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NO. 62237-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE GREGORY CANOVA

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Under RCW 9.94A.535(3)(y), the court may impose an exceptional sentence when the jury finds beyond a reasonable doubt that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." The defendant contends that a court cannot impose an exceptional sentence upon a conviction for second-degree assault, no matter how severe the harm, because the level of harm is completely subsumed in the standard range penalty for the offense. Should this Court agree with existing case law that an exceptional sentence can be imposed on this basis?

2. Has the defendant shown that the Supreme Court's holding that exceptional sentence aggravating circumstances are not subject to due process vagueness challenges is incorrect and harmful?

**B. STATEMENT OF THE CASE**

A jury convicted the defendant of assault in the second degree for intentionally assaulting Earl James Ketchum and recklessly inflicting substantial bodily harm upon him. CP 397;

see also RCW 9A.36.021(1)(a). This was count V of a seven count indictment. CP 12-15.

For the same acts constituting count V, the defendant was charged in count I with assault in the first degree, alleging that "with intent to inflict great bodily harm, [the defendant] did assault another and inflict great bodily harm upon Earl James Ketchum." CP 12-15; see also RCW 9A.36.011(1)(c). The jury acquitted the defendant on count I. CP 396. In instructing the jury, the court treated count V as a lesser included offense of count I. See CP 397. The results of the other remaining counts are not relevant to this appeal.

The State also charged the defendant in count V with an "aggravating circumstance" pursuant to RCW 9.94A.535(3)(y); that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense," of assault in the second degree. CP 14. A special verdict form was provided to the jury and read as follows:

We, the jury, return a special verdict by answering as follows:

Question: Did the injuries of Earl James Ketchum sustained during the commission of the crime of Assault in the Second Degree as charged in Count V substantially exceed the level of bodily harm

necessary to satisfy the elements of the crime of Assault in the Second Degree?

CP 398. The jury answered "yes," the injuries suffered by Mr. Ketchum did exceed the level necessary to satisfy the elements of assault in the second degree. CP 98.

The defendant did not object to any of the court's instructions pertaining to the charged aggravating circumstance. See 13RP<sup>1</sup> 59-76. When asked if he objected to the court failing to give any defense proposed instructions, the defendant said no. 13RP 76. The defendant did not propose any instruction further explaining or defining the aggravating circumstance. See CP 335-44, 346-47. This includes after the judge suggested an instruction defining "substantially exceed" might be necessary. 11RP 100-01. Later, when the jury inquired about what constitutes substantially exceeds the level of bodily injury, the court responded, "[t]here is no specific, legal definition of that term. Apply the commonly held meaning to the words." CP 392-93.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--2/13/08; 2RP--2/14/08; 3RP--2/19/08; 4RP--6/10/08 (Judge Carey); 5RP--6/10/08 (Judge Gonzalez); 6RP--6/11/08 & 6/16/08; 7RP--6/13/08; 8RP--6/17/08; 9RP--6/18/08; 10RP--6/19/08; 11RP--6/23/08; 12RP--6/24/08; 13RP--6/25/08; 14RP--6/26/08, 8/1/08 & 8/8/08.

The injuries suffered by Mr. Ketchum were quite severe and were inflicted by the defendant after he flew into a jealous rage in mistakenly believing his roommate was sleeping with his girlfriend.

James Ketchum<sup>2</sup> and Stacy Worthington were involved in an intimate dating relationship. 8RP 11. On the evening of April 21, 2007, James and Stacy were having sex in James' bedroom at an apartment James shared with the defendant. 8RP 14. Suddenly, the defendant barged into James' room, turned on the light, and saw James naked on top of Stacy making love to her. 8RP 14-16.

After exiting the room for a moment, the defendant rushed back in, pushed James off Stacy and repeatedly punched him in the face with closed fists, raining at least ten hard blows on him. 8RP 16-17. The defendant is six foot three, goes 200 pounds and is a fitness trainer who can bench press 280 pounds. 13RP 7-10. James is maybe five foot eight and goes a slim 160 pounds. 8RP 18; 13RP 10.

The first few blows knocked James unconscious; the rest just battered his face until he looked like an orangutan. 8RP 17; 10RP 34. The defendant then looked over at Stacy, realized his

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<sup>2</sup> Throughout the proceedings, Mr. Ketchum was referred to by his middle name James.

mistake and said, "I thought you were my girlfriend." 8RP 19. After telling Stacy not to call the police, and after another altercation with others outside the apartment complex, the defendant fled the scene, leaving the unconscious James on the bed. 8RP 22-23, 32, 38.

The first officer on the scene testified that "I've never seen a fist do damage like this," likening the "severe trauma" that he observed as similar to what occurs in a car accident. 8RP 144. He described how blood was splattered on the walls and pooling on the floor, that James was having difficulty breathing, his eyes were completely swollen shut and there was a softball sized knot to his face. 8RP 141, 144.

When paramedics arrived, James was completely unresponsive. 10RP 129. He was described as having "significant facial trauma" and was subconsciously agitated due to head trauma, and trying to clear his airway. 10RP 129. James had to be strapped to a backboard, restrained and intubated so that he could breathe properly. 10RP 132-33. His injuries were considered potentially life-threatening. 10RP 139.

James suffered at least eight fractures, and likely more as some of the orbital bones shattered. 9RP 56-57; 11RP 168-69.

This included a "potentially serious" fracture to the skull base, an injury that can lead to cranial bleeding. 11RP 148, 171. James had to undergo facial surgery whereby his jaw, broken in multiple places, had to be realigned, titanium plates inserted, and wired shut for over five weeks. 9RP 74; 11RP 148, 150.

At the time of trial, over a year after the assault, James still suffered from nerve damage and an inability to feel his lower jaw and lip. 8RP 92. This damage is likely permanent. 11RP 152-54. As a result, James tends to "dribble" and "drool" when he eats and sleeps.<sup>3</sup> 8RP 92.

When James arrived at Harborview Trauma Center, he had blood coming out of his ear canal, was still nonresponsive, and his breathing had to be done manually through an intubation tube. 9RP 41, 43-44, 48. Along with the multitude of facial fractures, James also had a fractured rib that had punctured the lung membrane causing a pneumothorax--a potentially life-threatening condition wherein the air escapes from the lung, enters the chest cavity and compresses the lung. 9RP 65-66, 68.

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<sup>3</sup> On appeal, the defendant refers to the plastic surgeon as saying that the damage to James was moderate. What the defendant omits is the surgeon's testimony that the term is relative, that he treats people with their "faces knocked off," and that yes, Mr. Ketchum's injuries were "absolutely" serious. 11RP 170-71.

With a prior first-degree assault conviction, prior second-degree assault conviction and a prior attempted robbery conviction, among others, the defendant had an offender score of eight.<sup>4</sup> CP 647, 652. His standard range was 53 to 70 months confinement. CP 647. The State was requesting an exceptional sentence of 120 months. 14RP 104.

In addressing the requested exceptional sentence, the court first accurately detailed the procedural and substantive requirements of the statute. 14RP 122. The court then noted that the jury had found "the level of injuries inflicted substantially exceeded the level of injury necessary to prove the underlying offense." 14RP 122. The court indicated it agreed with the jury's finding. Id. The court stated that the attack on Mr. Ketchum was "a very, very brutal, unprovoked assault,"..."you jumped on him and beat him to a pulp before you discovered your mistake." 14RP 126. The court then made the following findings:

Based upon the jury's finding of an aggravating circumstance, considering the mandate of the statute, the court does find that imposing an exceptional sentence is consistent with the purposes of the Sentencing Reform Act and that the facts found are

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<sup>4</sup> The court noted that but for one of his strike convictions having been adjudicated in juvenile court, the defendant would be facing a mandatory life sentence. 14RP 125.

substantial and compelling reasons justifying an exceptional sentence.

Having said that, I do not believe that the State's recommendation for 120 months is appropriate. I'm going to impose an additional 30 months at the top of the range and make the total sentence 100 months.

14RP 127. The court memorialized its findings on page two of the judgment and sentence. CP 647.

**C. ARGUMENT**

- 1. A COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE UPON CONVICTION FOR AN ASSAULT WHERE THE LEVEL OF BODILY HARM SUBSTANTIALLY EXCEEDS THE LEVEL OF HARM NECESSARY TO PROVE THE ELEMENTS OF THE CRIME.**

The defendant contends that as a matter of law a sentencing court can never impose an exceptional sentence for second-degree assault based on the aggravating circumstance contained in RCW 9.94A.535(3)(y); that "the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." The defendant's position is contrary to substantial existing case law and should be rejected.

The jury found that the defendant intentionally assaulted James Ketchum and thereby recklessly inflicted substantial bodily

harm upon him. CP 397; RCW 9A.36.021(1)(a). "Substantial bodily harm" "means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The jury also found that Mr. Ketchum's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault. CP 397-98.

RCW 9.94A.535(3)(y) specifically authorizes the imposition of an exception sentence upon a jury's finding, beyond a reasonable doubt, that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." The obvious purpose of this aggravating circumstance is to permit greater punishment when a defendant causes injuries to his victim that substantially exceed the level of injury required to establish the crime.

It is true that as a general rule, the seriousness of a victim's injuries may not be used to justify an exceptional sentence if that factor has been considered in defining the crime itself. State v. Wilson, 96 Wn. App. 382, 387, 980 P.2d 244 (1999), rev. denied, 139 Wn.2d 1018 (2000). However, it is also true, that this Court

has previously held that when the crime the defendant is convicted is second-degree assault, "the effects on the victim may be used to justify an exceptional sentence *if they are significantly more serious than in the usual case.*" Wilson, 96 Wn. App. at 388 (emphasis added).

Wilson, not cited by the defendant, is directly on point.

Wilson pled guilty to assault in the second degree. The trial court imposed an exceptional sentence based on the seriousness of the victim's injuries. This Court specifically held that the basis for the exceptional sentence was a legally permissible aggravating circumstance not subsumed within the standard range for second-degree assault. Wilson, at 387-88. This Court stated that its review was limited to determining whether there was sufficient evidence to support the finding that the victim's injuries were substantially greater or significantly more serious than typical for a second-degree assault.<sup>5</sup> Id.

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<sup>5</sup> It is noteworthy that the defendant has not challenged the sufficiency of the evidence that Ketchum's injuries substantially exceeded the level necessary to prove second-degree assault. In challenges to the sufficiency of the evidence supporting an aggravating circumstance, the court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstance beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). As briefly summarized above, Mr. Ketchum's injuries were severe.

The Wilson case does not stand alone. Multiple reviewing courts have found that the level of harm suffered by a victim can be a permissible basis to impose an exceptional sentence in assault cases. In State v. Randall, for example, the court rejected the same arguments made here, finding that Randall's exceptional sentence that was based on the level of harm to the victim of his second-degree assault conviction was legally appropriate. State v. Randall, 111 Wn. App. 578, 45 P.3d 1137 (2002); see also State v. George, 67 Wn. App. 217, 223, 834 P.2d 664 (1992) (level of injury justified exceptional sentence on defendant's conviction for first-degree assault), rev denied, 120 Wn.2d 1023 (1993), overruled on other grounds by State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995); State v. Flake, 76 Wn. App. 174, 183-84, 883 P.2d 341 (1994) (level of injury valid aggravating circumstance justifying exceptional sentence for vehicular assault); State v. Stubbs, 144 Wn. App. 644, 184 P.3d 660 (2008) (victim's significant injuries proper basis for exceptional sentence for first-degree assault), rev. granted, 165 Wn.2d 1035 (2009).

While not recognizing these cases, the defendant cites to State v. Bourgeois,<sup>6</sup> for the proposition that "the second-degree assault statute contemplates all injuries more significant than 'substantial bodily harm' but which do not rise to the level of 'great bodily harm.'" Def. br. at 11. This Court in Bourgeois said no such thing. First, Bourgeois was convicted in juvenile court of first-degree assault, not second-degree assault. The Court never discussed anything about second-degree assault. Second, this Court in Bourgeois, recognized the decision in State v. George, supra, and specifically rejected the argument the defendant makes here, that the level of harm inflicted upon a victim can not form the basis for an exceptional sentence upon an assault conviction. Bourgeois, 72 Wn. App. at 661-62. Thus, the Bourgeois case is in accord with the multiple cases cited above. What the Court in Bourgeois did find was that factually in his case, the harm to his victims was not "particularly egregious" so as to rise above the level of harm encompassed in setting the standard range for first-degree assault. Bourgeois, at 662.

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<sup>6</sup> State v. Bourgeois, 72 Wn. App. 650, 866 P.2d 43 (1994).

The injury necessary to prove second-degree assault as charged here can be as minor as a single broken finger.<sup>7</sup> See State v. Mahoney, 40 Wn. App. 514, 515, 699 P.2d 254 (1985). Yet to prove first-degree assault, the bodily harm must rise to a level "which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). To argue that there is nothing between the minimal level of harm necessary to prove second-degree assault, and the level of harm to prove first-degree assault (or even greater harm)<sup>8</sup> is to ignore the very definitions that

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<sup>7</sup> Under three prongs of the second-degree assault statute, there need not be any bodily harm caused. See RCW 9A.36.021(c), (d) and (e). It would be an absurd result to find that an exceptional sentence could be obtained under some prongs of the second-degree assault statute based on the level of harm, but not others.

<sup>8</sup> The defendant ignores the *mens rea* element of the statutes. A defendant can inflict injury far in excess of that needed to prove the level of harm necessary to prove first-degree assault, but still be convicted of only second-degree assault if the defendant did not intend to actually cause great bodily harm. While both first- and second-degree assault require an intentional assault, only first-degree assault requires intent to cause a specific level of harm. The harm caused for second-degree assault need only be recklessly inflicted. See Randoll, 111 Wn. App. at 583-84 (under the real facts doctrine, evidence of the level of injury rising to the level of first-degree assault can be used to impose an exceptional sentence for second-degree assault because the defendant did not possess the same intent to cause the level of harm and thus evidence of second-degree assault was not proof the defendant committed the greater crime of first-degree assault). To make a claim as the defendant does, that the legislature intended all persons convicted of second-degree assault to be sentenced within the standard range regardless of the harm caused, seems in conflict with the plain language of RCW 9.94A.535(3)(y) and ignores the differing *mens rea* elements of the offenses.

define the crimes. Multiple cases have held that the harm inflicted by a defendant can be a basis to impose an exceptional sentence for assault convictions. The defendant has failed to articulate a reason for overturning these cases.

**2. THIS COURT SHOULD REJECT THE DEFENDANT'S VAGUENESS CHALLENGE TO THE AGGRAVATING CIRCUMSTANCE.**

The defendant appears to argue that the aggravating circumstance in RCW 9.94A.535(3)(y) is unconstitutionally vague under the Due Process Clause, and as applied to him via the jury instructions patterned on the statute. However, the Supreme Court has held that aggravating circumstances are not subject to due process vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. The defendant fails to show why the Court's analysis is now wrong simply because a jury, rather than judge, makes the factual findings concerning the aggravating circumstance. Under Washington law, the sentencing judge still decides whether an aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence.

In addition, under settled law, the defendant's challenge to the jury instruction is waived because he did not object to the instruction or request any clarifying instruction.

Finally, even if the defendant can make a due process vagueness challenge to the statute and instruction, his claims should be rejected. The terms used in the statute defining the aggravating circumstance are ones of common understanding. Under the particular facts of this case, the defendant was on notice that his criminal conduct was aggravated when he severely battered a defenseless unconscious James Ketchum causing multiple facial fractures, potentially life threatening injuries and possible permanent injury to Mr. Ketchum's jaw and mouth.

- a. The Supreme Court Has Held That Exceptional Sentence Aggravating Circumstances Are Not Subject To Due Process Vagueness Challenges.

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary

enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Supreme Court has previously held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. at 459. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

The defendant argues that, in light of Blakely,<sup>9</sup> the Supreme Court's decision in Baldwin is incorrect. However, he fails to

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<sup>9</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

explain why the fact that a jury, rather than judge, makes the finding of whether an aggravating circumstance accompanied the commission of the crime compels the result that the Supreme Court's decision must be overruled.

The Court's analysis in Baldwin remains valid after Blakely. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. Instead, they list accompanying circumstances that may justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating circumstance does not mandate an exceptional sentence. Even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. RCW 9.94A.535. Because the defendant fails to show that the Supreme Court's decision in Baldwin was incorrect and harmful,<sup>10</sup> this Court must adhere to the holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge. See also Stubbs, supra.

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<sup>10</sup> See generally State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the Court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.").

- b. The Defendant Has Waived A Vagueness Challenge To The Jury Instructions Because He Did Not Object Or Request A Clarifying Instruction.

The defendant also appears to claim that the trial court's jury instructions are unconstitutionally vague. However, the defendant never proposed any additional or clarifying instructions, even when the issue was raised by the trial court.<sup>11</sup> The Supreme Court has repeatedly held that a criminal defendant who believes a jury instruction is unconstitutionally vague or unclear has a ready remedy -- proposal of a clarifying instruction -- and that the failure to propose further definitions precludes review of this claim of error.

In State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991), the defendant attempted to challenge the term "unlawful force" in the jury instructions as unconstitutionally vague. The Court held the claim was waived:

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<sup>11</sup> The Washington State Supreme Court Instruction Committee has stated that it believes "no further explanation of this aggravating circumstance [RCW 9.94A.535(3)(y)] is required." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.34 at 748 (3<sup>rd</sup> ed. 2008). The Supreme Court Committee added that "[t]his aggravating circumstance was added to the Sentencing Reform Act in 2005. The accompanying legislative history indicates that the statutory language was designed to codify existing common law aggravating factors. Laws of 2005, Chapter 68 §1." Id.

Although Fowler did take exception to the assault instruction proposed by the court, his exception did not involve the potential vagueness or overbreadth of the court's definition of the term "unlawful force". His objection cannot be raised for the first time on appeal.

114 Wn.2d at 69; see also State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946) (holding that defendant, who did not take exception to jury instructions, waived claim that they were vague and confusing).

The reasons for this waiver rule have been explained as follows:

Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed and to protect against arbitrary enforcement of law. See City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). *This rationale applies to statutes and official policies, not to jury instructions.* Unlike citizens who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction.

State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017, cert denied, 128 S.Ct. 375 (2007) (emphasis added); see also State v. Releford, 148 Wn. App. 478, 493-94, 200 P.3d 729 (2009) (holding that the defendant waived vagueness challenge to a jury instruction when he did not object to the instruction at trial).

This Court should decline to address the defendant's argument regarding the jury instructions. A defendant who believes an instruction is vague should request a clarifying instruction so that the trial court can cure any possible error. To hold otherwise would encourage defendants to delay raising such issues until they receive an adverse verdict. Because the defendant did not propose any further instructions with respect to the aggravating circumstance, he has waived any claim that the instruction was vague.

c. The Statute And Instruction Are Not Unconstitutionally Vague.

Even if the aggravating circumstance is subject to a due process vagueness challenge, the defendant's claim would fail. The party challenging a statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality, i.e., "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990).

A statute fails to provide the required notice if it forbids the doing of an act in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). However, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Id. at 7.

Because the defendant's challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to his conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). The challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Douglass, 115 Wn.2d at 182-83. The defendant does not acknowledge or engage in this analysis. The aggravating circumstance is not unconstitutionally vague when considered in the context of the defendant's actions.

The aggravating circumstance at issue required that the jury find that Mr. Ketchum's injuries substantially exceeded the level of bodily harm necessary to meet the minimal level of harm sufficient

to prove the element of substantial bodily harm. The facts of this case are on the far end of the spectrum of possible injuries that could be inflicted in a second-degree assault case. The defendant caused Mr. Ketchum multiple facial fractures, at time potentially life threatening injury, and possible permanent injury to his face. A man of common intelligence would not have to guess that causing such severe injuries could expose him to a possible exceptional sentence under RCW 9.94A.535(y) when a mere broken finger is sufficient to prove the crime of second-degree assault.

The defendant claims that the term "substantially exceeds" is so imprecise as to have no commonsense meaning. However, as this Court has explained:

We have noted, however, that "[s]ome measure of vagueness is inherent in the use of language." Because of this, we do not require "impossible standards of specificity or absolute agreement." "[V]agueness in the constitutional sense is not mere uncertainty." Thus, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct." Instead, a statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement."

State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007) (internal citations omitted).

The term "substantial" is used in a variety of criminal statutes and vagueness challenges have been rejected. State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) (rejecting claim that phrase "interferes substantially with his liberty" was unconstitutionally vague); State v. Saunders, 132 Wn. App. 592, 599, 132 P.3d 743 (2006) (rejecting vagueness challenge to the element of "substantial pain" in third-degree assault), rev. denied, 159 Wn.2d 1017 (2007); State v. Billups, 62 Wn. App. 122, 129, 813 P.2d 149 (1991) (holding that the term "substantial step" was not unconstitutionally vague). The statute's use of the term "substantially exceeds" does not render it unconstitutionally vague.

### **3. A DEFENDANT RETAINS THE ABILITY TO APPEAL AN EXCEPTIONAL SENTENCE.**

The defendant contends that the decision in Blakely v. Washington, and the resulting change to the exceptional sentence statutory scheme, somehow prevents all defendants from appealing from the imposition of an exceptional sentence. The defendant's argument is not well taken. One thing, and one thing only is different post-Blakely and the resulting statutory amendments to the sentencing reform act (SRA); the jury now must decide beyond a

reasonable doubt the facts supporting an exceptional sentence--a function that once belonged to the sentencing judge.

In a multiplicity of cases, the Supreme Court has outlined the appellate process and standard of review in challenging an exceptional sentence. See e.g., State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006); State v. Borg, 145 Wn.2d 329, 36 P.3d 546 (2001); State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996); State v. Bartlett, 128 Wn.2d 323, 907 P.2d 1196 (1995); State v. Pryor, 115 Wn.2d 445, 799 P.2d 244 (1990); State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986). That analysis is as follows:

A court may impose a sentence outside the standard range if "there are substantial and compelling reasons justifying an exceptional sentence." Borg, 145 Wn.2d at 336 (citing RCW 9.94A.535). When reviewing an exceptional sentence, "an appellate court asks three questions: (1) are the reasons supplied by the sentencing judge supported by the record; (2) do those reasons justify a sentence outside the standard range; and (3) was the sentence clearly excessive or too lenient." Borg at 336. The Supreme Court has said that the reviewing court "applies the clearly erroneous standard to the first question, the de novo standard to the second, and the abuse of discretion standard to the

third." Borg, at 337. Blakely and the statutory revisions thereof did not change the reviewability of the imposition of an exceptional sentence.

The Court in Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." Blakely, 124 S. Ct. at 2536. Thus, post-Blakely, the sentencing court could not find facts, not otherwise admitted, in imposing an exceptional sentence. As a result, the legislature amended the statutory sentence provisions of the SRA to provide for the jury to find the facts beyond a reasonable doubt that could support imposition of an exceptional sentence. The trial court could then impose an exceptional sentence "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Thus, the only consequence of Blakely and the resulting statutory amendments was to shift the fact finding function of an exceptional sentence proceeding from the sentencing judge to the jury. The ability of a defendant to appeal is unaffected. This is exactly the determination made in State v. Hale, 146 Wn. App. 299, 189 P.3d 829 (2008), a case the defendant has neither cited nor tried to distinguish.

In short, the defendant is in no different position to appeal his exceptional sentence than any other defendant since the advent of the exceptional sentence provisions of the SRA in 1984. The fact that he has chosen not to do so, but instead proceed on claims of vagueness, constitutionality and ability to appeal, is of his own device. But certainly the ability to appeal does exist. See e.g., Wilson, supra (exceptional sentence based on seriousness of victim's injuries affirmed); Bourgeois, supra (court overturns exceptional sentence based on seriousness of victims' injuries); Stubbs, supra (imposition of exceptional sentence based on severity of victim's injuries in first-degree assault case upheld on appeal).

The same is true regarding the defendant's argument that he cannot appeal the length of his sentence because courts have said that sentencing judges do not need to articulate the reasons for the length of an exceptional sentence. Although the defendant claims he is not challenging the Supreme Court's decision in State v. Ritchie, supra, his argument that there are no standards of review directly conflicts with the Court's decision.

As the Court noted, "an exceptional sentence is subject to review only as provided for in RCW 9.94A.210(4)." Ritchie, 126

Wn.2d at 392 (referring to former RCW 9.94A.210(4), now codified at RCW 9.94A.585(4)). The Court went on to define the scope of review from imposition of an exceptional sentence. "If the reasons are supported by the record," the Court said, "and justify an exceptional sentence, we must find that the sentence imposed was clearly excessive or clearly too lenient." Ritchie, at 392 (internal quotations and citations omitted); see RCW 9.94A.585(4).

This is not without a requisite standard on review. The Court cited to a half dozen Supreme Court cases and stated that "we consistently have held that the length of an exceptional sentence should not be reversed as clearly excessive absent abuse of discretion." Id. (citations omitted). For action "to be clearly excessive," the Court added, "it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." Id. at 393 (citing State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). Thus, not only did the Court in Ritchie iterate the standard of review, contrary to the defendant's assertion that review is not possible, that standard has been used successfully since the advent of the SRA. See e.g., State v. McClure, 64 Wn. App. 528, 827 P.2d 290 (1992) (lengthening

sentences and running counts consecutively excessive); State v. Brown, 60 Wn. App. 60, 802 P.2d 803 (1990) (90 month sentence for second-degree assault, greater than for first-degree arson or second-degree rape, clearly excessive), rev. denied, 116 Wn.2d 1025 (1991), overruled on other grounds in, State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992); State v. Delarosa-Flores, 59 Wn. App. 514, 799 P.2d 736 (1990) (30 year sentence, six times the standard range, clearly excessive), rev. denied, 116 Wn.2d 1010 (1991); also State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047 (exceptional sentence for multiple drug deliveries below standard range for one drug delivery clearly too lenient), rev. denied, 114 Wn.2d 1005 (2001); Hale, supra (100 month sentence for second-degree assault, a class B felony with a maximum penalty of 120 months is not excessive).

Contrary to the defendant's claim, the Supreme Court has discussed the reviewability of the length of an exceptional sentence. The defendant has not shown that the Court's prior rulings are clearly incorrect or harmful, and therefore, this Court must follow the dictates of the Supreme Court. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970).

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the exceptional sentence imposed here.

DATED this 15 day of September, 2009.

Respectfully submitted,

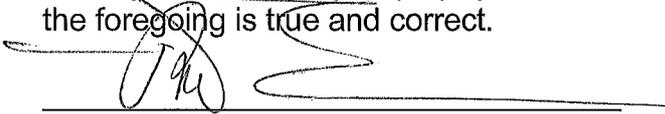
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DUNCALF, Cause No. 62237-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

09-15-2009  
Date