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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,

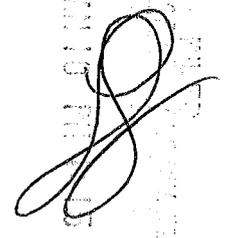
Respondent,

v.

RICHARD DUNCALF,

Appellant.

2011 JUN 15 11:10 AM  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WA



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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE JUDGE GREGORY CANOVA

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. QUESTION PRESENTED BY THE COURT**

This Court asked for supplemental briefing on the impact of the recent decision of the Supreme Court in State v. Stubbs, \_\_\_ Wn.2d \_\_\_, 240 P.3d 143 (Oct. 7, 2010).

**B. ANSWER**

The decision in Stubbs supports the State's position that an exceptional sentence is legally authorized upon a conviction for assault in the second degree where the jury has found that the level of harm suffered by the victim substantially exceeds the level of harm necessary to satisfy the minimum level of harm required to prove the crime.

**C. ARGUMENT**

Stubbs was convicted of assault in the first degree, a crime that required the jury to find that he intended to inflict, and did inflict, "great bodily harm." The jury also returned a verdict that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense of assault in the first degree. See RCW 9.94A.535. Stubbs argued on appeal that the court erred in imposing an exceptional sentence.

The Supreme Court indicated that--like here--"because the jury made the requisite finding, the issue is whether the trial court committed an error of law in imposing an exceptional sentence based on the severity of Goodwin's [the victim's] injuries." Stubbs, 240 P.3d at 146. The Court acknowledged and affirmed that "[o]ur opinions have established that particularly severe injuries may be used to justify an exceptional sentence, but only if they are greater than that contemplated by the Legislature in setting the standard range." Stubbs, at 147-48. "In light of our case law," the Court stated, "the question is whether the injuries in this case are greater than those contemplated by the legislature in establishing the standard range." Stubbs, at 148. This definitively answers a part of the legal question presented here, whether exceptional sentences are legally permissible for assault convictions where the bodily harm to the victim substantially exceeds the level of bodily harm necessary to satisfy the elements of the charged offense. The answer to that question is yes.

The Court then looked specifically at assault in the first degree and the level of harm required to prove the offense. The Court noted that the Legislature did not define a level of harm greater than "great bodily harm." Stubbs, at 148. The Court then

noted that great bodily harm includes the "permanent probability of death" such as a shortened life expectancy, and that one "cannot imagine an injury that exceeds great bodily harm but leave the victim alive." Stubbs, at 148.

Applied to the exceptional sentence statute, the Court said that the trier of fact is required to "measure the victim's actual injuries against *the minimum injury that would satisfy the definition,*" in Stubbs' case, "great bodily harm." Stubbs, at 148 (emphasis added). However, in the case of first-degree assault and great bodily harm, the Court held, the Legislature created but a single minimum "kind" of harm and therefore an exceptional sentence is not possible upon a conviction for first-degree assault. Stubbs, at 149. In other words, the minimum level of harm includes harm resulting in the probability of death. This is not true for second-degree assault and the minimum injury required to satisfy the definition of "substantial bodily harm."

"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). This is the minimum level of injury necessary to

satisfy the harm element of second-degree assault. Thus, a level of bodily harm greater than this minimum level can be used to impose an exceptional sentence if the level of harm is found by a jury to substantially exceed this level--a finding that was made here and has not been challenged.

This level of harm can include bodily harm that leads to a probability of death but that is still not what is contemplated in the standard range for the greater offense of first-degree assault. This is because first-degree assault requires a greater intent, an actual intent to cause "great bodily harm," whereas, second-degree assault merely requires an intent to assault another and the reckless infliction of substantial bodily harm. RCW 9A.36.021. That is exactly the situation here.

The jury 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. More fully described in the Brief of Respondent, these injuries included potentially life threatening injuries, "significant facial trauma," at least eight facial fractures, a significant skull injury and likely permanent nerve damage that has left Mr. Ketchum with an inability to feel and control his lower lip and jaw. 8RP 92; 9RP 74; 10RP 129, 132-33,

139; 11RP 148, 150-54, 171. In short, while the defendant's intent may have risen only to the level of assault in the second degree, the level of bodily harm he inflicted substantially exceeded that level minimally necessary to prove "substantial bodily harm." In this case, the injuries inflicted by the defendant were so severe as to fall within the definition of "great bodily harm." Under Stubbs, an exceptional sentence is legally justified in this case.

**D. CONCLUSION**

For the reasons cited above and in the State's Brief of Respondent, this Court should affirm the defendant's sentence.

DATED this 7 day of January, 2011.

Respectfully submitted,

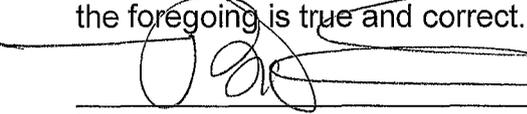
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: DJ McCurdy  
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Supplemental 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

01-10-2011  
\_\_\_\_\_  
Date