No. 91669-1

No. 45296-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NAKIA L. OTTON,

Appellant.

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

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting out-of-court statements as substantive evidence.

2. The State's failure to prove the "true threat" element of harassment violated Nakia Otton's First Amendment right to free speech.

3. The court's imposition of an exceptional sentence above the standard range violated Mr. Otton's Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prior out-of-court statement by a witness is inadmissible as substantive evidence unless it meets the requirements of ER 801(d)(1)(i). Here, where the court improperly relied on *State v. Smith*[1] to admit a witness's out-of-court statement based on "reliability," was the statement erroneously admitted as substantive evidence?

2. To convict a defendant of harassment, the First Amendment requires the State to prove beyond a reasonable doubt that the threat was a "true threat." A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm or to take the life of another. In the absence of

[1] 97 Wn.2d 856, 651 P.2d 207 (1982).

evidence to prove beyond a reasonable doubt that a reasonable person in Mr. Otton's position would foresee his statement would be interpreted as a serious expression of his intention to inflict bodily harm or to take the life of another, rather than a statement made in the heat of a drunken argument, must his conviction for harassment be reversed?

3. A defendant cannot be sentenced to a term above the standard range based on an unscored misdemeanor criminal history, in the absence of a jury determination beyond a reasonable doubt that the presumptive range is "clearly too lenient." Must Mr. Otton's exceptional sentence based on his unscored criminal history be reversed when it was based on a judicial finding that the presumptive sentence was clearly too lenient?

4. A defendant cannot be sentenced to a term above the standard range based on victim vulnerability in the absence of proof beyond a reasonable doubt that the victim's particular vulnerability was a substantial factor in the commission of the crime. Must Mr. Otton's exceptional sentence based on victim vulnerability be reversed where the evidence established that the alleged assault occurred during a drunken argument between romantic partners, and not because of the alleged victim's disability?

6. The trial court erred in entering Finding of Fact 1(a) to justify the exceptional sentence.

7. The trial court erred in entering Finding of Fact 1(b) to justify the exceptional sentence.

8. The trial court erred in entering Conclusion of Law I to justify the exceptional sentence.

C. STATEMENT OF THE CASE

Nakia L. Otton and Debra Dugan began a romantic relationship in 2010. RP 126. Starting in October 2011, Ms. Dugan underwent six brain surgeries and by the time of trial on the instant charges, she was disabled and unable to work, she suffered from memory problems, and she occasionally had difficulty speaking. RP 123-24, 133.

On December 8, 2012, Ms. Dugan was asleep in bed when Mr. Otton came home intoxicated and "flopped" on her. RP 129-30. Ms. Dugan pushed him off the bed and went back to sleep, while Mr. Otton passed out on the bedroom floor. RP 129-30. Some time later, Ms. Dugan awoke, got out of bed, and apparently kicked Mr. Otton in his face, waking him. RP 130. An argument ensued. Mr. Otton was angry because he thought Ms. Dugan had purposely kicked him and Ms. Dugan was angry because Mr. Otton had been gone all day and came home intoxicated. RP 131-32. Mr. Otton left the residence and Ms. Dugan called 911. RP 131-32.

According to the responding officer, Ms. Dugan reported that Mr. Otton accused her of kicking him, they had a physical altercation in which Mr. Otton pushed Ms. Dugan, banged her head against the wall, pushed her arm against her throat so she had difficulty breathing, and said, "See how easy it would be to kill you." RP 179, 183. The officer took a written statement from Ms. Dugan. RP 186-90, 222-25. In her written statement, Ms. Dugan wrote that Mr. Otton "threatened to kill me," but she did not quote Mr. Otton's exact words. Ex. 14.

Mr. Otton was charged with assault in the second degree and harassment. CP 1-2. The State gave notice that it sought an exceptional sentence above the standard range based on 1) Mr. Otton's prior unscored misdemeanors resulted in a presumptive sentence that was clearly too lenient, 2) Mr. Otton knew Ms. Dugan was particularly vulnerable, and/or 3) the current offense involved domestic violence and was part of an on-going pattern of abuse or the current offense manifested deliberate cruelty. CP 6-7.

Mr. Otton was convicted as charged. CP 38, 42. For the aggravating factors, the jury returned a special verdict that Mr. Otton and Ms. Dugan were members of the same family or household, the defendant knew or should have known that Ms. Dugan was particularly vulnerable, and her particular vulnerability was a substantial factor in the commission

of the crimes. CP 39, 41. The jury was not asked to determine whether Mr. Otton's unscored criminal history resulted in a presumptive sentence that was clearly too lenient, whether the offenses were part of an on-going pattern of abuse, or whether the offenses manifested deliberate cruelty.

Based on his offender score of '2,' Mr. Otton faced a standard range sentence of 12 to 14 months for the assault and 4 to 12 months for the harassment. CP 46. The judge determined an exceptional sentence above the standard range was justified based on "vulnerable victim," and "prior unscored domestic violence offenses," and imposed a sentence of 30 months on the assault. CP 49, 53.

D. ARGUMENT

1. Ms. Dugan's written statement was improperly admitted as substantive evidence.

Ms. Dugan gave the following written statement to the responding officer that purportedly described the altercation:

> approx time 2:00 Nakia Otton came home drunk & passed out on the bedroom floor. He woke up about an hour later, accused me of kicking him in the lip. He held me on the bed, holding me by neck against the wall & the bed – I couldn't breath. He told me he was gonna kill me. His mom showed up & took him out –

Ex. 14. The trial court admitted the statement pursuant to *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982) and *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005). RP 205, 210-12. *Smith* and *Thach* considered

the admissibility of prior out-of-court statements as substantive evidence under ER 801(d)(1)(i). Thus, even though the court did not expressly cite ER 801(d)(1)(i), Ms. Dugan's statement was admitted as substantive evidence under the evidentiary rule.

ER 801(d)(1)(i) provides a statement is not hearsay if:

> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Nieto*, 119 Wn. App. 157, 160, 79 P.3d 473 (2003). A trial court abuses its discretion when it conducts an incomplete legal analysis or bases its ruling on a misapprehension of legal issues. *Id.* Here, because the *Smith* test is no longer good law, the court abused its discretion in admitting her prior statement.

a. Rather than adhering to the plain language of ER 801(d)(1)(i), *Smith* promulgated a separate test in which "reliability is the key."

In *Smith*, the victim was assaulted in a motel room and badly beaten, and she identified the defendant as her attacker. 97 Wn.2d at 858-59. When the police advised her that nothing could be done unless she testified in court, she went to the police station, gave a written statement

describing the assault, and again identified the defendant as her assailant. *Id.* at 858. The victim signed each page and the detective signed as her witness. *Id.* The detective then took the victim to a notary, where she read the affidavit portion of the statement and oath, and notary executed the jurat and applied his seal to the statement. *Id.* At trial, the victim testified to the same facts set forth in her statement, except she identified a different individual as her assailant. *Id.* She explained that she originally identified the defendant only because she was angry with him. *Id.* at 858-59.

The Court reviewed the legislative history of ER 801(d)(1)(i) and held, not that the circumstances of the case met the definition of "other proceeding," but that the original purpose of the sworn statement – to determine the existence of probable cause – was the same as those circumstances that did meet the definition of "other proceeding." *Id.* at 862. Thus, the Court ruled the victim's written statement was admissible under ER 801(d)(1)(i), on the grounds it satisfied the purpose of determining probable cause. *Id.* at 862-63.

The *Smith* Court cautioned, however, that "each case depends on its facts with reliability the key," and it expressly disavowed interpreting the rule to "always exclude or always admit such affidavits." 97 Wn. App. at 861. Rather, the court articulated four factors to determine whether an

affidavit is admissible as substantive evidence: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guarantees of truthfulness; (3) whether the statement was taken as standard procedure in a permissible method for determining probable cause; and (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement. *Id.* at 861-63.

Following *Smith*, Washington courts have applied the four factors to determine whether a prior statement is admissible under ER 801(d)(1)(i). *See, e.g., Thach*, 126 Wn. App. at 308; *Nieto*, 119 Wn. App. at 163; *State v. Nelson*, 74 Wn. App. 380, 387, 874 P.2d 170 (1994). However, at least one other court has noted the error in the *Smith* analysis. In *Delgado-Santo v. State*, the Florida Court of Appeals discussed the problem with the case-by-case approach to admission of a written statement under its identical rule of evidence:.

> *Smith* ... purport[s] to make the question turn on the "reliability' of the contents of the particular statement and of the conditions under which it was given. In our view, the basic flaw in this conclusion is that it finds no basis in the statute. While the legislature and Congress may have been ultimately concerned with the "reliability" of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the means by which that end is to be achieved. By suggesting, without statutory authority, that the determination that the

> existence of a proceeding can depend upon what is said before it, the *Robinson*[2]-*Smith* test of reliability violates this basic principle.

471 So.2d 74, 79 (Fla. Ct. App. 1985) (internal citation omitted). Accordingly, the court concluded that that a "bright line" test was mandated and police questioning clearly was not an "other proceeding" for purpose of ER 801(d)(1)(i). *Id.*

b. A judicial determination of the "reliability" of an out-of-court statement is no longer an acceptable test after *Crawford*.

Twenty-two years after the *Smith* decision, the United States Supreme Court decided *Crawford v. Washington*, 124 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In *Crawford*, the Court specifically noted the inherent problem in granting courts the power to assess the reliability of an out-of-court statement: "Reliability is an amorphous, if not entirely subjective, concept." 541 U.S. at 63. Too frequently, it found, courts have attached the same significance to opposite facts. *Id.* For example, the Colorado Supreme Court found a statement was reliable because its inculpation of the defendant was "detailed," whereas the Fourth Circuit found a statement was reliable because its inculpation of the defendant was "fleeting." *Id.* Similarly, the Virginia Court of Appeals found a statement reliable because the witness was in custody and a suspect,

[2] *Robinson v. State*, 455 So.2d 481 (Fla. 5th DCA 1984).

whereas the Wisconsin Court of Appeals found a statement reliable because the witness was out of custody and not a suspect. *Id.* Accordingly, when left to a court's discretion, too many facts can be turned either in favor or against the reliability of a statement, depending on the court.

While *Crawford* addressed the admissibility of an out-of-court statement in the context of witness unavailability for cross-examination at trial, its concern about the subjective nature of "reliability" echoes the concerns raised in *Delgado-Santos*. As pointed out in *Delgado-Santos*, the legislature enacted specific, objective criteria, including the specific forum, for admission of a prior statement under ER 801(d)(1)(i). 471 So.2d at 79. *Smith*'s deviation from those objective criteria, and it's ruling instead that "reliability is key," is invalid under *Crawford*, and contrary to the plain language of the rule.

Improper admission of hearsay requires reversal. Ms. Dugan's written statement was wrongly admitted as substantive evidence under pursuant to ER 801(d)(1)(i), and her trial testimony was insufficient to support the charges. Accordingly, the erroneous admission of her statement was not harmless beyond a reasonable doubt, and Mr. Otton's convictions for assault and harassment must be reversed. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

2. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Otton made a "true threat."

a. The State is required to prove every essential element of the crime beyond a reasonable doubt and, where the crime implicates speech, the State is further required to prove the proscribed speech is unprotected by the constitution.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Where a challenge to the sufficiency of evidence implicates core First Amendment rights, the appellate court must conduct an independent review of the record to determine whether the speech in question was unprotected. *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707

(2006). "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Rather, the "rule of independent review" requires an appellate court to "freshly examine 'crucial facts.'" – those facts that are intricately intermingled with the legal question. *Id.* at 50-51. "Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question." *Id.* at 51; *accord State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

b. <u>The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Otton communicated a "true threat."</u>

A threat is pure speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, § 5; *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as "true threats," "fighting words," or words that produce a "clear and present danger." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); *Chaplinsky v. New Hampshire*, 315

U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); *Schenck v. United States*, 249 U.S 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Not all threats are "true threats." *Watts*, 394 U.S. at 707. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listener." *Bauer v. Sampson*, 261 F.3d 775, 783 (9th Cir. 2001) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

In Washington, courts adhere to an objective speaker-based test for a "true threat."

> A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Kilburn, 151 Wn.2d at 43-44 (internal citations and quotations omitted); *accord Allen*, 176 Wn.2d at 626. Thus, statements that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Here, the investigating officer testified that Ms. Dugan reported Mr. Otton was intoxicated, angry, and, in the heat of the argument, he said, "See how easy it would be to kill you." RP 179. In context and under the circumstances, a reasonable person in Mr. Otton's position would not foresee that his statement would be interpreted as a serious express of intent to cause bodily injury or to kill Ms. Dugan.

"Speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a 'true threat." *Williams*, 144 Wn.2d at 209 (citations omitted). Here, in the absence of proof beyond a reasonable doubt that a reasonable person in Mr. Otton's position would foresee that his statement would be deemed a serious expression of intent to cause bodily injury or to kill Ms. Dugan, rather than an angry statement made while under the influence of alcohol and in the heat of an argument, his statement was not a true threat and his conviction for harassment must be reversed. *See Kilburn*, 151 Wn.2d at 54.

3. The exceptional sentence above the standard range based on a judicial finding that Mr. Otton's prior unscored convictions resulted in a presumptive sentence that was clearly too lenient violated Mr. Otton's right to jury trial and to proof beyond a reasonable doubt.

RCW 9.94A.535(2) provides, in relevant part:

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter.

Notwithstanding the statute, however, case law unequivocally holds that the "clearly too lenient" aggravator must be found by a jury beyond a reasonable doubt. *State v. Alvarado*, 164 Wn.2d 556, 564-65, 192 P.3d 345 (2008); *State v. Hughes*, 154 Wn.2d 118, 136-37, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. Saltz*, 137 Wn. App. 576, 581, 154 P.3d 282 (2007).

Subject to constitutional restraints, a court's sentencing authority is purely statutory. *See Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). A court has no inherent authority to impose an exceptional sentence above the standard range. *Pillatos*, 159 Wn.2d at

469. A court-created procedure for imposition of an exceptional sentence would "usurp the power of the legislature." *Hughes*, 154 Wn.2d at 152.

A court exceeds its constitutional authority if it imposes a sentence above the standard range based on judicial factual determinations that are not proved to a jury beyond a reasonable doubt. U.S. Const. amend. VI, XIV; Const. art I, §§ 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Whether an exceptional sentence exceeds the court's constitutional authority is a question of law reviewed *de novo*. *Saltz*, 137 Wn. App. at 580.

In *Saltz*, the defendant was convicted of second degree malicious mischief and stipulated to his misdemeanor criminal history. 137 Wn. App. at 579-80. As in the present case, the court imposed an exceptional sentence based on a judicial finding that the defendant's prior unscored misdemeanors resulted in a presumptive sentence that was "clearly too lenient." *Id.* at 579.

On appeal, the court held RCW 9.94A.535(2)(b) was unconstitutional as applied to the defendant, on the grounds that the defendant stipulated to the existence of his criminal history, but he did not further stipulate that the presumptive sentence was clearly too lenient. 137 Wn. App. 583-84. Citing *Blakely*, *Apprendi*, and *Hughes*, the court explained that the "clearly too lenient" conclusion was a factual

determination rather than a legal issue. *Id.* at 581. When determining whether a defendant's unscored misdemeanor history results in a presumptive sentence that is clearly too lenient, "courts have historically considered the number of the convictions and/or the relationship between the prior unscored convictions and the current offense." *Id.*; *accord State v. Clarke*, 156 Wn.2d 880, 895-96, 134 P.3d 188 (2006); *State v. Ratliff*, 46 Wn. App. 325, 331-32, 730 P.3d 716 (1986). Thus:

> [t]he *fact of the existence* of misdemeanor history is an objective determination. However, the existence of misdemeanor criminal history is subjective in the "too lenient" context because, like multiple offense policy cases, an additional determination must be made: that a standard range sentence would clearly be too lenient because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted fro in calculating the standard range.

Saltz, 137 Wn. App. at 582 (emphasis in original, internal citation omitted). Accordingly, a judge may properly determine the nature and number of unscored misdemeanors, but a jury must decide, in light of that criminal history, whether the defendant is particularly culpable or the current crime is particularly egregious. *Id.* at 583.

Similarly, in *Alvarado*, the Washington Supreme Court considered whether a judge or a jury can determine whether a defendant's multiple current offenses and high offender score would result in a "clearly too lenient" presumptive sentence. 164 Wn.2d at 563. Citing *Saltz*, the Court

agreed that, "while the fact of a misdemeanor history is an objective determination, the 'clearly too lenient' language calls for a subjective determination because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted for in calculating the sentencing range." *Id.* at 564-65. Therefore, as in *Saltz*, the Court concluded that the "clearly too lenient" finding must be made by a jury, and not by a judge. *Id.*

The present case is indistinguishable from *Saltz*. Mr. Otton received an exceptional sentence above the standard range based on the judicial finding that his unscored misdemeanor history resulted in a presumptive sentence that was clearly too lenient. CP 53. Although Mr. Otton did not contest the existence of his criminal history, he did not stipulate or waive his right to a jury determination that the presumptive sentence was clearly too lenient. Thus, RCW 9.94A.535(2)(b) is unconstitutional as applied to Mr. Otton, Finding of Fact 1(a) and Conclusion of Law 1 cannot stand, and the exceptional sentence above the standard range based on the judicial determination of "clearly too lenient" must be reversed.

4. Insufficient evidence was presented to support the exceptional sentence above the standard range based on "particular vulnerability."

a. An exceptional sentence based on the aggravating factor of "particular vulnerability" requires proof beyond a reasonable doubt the victim had a particular vulnerability and that vulnerability was a substantial factor in the commission of the offense.

RCW 9.94A.535(3)(b) authorizes a court to impose an exceptional sentence above the standard range if the trier of fact finds beyond a reasonable doubt "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." It is not enough that the victim was vulnerable. The Legislature enacted the phrase "particularly vulnerable," not "vulnerable" only. Statutes are interpreted to give effect to all verbiage with no language rendered meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Accordingly, in the context of an exceptional sentence based on "particularly vulnerable," court have ruled the State must prove "(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, 291-92, 143 P.3d 795 (2006) (emphasis in original); *accord State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001) ("In order for the victim's vulnerability to justify an exceptional sentence,

the defendant must know of the particular vulnerability and the vulnerability must be a substantial factor in the commission of the crime.").

A challenge to the reasons supplied by the sentencing court to justify an exceptional sentence is reviewed under the "clearly erroneous" standard. RCW 9.94A.575(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

b. The court's finding that Ms. Dugan's disability was a substantial factor in the offense was clearly erroneous.

There was no nexus between the alleged assault of Ms. Dugan and her disability. Mr. Otton and Ms. Dugan were living together, Ms. Dugan testified that an argument started when she was asleep in bed, Mr. Otton came home intoxicated and fell asleep on the bedroom floor, and she kicked him when she got out of bed. RP 129-30. Her testimony was corroborated by Mr. Otton's statement to the investigating officer that the argument started when Ms. Dugan kicked him and caused a bloody lip. RP 227. Thus, the alleged assault occurred during a drunken domestic dispute, and not because Ms. Dugan was disabled or particularly vulnerable.

In *State v. Barnett*, the defendant and the 17-year-old victim dated for approximately two months when victim attempted to end the

relationship. 104 Wn. App. 191, 195, 16 P.3d 74 (2001), *abrogated on other grounds in State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). The victim obtained a restraining order and when the order was served on the defendant, he broke into the victim's house, raped her at knife point, broke various items in the house, chased her to a nearby store, and attempted to prevent her from getting into a car. 104 Wn. App. at 195. The defendant was convicted of unlawful imprisonment, burglary, rape, malicious mischief, kidnapping, assault, and violation of a court order, and the court imposed an exceptional sentence based, *inter alia*, on victim vulnerability. *Id.* at 195-96. On appeal, the court reversed the finding of vulnerability on the grounds the crimes were due to the relationship, and not any perceived vulnerability of the victim.

> Ms. M was home alone. But that was not the reason he chose her as a victim. *See State v. Ross*, 71 Wash.App. 556, 565-66, 861 P.2d 473, 883 P.2d 329 (1993) (defendant selected victims who were alone in offices because they were vulnerable). Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime.

Id. at 205.

Similarly, here, the incident arose because of an argument between romantic partners, and not because Ms. Dugan was disabled. It may be noted, Mr. Otton has a history of assaultive behavior against domestic partners, including an incident involving Ms. Dugan before she become

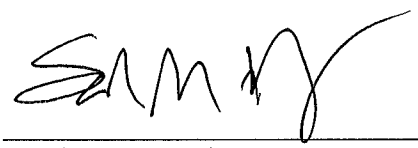
disabled. RP 162-63, 168; CP 5. In the absence of evidence that Ms. Dugan's "particular" disability was a "substantial factor" in the incident, Finding of Fact 1(b) and Conclusion of Law 1 cannot stand, the trial court's reason for the aggravating factor was clearly erroneous and the exceptional sentence must be reversed.

E. CONCLUSION

For the foregoing reasons, Mr. Otton requests this court reverse his convictions for assault and harassment. Alternatively, Mr. Otton requests this court reverse his exceptional sentence and remand for resentencing within the standard range.

DATED this 28th day of February 2014.

Respectfully submitted,



Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, RESPONDENT, v. NAKIA OTTON, APPELLANT.	)))))))))	NO. 45296-1-II

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