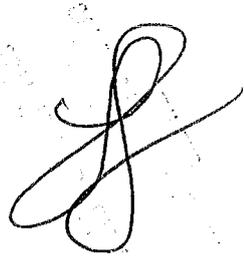


62237-4

62237-4

86853-1
No. 62237-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

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United States Supreme Court

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159
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A. SUPPLEMENTAL ARGUMENT

The Legislature has defined the spectrum of injuries which may result from an assault. That spectrum lying between no harm and death is divided in three; “bodily harm,” “substantial bodily harm,” and “great bodily harm.” RCW 9A.04.110(4). The Legislature did not leave gaps within this hierarchy. Recently in State v. Stubbs, , the Supreme Court concluded injuries that lie within one level of harm, even at the extreme edge, cannot “substantially exceed” that level of harm but instead are merely “different in degrees, not kind.” __ Wn.2d __, 240 P.3d 143, 149 (2010).

In determining the Legislature has necessarily considered those injuries in setting the standard range, the Court framed the necessary question as

. . . whether the injuries . . . are greater than those contemplated by the legislature in establishing the standard range. In other words, do they fall within the statutory definition of “great bodily harm” or outside it?

Stubbs, 240 P.3d at 149. Addressing a conviction of first degree assault Stubbs said:

One case of “great bodily harm,” then, is not qualitatively different than another case. Such a leap is best understood as the jump from “bodily harm” to “substantial bodily harm” or from “substantial bodily

harm” to “great bodily harm.” That is what is meant by *substantially* exceeds.

Id.

Thus, so long as the injuries inflicted by Mr. Duncalf fit within the definition of “substantial bodily injury” they cannot substantially exceed that level of injury. Instead, under Stubbs and the Sixth Amendment, the aggravating factor could only apply if the jury found Mr. Duncalf inflicted “great bodily injury.” But the jury was never separately asked to determine whether the injuries rose to the level of great bodily injury. Without such a finding the sentence violates the Sixth Amendment. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). And most importantly the jury acquitted Mr. Duncalf of first degree assault. CP 396. Thus, the jury did not find Mr. Duncalf inflicted great bodily harm.

The State, in its response brief, theorizes the jury’s acquittal may have rested upon its finding that Mr. Duncalf did not intentionally cause great bodily injury but rather did so only recklessly. Brief of Respondent at 13, n.8. First, from the facts of this case it is difficult to imagine how the jury could find Mr. Duncalf inflicted great bodily injury but did so unintentionally. But more

importantly, there is no basis in law to support the State's efforts to dissect the acquittal.

Additionally, even if one entertains the State's theoretical verdict, in returning its special verdict the jury was never instructed to make a finding that "great bodily injury" was inflicted. Instead, the jury was asked only to find whether the injuries "substantially exceeded" those necessary to prove second degree assault. CP 397-98. Despite the jury's inquiries, the court refused to define the term "substantially exceeds," telling the jury to instead rely on its common meaning. CP 392-93. But it is clear from Stubbs that that term has a specific meaning, in this case it means injuries amounting to great bodily injury. There is no reason to think that jurors concluded the common meaning of the term "substantially exceeds" required them to find great bodily injury. That is especially true where the State, in both this case and in Stubbs, has argued that is not what the term meant.

Even if one does not accept the acquittal as a finding that the State did not prove great bodily injury, there still remains no other finding by the jury of that fact. Because the jury was required to make that finding beyond a reasonable doubt, the Sixth

Amendment does not permit the imposition of an exceptional sentence. Blakely, 542 U.S. at 306-07.

The jury did not find Mr. Duncalf inflicted great bodily injury, thus this Court must reverse the exceptional sentence and remand for entry of a standard range sentence.

B. CONCLUSION

Based upon the arguments set forth above, and those in Mr. Duncalf's previous briefs, this Court must reverse Mr. Duncalf's sentence.

Respectfully submitted this 10th day of January, 2011.



GREGORY C. LINK – 25228
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 62237-4-I
)	
RICHARD DUNCALF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] RICHARD DUNCALF	(X)	U.S. MAIL
881568	()	HAND DELIVERY
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