms asking (Question One) whether the defendants manifested deliberate cruelty and (Question Two) whether the defendants knew or should have known Lewis was particularly vulnerable or incapable of resistance. Jurors answered both questions "yes" as to both defendants. CP 301, 971.

Based on the jury's findings on the two aggravating circumstances, the trial judge added 144 months to each defendant's sentence, resulting in a total term of 388 months for Bukovsky and 364 months for Gordon. CP 309-320, 542-545, 1002-1013, 1038-1041.

2. Argument and Decision on Appeal

Among the various issues raised on appeal was a challenge to the sufficiency of the jury instructions on the aggravating circumstances. Counsel for Gordon argued that the instructions violated due process because they did not contain the necessary

elements of proof, thereby relieving the State of its constitutional burden to prove the aggravating circumstances beyond a reasonable doubt. See Opening Brief of Appellant Gordon, at 1 (assignment of error 3), at 4 (issue statement 4), at 35-54 (argument).

In response, the State argued that the instructions addressing the aggravating circumstances were constitutionally sufficient and that any missing instructions were merely “definitional.” Therefore, their absence could not be challenged for the first time on appeal because the defense could not demonstrate a manifest constitutional error under RAP 2.5(a)(3). See Brief of Respondent, at 44-48.

The Court of Appeals disagreed. Recognizing that the failure to provide definitions for elements of the State’s proof is not manifest constitutional error, the Court concluded that the failure in this case was the failure to provide – not *definitions* of elements – but the actual elements. Gordon, 153 Wn. App. at 529 (finding instructions “lacked any articulation of the specific elements of each factor.”). These necessary elements of proof for both “deliberate cruelty” and “particular vulnerability” were well defined in Washington case law and their absence was manifest

constitutional error under RAP 2.5(a). Id. at 531-535. The Court of Appeals also concluded that the State could not demonstrate this error was harmless beyond a reasonable doubt. Id. at 535-539.

Although appointed appellate counsel for Bukovsky did not make a similar challenge to the jury instructions on the aggravating circumstances, the Court of Appeals recognized that he had suffered the identical constitutional violation and, invoking its authority under RAP 1.2(a), also vacated his exceptional sentence. Gordon, 153 Wn. App. at 540.

This Court granted the State's Petition for Review.

C. ARGUMENT

1. THE COURT OF APPEALS PROPERLY FOUND MANIFEST CONSTITUTIONAL ERROR.

Due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Roberts, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977). Instructions that relieve the State of its burden to prove an element present an issue of manifest constitutional error under RAP 2.5(a)(3) and may be challenged for

the first time on appeal. See State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

The Court of Appeals properly distinguished the failure to include an element of the State's proof in the jury instructions from the situation where all elements are included in the instructions, but the trial court fails to further define those elements. The former can be raised for the first time on appeal. The latter cannot. See Gordon, 153 Wn. App. at 531-532 (citing State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990); State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009)).

The Court of Appeals also properly recognized that "[a]fter *Apprendi* and *Ring*, the alleged error here can be fairly characterized as failing to properly instruct on an element of the aggravated crime." See Gordon, 153 Wn. App. at 534.

In Apprendi, the United States Supreme Court held that under the Sixth and Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New

Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court also noted that whenever a fact increases a sentence “beyond the maximum authorized statutory sentence, [the fact] is the functional equivalent of an element.” Id. at 494 n.19. And, in Ring, the Court described Arizona’s aggravating circumstances as the “functional equivalent of an element of a greater offense.” Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (quoting Apprendi, 530 U.S. at 494 n.19).

This Court recently addressed the relationship between aggravating circumstances and elements of the charged offense in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). One of the issues on appeal was whether Powell’s Sixth Amendment rights had been violated because the information in his case had not included notice of the aggravating circumstances ultimately used to impose an exceptional sentence. Powell, 167 Wn.2d at 681. This Court was divided. A four-justice plurality held there is no requirement that aggravating circumstances be pled in the information so long as adequate notice is otherwise provided. Id. at 681-688. Two justices concurred for cases like Powell’s, where

the original information predates Blakely,¹ but indicated aggravating factors must be charged in any information filed post-Blakely. Id. at 689-691 (Stephens, J., concurring). Three justices dissented, finding that the State was always required to charge aggravating factors in the information.² Id. at 691-697 (Owens, J., dissenting).

While this Court was split on whether and when aggravating circumstances must be pled in the information, there was no split on whether aggravating circumstances are treated the same as substantive crimes for purposes of the State's proof. The plurality, concurrence, and dissent agreed that if an aggravating circumstance exposes the defendant to a greater punishment than that authorized by the jury's verdict, proof of that circumstance is the functional equivalent of the elements of the substantive crime and must be proved to a jury beyond a reasonable doubt. See Powell, 167 Wn.2d at 684 (aggravating factor "is the functional equivalent of an element"); Id. at 689 (Stephens, J., concurring) ("Any facts justifying a sentence above an offense's standard range

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

² Adding the two concurring judges to the three dissenting judges reveals a majority of the Court agreeing that post-Blakely, aggravating circumstances must be pled in the information.

are functionally equivalent to elements of the crime.”); Id. at 691 (Owens, J., dissenting) (“Aggravating Circumstances Are Essential Elements of a Crime.”).

This Court’s prior decisions establish the precise elements of proof for the two aggravating circumstances in this case.³ “Deliberate cruelty” requires proof “of 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); see also 11A Washington Pattern Jury Instructions, WPIC 300.10, at 704 (West

³ The Legislature’s post-Blakely amendments to the SRA, requiring that juries find aggravating circumstances, merely rendered a procedural change and not a substantive one. See State v. Pillatos, 159 Wn.2d 459, 470-477, 150 P.3d 1130 (2007). “A familiar and fundamental rule for the interpretation of a statute is that it is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it.” Kelso v. City of Tacoma, 63 Wn.2d 913, 917, 390 P.2d 2 (1964). Statutory amendments are presumed to be consistent with previous judicial decisions. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). Indeed, when enacting the 2005 amendments, the Legislature made clear it did not intend to expand or restrict existing statutory or common law aggravating circumstances. State v. Stubbs, ___ P.3d ___, WL 3911343 at *7 (Wash. Oct. 7, 2010) (citing Laws of 2005, ch. 68, § 1).

2008) (setting forth findings necessary for proof of this aggravating circumstance).

“Particular vulnerability” requires proof “(1) that the defendant knew or should have known (2) of the victim’s *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.” State v. Suleiman, 158 Wn.2d 280, 291-292, 143 P.3d 795 (2006); see also WPIC 300.11 (setting forth findings necessary for proof of this aggravating circumstance).

Instructions indicating the necessary elements of proof for these aggravating circumstances serve the same critical role as “to convict” instructions for substantive crimes. For example, informing jurors they are to decide whether a defendant committed “burglary” means nothing unless jurors are expressly instructed on the elements required for burglary. Similarly, informing jurors they are to decide whether a defendant was “deliberately cruel” or the victim “particularly vulnerable” means nothing unless jurors also are expressly instructed on the elements for those aggravating circumstances. In both scenarios, the failure to provide an element of the State’s proof is manifest constitutional error. See Mills, 154

Wn.2d at 6; Eastmond, 129 Wn.2d at 502; Aumick, 126 Wn.2d at 429; Gordon, 153 Wn. App. at 534-535.

In contrast, the failure to *further* define the elements of proof is not constitutional error. Thus, for example, had the trial court in Bukovsky's case properly instructed jurors that deliberate cruelty required proof of "gratuitous violence" and particular vulnerability required proof the victim's vulnerability was a "significant factor" in the crime, but failed to further define those elements, that failure could not be challenged for the first time on appeal because it would fall outside RAP 2.5(a)(3). See Fowler, 114 Wn.2d at 814-815. But that is not what occurred.

The State maintains that Bukovsky's jury was fully informed of the elements of the aggravating circumstances because "the instructions and special verdict forms mirrored the statutory language enacted by the Legislature [in RCW 9.94A.535]." Petition, at 11. But that statute does not contain all elements of the State's proof; nor was it intended to. Rather, as the statute itself indicates, RCW 9.94A.535 is merely a "list of factors that can support a sentence above the standard range." RCW 9.94A.535(3); see also supra note 3 (statute not intended to affect substantive change to proof requirements).

Since Bukovsky has demonstrated manifest constitutional error in the instructions addressing the aggravating circumstances, the State must demonstrate beyond a reasonable doubt the jury verdicts would have been the same absent the error. Washington v. Recuenco, 548 U.S. 212, 218-222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (for purposes of harmless error, failure to properly submit sentencing factor to jury and failure to submit element of charged crime analogous); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (adopting harmless beyond a reasonable doubt standard for omitted elements of proof).

For the reasons discussed in the Court of Appeals opinion, the State cannot make this showing. For "deliberate cruelty," jurors were simply asked whether the defendants "manifested deliberate cruelty to the victim." CP 282, 301. They were never told the State's burden included proof that the crime involved gratuitous violence as an end in itself or that it included proof the cruelty exceeded that normally associated with, or inherent in, the crime. Gordon, 153 Wn. App. at 536-537.

For "particular vulnerability," jurors were simply asked whether the defendants knew the victim "was particularly vulnerable or incapable of resistance." CP 283, 301. They were never told the

State's burden included proof that the victim's vulnerability was a substantial factor in commission of the crime. Gordon, 153 Wn. App. at 537-539.

The elements of proof for both these aggravating circumstances differ from the common, ordinary understanding jurors likely ascribed to the phrases "deliberate cruelty" and "particular vulnerability" and are more demanding in their requirements. See Gordon, 153 Wn. App. at 536-539. Therefore, the errors were not harmless beyond a reasonable doubt.

2. THE COURT OF APPEALS PROPERLY EXERCISED ITS BROAD DISCRETION UNDER RAP 1.2.

In appealing his conviction and sentence, one of Bukovsky's primary goals was to convince the Court of Appeals that his exceptional sentence should be vacated. Three of the five issues raised on his behalf were aimed at reversing the exceptional sentence. See Brief of Appellant, at 24-35. Indeed, because his other challenge – that the felony murder statute violated equal protection – had previously been rejected in another case, his only realistic chance of success lay in a challenge to his exceptional sentence. See State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048, review denied, 164 Wn.2d 1035 (2008) (rejecting same equal

protection claim eight months before brief filed on Bukovsky's behalf).

Gordon's appellate counsel also attacked the trial court's imposition of an exceptional sentence, but added the claim now at issue in this appeal, i.e., that the jury instructions failed to include all essential elements of the two aggravating circumstances. See Brief of Appellant Gordon, at 35-57. To join this claim, counsel for Bukovsky merely had to provide notice to the Court of Appeals that she adopted this portion of Gordon's brief. See RAP 10.1(g)(2) ("In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may . . . file a separate brief and adopt by reference any part of the brief of another."). Through either ignorance or inadvertence, however, Bukovsky's attorney failed to do so.

Fortunately for Bukovsky, the Rules of Appellate Procedure authorized the Court of Appeals to overlook this technical oversight.

RAP 1.2(a) provides:

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, subject to the restrictions in rule 18.8(b).⁴

Not only are the rules liberally interpreted, “[t]he appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice” RAP 1.2(c); see also State v. Watson, 155 Wn.2d 574, 578, 122 P.3d 903 (2005) (recognizing authority to disregard an applicable rule).

Interpreting RAP 1.2, this Court has said:

a technical violation of the rules . . . should normally be overlooked and the case should be decided on the merits. This result is particularly warranted where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court.

State v. Olson, 126 Wn.2d 315, 318-319, 893 P.2d 629 (1995).

The decision to waive a violation of the rules is reviewed for abuse of discretion. Id. at 323. A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. A decision is manifestly unreasonable if it adopts a view that no reasonable person would take. In re

⁴ RAP 18.8(b) addresses time limitations for filing a notice of appeal, notice for discretionary review, motion for discretionary review, petition for review, or motion for reconsideration.

Personal Restraint of Duncan, 167 Wn.2d 398, 402-403, 219 P.3d 666 (2009).

The Court of Appeals did not abuse its discretion here. There was no doubt Bukovsky sought reversal of his exceptional sentence, both the defense and prosecution had a full and fair opportunity to address the merits of the issue in Gordon's and the State's briefs,⁵ Gordon's and Bukovsky's circumstances are factually and legally indistinguishable, and the State cannot establish any prejudice from the Court of Appeals exercise of discretion. The Court of Appeals decision is fully consistent with RAP 1.2 and Olson.

Beyond RAP 1.2, other rules underscore appellate courts' broad authority to decide issues. They are authorized "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." RAP 7.3. This includes the authority to dispose of cases based on issues not even raised in the parties' briefs. See RAP 12.1(b); Greengo v. Public Employees Mut. Ins. Co., 135

⁵ This important fact distinguishes Bukovsky's case from the several cases, cited in the State's Petition for Review, where appellants were prohibited from raising a new issue in a reply brief or supplemental brief filed after this Court accepted review. In none of those cases did the opposing party have an opportunity to address the issue. See Petition, at 12-13 (citing cases).

Wn.2d 799, 812-813, 959 P.2d 657 (1998) (“This court may raise issues sua sponte and may rest its decision thereon.”); see also State v. Aho, 137 Wn.2d 736, 740, 975 P.2d 512 (1999) (deciding case based on due process argument not addressed by parties or Court of Appeals and finding additional briefing unnecessary).

In light of this broad authority, the Court of Appeals’ decision to allow Bukovsky to adopt the argument of his co-appellant, despite counsel’s failure to notify the Court of such an adoption, fell well within that Court’s authority.⁶

In its Petition for Review, the State accuses the Court of Appeals of having “acted as an advocate on [Bukovsky’s] behalf.” Petition, at 15. This is simply not true. The goal in any appeal is “to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). The various rules providing this Court and the Court of Appeals with the authority to accomplish this task are neutral – they favor neither party.

⁶ The Court of Appeals noted “the inevitability of both a subsequent personal restraint petition by Bukovsky and its success.” Gordon, 153 Wn. App. at 540. Although unnecessary to that Court’s decision to apply Gordon’s argument to Bukovsky, this observation was correct. Assuming it becomes necessary, undersigned counsel will file a PRP on Mr. Bukovsky’s behalf.

Sometimes “justice” will result in a favorable outcome for the State. See, e.g., Watson, 155 Wn.2d at 577-578 (granting State relief despite fact it was not “an aggrieved party” under RAP 3.1); Olson, 126 Wn.2d at 316-324 (granting State relief despite failure to include proper assignments of error). Other times, as in Bukovsky’s case, “justice” will result in a favorable outcome for the defense. But this does not make the Court of Appeals an advocate for the defense any more than it makes that Court an advocate for the State when rules are waived in its favor.

D. CONCLUSION

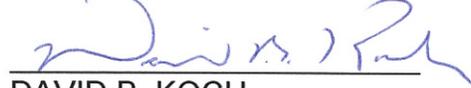
The Court of Appeals correctly found that the jury instructions used at Bukovsky's trial violated due process because they failed to require that the State prove every element of the aggravating circumstances beyond a reasonable doubt. This is manifest constitutional error and not harmless beyond a reasonable doubt.

The Court of Appeals also properly exercised its broad discretion to overlook a technical violation of the procedural rules and allow Bukovsky to adopt Gordon's argument despite appointed counsel's failure to provide notice of the adoption.

DATED this 29th day of October, 2010.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Petitioner,)	
)	
vs.)	NO. 84240-0
)	
JOHN C. GORDON &)	
CHARLES BUKOVSKY,)	
)	
Respondents.)	

DECLARATION OF SERVICE

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

THAT ON THE 29TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT BUKOVSKY** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*