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FILED
JUN 8 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 86853-1

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. STATEMENT OF THE CASE..... 2

C. ARGUMENT 3

1. The vagueness doctrine of the Fourteenth Amendment’s Due Process Clause applies to aggravating factors3

2. The aggravating factor in RCW 9.94A.535(3)(y) is vague.....11

3. Because RCW 9.94A.535(3)(y) is impermissibly vague, the Court must either strike the factor or require trial courts provide a limiting definition of the factor to the jury13

4. Because the standard range sentence for second degree assault contemplates the injuries which occurred here, the trial court could not impose an exceptional sentence.....17

D. CONCLUSION..... 19

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend. VI	passim
U.S. Const. amend. XIV	passim

Washington Supreme Court

<u>In re Personal Restraint of Cashaw</u> , 123 Wn.2d 138, 866 P.2d 8 (1994).....	5, 10
<u>O’Day v. King County</u> , 109 Wn.2d 796, 749 P.2d 142 (1988)	3
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	10
<u>State v. Baldwin</u> , 150 Wn.2d 448, 78 P.3d 1005 (2003)	passim
<u>State v. Jacobsen</u> , 92 Wn.App. 958, 965 P.2d 1140, <u>review denied</u> , 137 Wn.2d 1033 (1999)	4
<u>State v. Rhodes</u> , 92 Wn.2d 755, 600 P.2d 1264 (1979).....	4
<u>State v. Schaler</u> , 169 Wash.2d 274, 236 P.3d 858 (2010)	16
<u>State v. Stubbs</u> , 170 Wn.2d 117, 240 P.3d 143 (2010)	passim

United States Supreme Court

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	passim
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	passim
<u>Duncan v. Louisiana</u> , 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968).....	5
<u>Giacco v. Pennsylvania</u> , 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).....	3
<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....	3, 11
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	6, 7
<u>Kolender v. Lawson</u> , 461 U.S. 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983).....	3
<u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).....	7, 8
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).....	13
<u>Smith v. Goguen</u> , 415 U.S. 574, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973).....	3
<u>State v. Gordon</u> , 172 Wn.2d 671, 260 P.3d 884 (2011).....	14, 15

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511
(1990).....13, 14

Statutes

RCW 9.94A.535..... passim
RCW 9A.04.110..... 17

A. INTRODUCTION

In Apprendi v. New Jersey,¹ the Supreme Court recognized that sentencing enhancements which increase the maximum sentence to which a person is exposed trigger the Fourteenth Amendment's Due Process Clause because those enhancements affect the person's liberty interest in being free of confinement. Thus, Apprendi held the Fourteenth Amendment's Due Process Clause required the proof beyond a reasonable doubt of those enhancements. Additionally, the Sixth Amendment right to a jury trial incorporated by the Fourteenth Amendment's Due Process Clause required those facts be proved to a jury. In Blakely v. Washington,² the Court expressly applied that holding to aggravating factors in the Sentencing Reform Act (SRA). Because aggravating factors trigger the protection of the Fourteenth Amendment's Due Process Clause, those factors are subject to challenge under the vagueness doctrine of the Due Process clause.

The aggravating factor in RCW 9.94A.535(3)(y) that injuries inflicted during a crime substantially exceed that necessary to satisfy the elements of the offense is inherently subjective and thus violates the

¹ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

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

vagueness doctrine. As such, that factor cannot apply unless the jury is provided an instruction adequately narrowing definition.

Because the jury did not receive such a narrowing instruction, and instead was told to simply use the common understating of the term, Mr. Duncalf's sentence must be reversed.

B. STATEMENT OF THE CASE

In addition to other charges not relevant to this appeal, the State charged Mr. Duncalf with both first-degree assault and in the alternative second-degree assault with the allegation that he inflicted injuries which substantially exceeded those necessary to establish substantial bodily injury. CP 12-15.

When the jury asked for a definition of "what constitutes 'substantially exceeds' the level of bodily injury necessary to constitute 'substantial bodily injury,'" CP 392, the court instructed there is no specific definition and the jury should employ the "commonly held meaning to the words." CP 393.

A jury acquitted Mr. Duncalf of first degree assault, CP 396, and instead convicted him of second degree assault with a special verdict that the injuries inflicted exceeded those necessary to prove second degree assault. CP 397-98. The trial court imposed an exceptional sentence of 100 months. CP 649.

C. ARGUMENT

1. The vagueness doctrine of the Fourteenth Amendment's Due Process Clause applies to aggravating factors.

The vagueness doctrine of the Due Process Clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09. A “statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O’Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

In State v. Baldwin, this Court overturned its prior decision in State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that aggravating factors were not subject to a vagueness challenge. 150 Wn.2d 448, 78 P.3d 1005 (2003) Baldwin offered several justifications for its conclusion. First, Baldwin held “the void for vagueness doctrine should have application only to laws that “proscribe or prescribe conduct” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.” 150 Wn.2d at 459 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). Baldwin concluded that because sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459. Second, Baldwin concluded there was no liberty interest at stake in the determination of an aggravating factor, stating “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.” Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw,

123 Wn.2d 138, 144, 866 P.2d 8 (1994)). It is clear, that each of these conclusions is incorrect in light of Apprendi and Blakely

First, Baldwin's conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties" is indisputably incorrect following Blakely. There the Court held aggravating factors do alter the statutory maximum of the offense. Blakely 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." The vast majority of aggravating factors may no longer be considered by a sentencing court at all, unless they are first found by the jury beyond a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-Blakely scheme, the aggravating factors are not matters that merely direct judicial discretion at all.

Further, the conclusion that aggravating factors do not impact a liberty interest is also contrary to the conclusions reached in Apprendi and Blakely. Those cases concluded the Due Process Clause does apply to aggravating factors. First, it is by virtue of the Fourteenth Amendment Due Process Clause that the Sixth Amendment is incorporated against the states. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968). In determining whether to incorporate a specific right within the Due Process Clause the Court asked the following:

whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right, essential to a fair trial

(Internal citations and quotations omitted.) Id. 148-49. The Court reasoned the right a jury trial “in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Id. 156. Thus, the Sixth Amendment right to jury applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake. And because it applies equally to aggravating factors the same liberty interests must necessarily be at stake.

Second, in Apprendi, the Court said:

[a]s we made clear in [In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)], the “reasonable doubt” requirement “has [a] vital role in our criminal procedure for cogent reasons.” 397 U.S., at 363, 90 S.Ct. 1068. Prosecution subjects the criminal defendant both to “the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction.” Id. We thus require this, among other, procedural protections in order to “provid[e] concrete substance for the presumption of innocence,” and to reduce the risk of imposing such deprivations erroneously. Id.

Apprendi, 530 U.S. at 484. Thus, Apprendi, specifically applied to Washington’s SRA by Blakely, applied the Due Process Clause’s

protection to sentence enhancements because of the loss of liberty associated with the finding. Apprendi also noted “we have made clear beyond peradventure that Winship’s due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.” Id. (Brackets in original, internal quotations omitted.) Thus, liberty interests arise from facts which establish the length of the sentence.

Apprendi and Blakely clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as Apprendi expressly noted aggravating factors impact the most basic of liberty interests - the right to be free of confinement. And it is because they affect the most basic liberty interest that enhancements and aggravating factors, just as traditional elements, must be proved beyond a reasonable doubt. With the recognition that this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of Baldwin’s underpinnings is lost.

In reaching its conclusion that no liberty interest was affected, Baldwin relied principally on Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Lockett merely held that in death penalty cases, a legislature could not restrict juries’ ability to consider the full

array of potential mitigating evidence in determining whether to return a verdict to impose the death penalty. The Court found such restrictions in the Ohio statute violated both the Eighth and Fourteenth Amendments. 438 U.S. at 605. Lockett recognized that in noncapital cases “legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases,” Id. at 603-04. But Lockett says nothing about whether an individual has a liberty interest in guidelines, indeed it never mentions the term “guidelines.” And even if it did, because the issue in that case was whether the legislature could restrict the jury’s consideration of mitigation in a capital case, any discussion of liberty interest in a standard range is dicta and not the holding of the Court. In fact the Court said

... We emphasize that in dealing with standards for imposition of the death sentence we intimate **no view** regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

(Emphasis added.) 438 U.S. at 605, n.13. Thus, Lockett did not dictate the outcome of Baldwin nor was it even relevant.

Any while Lockett offered the general recognition that legislatures may establish the amount of discretion afforded sentencing judges, the SRA has largely eliminated judicial discretion at sentencing. And with it has specifically removed a judge’s ability to find aggravating factors.

RCW 9.94A.537. This was done in recognition that the Due Process Clause requires more of that finding. That jury finding does lead to a specific result: an increase in the prescribed range of punishment.

Further, the relevant question is not whether Mr. Duncalf has a right to be sentenced to the standard range. Rather, the Court must ask whether his maximum sentence may be increased beyond that range without the protections of the Due Process Clause. Appendi and Blakely have recognized that Mr. Duncalf plainly does have the right, his Sixth Amendment right to a jury trial and Fourteenth Amendment rights to due process, to be sentenced below the maximum sentence but for the jury's finding of an aggravating fact. Because it is that jury finding which triggers the increase in punishment, that finding is subject to the vagueness doctrine.

Baldwin's reasoning is analytically unsound. Under Baldwin a defendant may only raise a vagueness challenge to elements which require a particular result. Baldwin, 150 Wn.2d at 460. By that logic no such challenge could ever be raised to challenge the elements of an offense in jurisdictions which do not employ determinate sentencing, such as the federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is

always free to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, or for that matter does not require the court impose any sentence at all. Nor would Baldwin's reasoning permit vagueness challenges to condition of community custody, as a violation of those conditions do not dictate an outcome. Yet, not only has this Court permitted such challenge, it has struck several conditions as unconstitutionally vague. See e.g. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

Moreover, the reasoning of Cashaw, relied on in Baldwin, is of limited value in assessing the applicability of the vagueness doctrine to a statutory factor which increases punishment. The parole statutes at issue in Cashaw concerned whether a defendant had a right to be freed prior to the expiration of his lawfully imposed sentence. 123 Wn.2d at 145-47. In Cashaw, since the defendant's confinement was lawful he had no constitutional right to demand something less than what was lawfully ordered, unless he could demonstrate a statutory directive that required a different outcome. By contrast, the challenge here concerns the lawfulness of the sentence in the first instance. In this scenario a defendant must be afforded the opportunity to challenge the

constitutionality of the confinement, e.g. whether it violates the Due Process Clause prohibition of vague statutes.

Baldwin is plainly incorrect and should be overturned. Following Apprendi and Blakely, it is clear that the Due Process Clause applies to the determination of whether an aggravating factor exists. The vagueness doctrine of the Due Process Clause must also apply.

2. The aggravating factor in RCW 9.94A.535(3)(y) is vague.

A statute is vague where it fails to provide ascertainable standards so as to protect against arbitrary and subjective application. Grayned, 408 U.S. at 108. RCW 9.94.535(3)(y) does not provide ascertainable standards. That is readily demonstrated by the litigation history of this case and State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 2010).

Prior to submitting the case to the jury, the trial court told the prosecutor “[y]ou will also need an instruction that defines substantially exceed. That will be the first question or one of the first questions we will get from the jury.” 6/23/09 RP 101. As predicted, the jury inquired “what constitutes ‘substantially exceeds’ the level of bodily injury necessary to constitute ‘substantial bodily injury.’” CP 392. The court responded there is no specific definition and the jury should employ the “commonly held meaning to the words.” CP 393.

On appeal, and in response to Mr. Duncalf vagueness claim, the State contended the factor was not vague because the injuries “are on the far end of the spectrum of possible injuries that could be inflicted in a second-degree assault.” Brief of Respondent at 22. The State advanced a similar definition in Stubbs, 170 Wn.2d at 129. This Court rejected that definition. Id. at 130. Instead, the Court adopted a specific definition of the term, defining it as injuries which satisfy the next-greater degree of the offense. Id. In adopting a specific definition, the Court implicitly rejected the “common understanding” definition which the trial court provided the jury here. Thus, at no point prior to Stubbs was there an agreed-upon definition of the phrase.

And beyond the lack of a legal definition of the term, the facts of this case present ambiguity as to whether the injuries are atypical. Here the emergency room physician testified that he could not say whether the facial injuries resulted from one punch or more. 6/18/08 RP 70. Dr. Kris Moe, the plastic surgeon, allowed the injuries most likely resulted from more than a single punch but were nonetheless moderate by comparison to those of his other patients. 6/23/08 RP 170.

Neither RCW 9.94A.535(3)(y) nor the court’s instruction to the jury provided the jury objective guidance in its application of the aggravator to Mr. Duncalf and the facts of this case. Importantly, Mr.

Duncalf does not contend that the statute is vague because a different jury might reach a different result. Instead, he contends the doctrine is violated because there is no assurance that a subsequent jury would apply the same definition of “substantially exceeds.” Because RCW 9.94A.535(3)(y) does not guard against this arbitrary and inherently subjective application it is void for vagueness. Mr. Duncalf’s sentence which is predicated on this unconstitutionally vague aggravator must be reversed.

3. Because RCW 9.94A.535(3)(y) is impermissibly vague, the Court must either strike the factor or require trial courts provide a limiting definition of the factor to the jury.

The United States Supreme Court has made clear, “It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.” Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds by, Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Nevertheless, an aggravating factor that is vague may be applied if state courts have adopted an acceptable limiting definition. Walton, 497 U.S. at 654–55. Thus, the vagueness problem is cured only if the jury is provided the limiting definition.

In Stubbs, this Court adopted a proper limiting definition of the phrase. The Court explained that “substantially exceeds” means injuries which rise to the level of the next greater degree of harm. 170 Wn.2d at

130. Going forward that definition, if provided to the jury, is sufficient to shield the statute from vagueness challenges. However, that definition was not provided to the jury in this case. Instead, the trial court told the jury to give the aggravator its usual meaning. CP 393. But the factor's usual meaning is inherently subjective and vague.

In State v. Gordon, this Court concluded aggravating factors submitted to the jury need not be defined beyond the statutory terms. 172 Wn.2d 671, 679-80, 260 P.3d 884 (2011). Walton makes clear, however, that where the statutory language is inherently vague, it is not sufficient to merely to provide the jury an instruction which parrots that vague language. 497 U.S. at 653. Gordon cannot preclude providing the jury a constitutionally mandated limiting construction to an inherently vague statute.

The Sixth and Fourteenth Amendment require the jury find every fact necessary to impose punishment. The necessary factual finding here, and the one that saves the statute from the vagueness problem, is that Mr. Duncalf inflicted great bodily injury. The jury did not return a verdict on that fact. Nor is there any reason to believe the jury understood the special verdict to require such a finding. First, because that requirement was not mandated until Stubbs was decided more than two years after the verdict in this case. Second, that requirement was never communicated to the

jury. Third, the trial court expressly told the jury to simply employ the common understanding of the term rather than the specific definition adopted by Stubbs. There is no jury finding that Mr. Duncalf inflicted great bodily injury. Indeed, the jury's acquittal on the greater offense strongly suggests they did **not** find great bodily harm.

Importantly, in Gordon the Court was not presented with a vagueness challenge to the aggravators at issue, and thus decided only what the Sixth Amendment required. But the Sixth Amendment would be relatively hollow if a jury need only answer an inherently subjective question. And, as discussed at length above, the requirement of the jury finding is not merely a Sixth Amendment requirement. Instead, it is also mandated by the Due Process Clause.

While the Sixth Amendment may be satisfied so long as the jury makes the necessary factual finding to support punishment, the Due Process Clause requires the jury make that finding beyond a reasonable doubt. Due process requires that inherently vague statutory factors be sufficiently explained to the jury. Here, the trial court's direction that jurors rely on the commonsense understanding of the term "substantially exceeds" did not provide any substance nor cure its inherent subjectiveness, nor was it a correct definition in light of Stubbs. The inadequacy of that instruction is readily apparent from the fact that Stubbs

took 13 pages to explain what the term did and did not mean. 170 Wn.2d at 124-37.

A requirement that juries be provide definitions of inherently vague factors mirrors the requirement that courts specifically instruct juries on the definition of a “true threat.” State v. Schaler, 169 Wash.2d 274, 287-88, 236 P.3d 858 (2010). While not an element of the offense, the definition of true threat is nonetheless conveyed to the jury to ensure the verdict does not rest upon speech protected by the First Amendment and to ensure that statues which criminalize certain forms of speech are not impermissibly overbroad. Id. Such a prophylactic instruction is equally necessary in cases in which the jury is required to make a finding of an aggravating factor which is inherently vague.

To be sure, many aggravating factors will not need such an instruction. There is no reason, for example, to provide any further definition of what is meant by a “pregnant victim.” See, RCW 9.94A.535(3)(c). But the substantially-exceeds aggravating factor has a specific legal meaning beyond its inherently vague terms. That specific legal meaning is easily relayed to the jury - “Did the defendant inflict great bodily harm?” That specific legal meaning is not readily apparent from the language of the statute. Thus, there is no way to know future juries employed it as opposed to some other common, but subjective,

meaning. That legal definition must be conveyed to juries to save the statute from a vagueness challenge. The alternative would be to simply strike the aggravating factor from the statute.

Because the jury in this case was not provided a limiting definition, but was instead wrongly instructed to rely on the inherently subjective common understanding of the inherently subjective aggravating factor, Mr. Duncalf's sentence must be reversed.

4. Because the standard range sentence for second degree assault contemplates the injuries which occurred here, the trial court could not impose an exceptional sentence.

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. Stubbs 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." 170 Wn.2d at 130. The Court framed the necessary question as

. . . whether the injures . . . 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?

Id. 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.

Here, the jury did not make a finding of great bodily injury. The jury acquitted Mr. Duncalf of first degree assault, the only offense for which it was instructed it need make such a finding. CP 396.

Because the jury only found 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.” In returning its special verdict the jury was not asked 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. But that is not a finding of great bodily injury.

In the Court of Appeals, the State theorized the jury’s acquittal may have rested upon its finding that the 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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 86853-1
v.)	
)	
RICHARD DUNCALF,)	
)	
Petitioner.)	

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State v. Richard Duncalf
No. 86853-1

Please accept the attached documents for filing in the above-subject case:

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