

NO. 63213-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TALIFERRO WILLIAMS,

Appellant.

2018 MAR 23 PM 2:48
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the State presented sufficient evidence supporting appellant Taliferro Williams's third-degree assault conviction.

2. Whether the trial court properly instructed the jury on the rapid recidivism aggravating circumstance.

3. Whether the State presented sufficient evidence supporting the rapid recidivism aggravating circumstance.

4. Whether Williams waived any claim that the trial court's findings of fact concerning his exceptional sentence violated his constitutional right to a jury trial when he did not object to them.

5. Whether Williams has failed to show that the trial court's findings of fact concerning his exceptional sentence violated his constitutional right to a jury trial given that the findings did not increase the relevant statutory maximum for the crime.

6. Whether Williams's claim that the trial court did not provide a presumption of innocence instruction at the aggravating factor phase of the trial is factually incorrect given that the trial court provided the jury with a presumption of innocence instruction before they deliberated on the aggravating circumstance.

7. Whether Williams has waived his claim that the trial court erred by not providing a second instruction on the presumption of innocence when he never proposed such an instruction.

8. Whether Williams has failed to show that the trial court was required to provide a second instruction on the presumption of innocence.

9. Whether Williams can challenge the rapid recidivism aggravating circumstances as unconstitutionally vague given that the Washington Supreme Court has held that aggravating circumstances are not subject to vagueness challenges.

10. Whether Williams has failed to establish that the rapid recidivism aggravating circumstance is unconstitutionally vague as applied to his conduct.

11. Whether the trial court properly denied Williams's motion for a mistrial based upon comments made to some jurors by individuals outside the courtroom.

B. STATEMENT OF THE CASE

On September 13, 2008 at 8:58 a.m., Taliferro Williams was released from the King County Jail. RP(1/16/09) 9.

Later that night, Seattle Police Department Officers James Shearer and Kerry Zieger were working on a bicycle squad in downtown Seattle. RP(1/14/09) 6-8; RP(1/15/09) 23-24. The officers were in uniform; their clothing, helmets and bikes were all marked with the word "police" in reflective lettering. RP(1/14/09) 7.

The officers heard Williams yell, "Hey asshole, I can kick your ass, fuck you." RP(1/14/09) 17; RP(1/15/09) 24. He repeated, "Yeah, I can kick your ass." RP(1/14/09) 17. It was unclear whether these comments were directed toward the officers or two males who were in front of Williams. RP(1/14/09) 17.

The officers decided to contact Williams. RP(1/14/09) 18-19. As they approached, Williams looked back at them. RP(1/14/09) 20; RP(1/15/09) 38-39, 53. Officer Zieger made the initial contact, placed his hand on Williams's wrist and asked him to drop a bottle that he had in his hand. RP(1/15/09) 31, 52. Officer Shearer approached Williams from the other side. RP(1/15/09) 31-32. Williams dropped the bottle and, with his other hand, stabbed Officer Shearer in the leg with a hemostat, a type of medical scissor. RP(1/15/09) 7, 34; RP(1/14/09) 19-21. He repeated the stabbing motion two more times, causing three cuts, each about

two to three inches long, to the officer's leg. RP(1/14/09) 23;
RP(1/15/09) 58, 59.

The police arrested Williams and pried the hemostat out of his hand. RP(1/15/09) 34-36, 49-50. While he was being placed in handcuffs, Williams stated, "You fucking punks. Take these handcuffs off and I will kick your ass." RP(1/15/09) 44. Williams appeared intoxicated. RP(1/15/09) 41-42.

The State charged Williams with one count of third degree assault and alleged an exceptional sentence aggravating circumstance: that Williams committed the offense shortly after being released from incarceration. CP 1.

The trial began on January 13, 2009 and was bifurcated into a guilt phase and an "aggravating factor" phase. On January 15, 2009, the jury found Williams guilty as charged. CP 25. After the jury heard additional testimony on the aggravating circumstance, Williams noted an objection to the aggravating circumstance on the grounds that it was vague. RP(1/16/09) 4-13. The jury found that Williams had committed the offense shortly after being released from incarceration. CP 26; RP(1/16/09) 2-12.

On March 13, 2009, the court imposed an exceptional sentence of 36 months. CP 47. This appeal follows.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS WILLIAMS'S THIRD-DEGREE ASSAULT CONVICTION.

Williams raises only one issue concerning his third-degree assault conviction; he claims that the State presented insufficient evidence that he *intentionally* cut Officer Shearer. This claim is without merit.

In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State. “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In order to find Williams guilty of third-degree assault, the jury had to find that Williams assaulted Officer Shearer who was performing his official duties at the time of the assault. CP 20.

A jury instruction defined assault as "an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person." CP 21.

The testimony at trial was sufficient to establish that Williams *intentionally* assaulted Officer Shearer. The testimony established that, at the outset, Williams was acting in a belligerent and threatening manner. RP(1/14/09) 17; RP(1/15/09) 24. Williams saw the officers as they approached. RP(1/14/09) 20; RP(1/15/09) 38-39, 53. He then *repeatedly* stabbed the officer's leg with the hemostat and caused three cuts. RP(1/14/09) 19-23; RP(1/15/09) 7, 34, 58, 59. Williams did not express any remorse or suggest that the cutting was accidental; in fact, the officers had to pry the hemostat out of his hand. RP(1/15/09) 34-36, 49-50. As he was arrested, he called the police "fucking punks" and threatened to "kick [the officers'] ass." RP(1/15/09) 44. Based upon this evidence, a rational trier of fact could have found that Williams intentionally assaulted Officer Shearer.

2. THE TRIAL COURT PROPERLY DEFINED THE AGGRAVATING CIRCUMSTANCE.

For the first time on appeal, Williams claims that the trial court erred in defining the rapid recidivism aggravating circumstance. Although the instruction mirrored the statutory language for the aggravating circumstance, Williams claims that the jury was also required to find several additional implied "elements." An examination of the relevant statute and the legislative history establish that this claim lacks merit.

a. The Plain Wording Of The Statute Does Not Support Implying Additional "Elements."

In determining the meaning of a criminal statute, the court first looks to the plain language of the statute. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). If the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone, and the court does not look beyond the language or consider the legislative history. C.J.C. v. Corporation of Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).

Here, the plain language of the statute is clear and unambiguous. RCW 9.94A.535(3)(t) defines the aggravating

circumstance as "[t]he defendant committed the current offense shortly after being released from incarceration." The court's instruction used the statutory language and asked, "Did the defendant commit the crime of assault third degree shortly after being released from incarceration?" CP 26.

Williams seeks to add several additional "elements" to this aggravating circumstance, not included in the statute. He claims that the jury was required to find "a) that the prior offense bore some similarity to the current offense; b) that the recidivism demonstrated a heightened threat or culpability; and c) that the recidivism demonstrated greater than usual disregard for the law." Appellant's Opening Brief at 21. These additional "elements" are not even hinted at by the plain and unambiguous language of the statute. Given that the legislature did not include these concepts, it is unnecessary for the court to look beyond the language and consider the legislative history. Nonetheless, as described below, that history does not support Williams's interpretation.

b. The Legislative History And Relevant Caselaw Do Not Support Implying Additional "Elements."

Williams notes that when the legislature added the rapid recidivism aggravating circumstance in 2005, it intended to codify existing common law aggravating circumstances. He claims that the caselaw governing the rapid recidivism aggravator required a finding of the additional "elements" that he proposes. The fundamental flaw with his argument is that, at the time that the legislature codified this aggravating circumstance, there was only one published case discussing it, and that opinion did not clearly require the factual findings that Williams claims are required.

Prior to 2005, the Sentencing Reform Act ("SRA") set forth an illustrative, nonexclusive list of aggravating circumstances that the trial court could consider in imposing an exceptional sentence. Former RCW 9.94A.390. A trial court was free to consider non-statutory aggravating circumstances. State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). On appeal, the appellate court then examined whether the reasons justified departure from the standard range as a matter of law. State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996). In 2005, the legislature codified numerous common law aggravating

circumstances, including rapid recidivism, in response to the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), holding that a defendant has a Sixth Amendment right to a jury finding of an aggravating circumstance. See Laws of 2005, ch. 68, § 1.

When the legislature added the rapid recidivism aggravating circumstance in 2005, only one published case addressed it. In State v. Butler, 75 Wn. App. 47, 876 P.2d 481 (1994), the trial court imposed an exceptional sentence based upon the fact that Butler had committed a robbery and an attempted rape within 12 hours of his release from prison. The court found that "[t]he crimes occurred with [sic] 12 hours of the defendant's release from DOC" and concluded that "[t]he defendant is particularly culpable by virtue of the rapidity with which he reoffended; prior DOC commitment was inadequate deterrence to violent crime." Id. at 50.

On appeal, Butler argued that consideration of his recidivism was improper because "the fact that a defendant reoffends merely establishes the existence of prior crimes, which is already part of the offender score component of the standard range." Id. at 54. This Court rejected this argument and held that rapid recidivism

was a valid aggravating circumstance as a matter of law, explaining:

The trial court's findings here are distinguishable from mere criminal history, however. In considering Butler's *rapid* recidivism, the trial court focused on the especially short time period between prior incarceration and reoffense, a factor not contemplated in setting the standard range. As explained in George, an exceptional sentence is justified if the circumstances of the crime indicate a greater disregard for the law than otherwise would be the case. 67 Wn. App. at 224, 834 P.2d 664. Here, Butler's immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense.

Id. The court clearly endorsed and defined the aggravating circumstance:

Thus, we hold that the commission of a crime shortly after release from incarceration on another offense may properly be used to distinguish that crime from others in the same category. Hence, under circumstances such as those in the present case, rapid recidivism constitutes a sufficiently substantial and compelling reason to justify the imposition of an exceptional sentence.

Id. (emphasis added).

The legislature later added the rapid recidivism aggravating circumstance to the SRA, using language straight from Butler: "The defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.535(3)(t).

Citing language from the Butler court's discussion of why rapid recidivism is a valid aggravating circumstance, Williams argues that a factual finding of "disdain for the law" is required. The flaw with this argument is that the court's discussion of the issue was in response to Butler's claim that, as a matter of law, rapid recidivism was not an appropriate aggravating circumstance. For the policy reasons discussed, the court concluded that it was. The court did not state that any additional factual findings were required, and proceeded to hold that "the commission of a crime shortly after release from incarceration on another offense may properly be used to distinguish that crime from others in the same category." Butler, 75 Wn. App. at 50. It is clear that the legislature did not interpret the Butler decision as requiring any further factual findings.

As additional support for his argument that the court should imply additional "elements," Williams cites to State v. Hughes, 154 Wn.2d 118, 141-42, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) and State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007). However, Hughes and Saltz are irrelevant in discerning the legislature's intent because both decisions were issued *after* the legislature added the rapid

recidivism aggravating circumstance to the SRA.¹ The only decision that the legislature intended to codify was Butler. In any event, neither Hughes nor Saltz supports ignoring the plain language of the statute and adopting Williams's interpretation.

With respect to Hughes, the sentencing occurred before Blakely, and at issue on appeal was whether the trial court's findings of fact supporting the rapid recidivism aggravating circumstance violated the defendant's Sixth Amendment jury trial right. The trial court's findings encompassed many facts, including that the defendant showed a lack of remorse and that he demonstrated a flagrant disregard for the law. 154 Wn.2d at 141. The Supreme Court held that these findings violated Blakely because they went beyond the existence of prior convictions. Id. at 141-42. The Hughes court did not purport to precisely define what was required for the rapid recidivism aggravating circumstance.

In Saltz, the defendant stipulated to the rapid recidivism aggravating circumstance, but then challenged his exceptional

¹ The Senate passed the amendments to the SRA, which added the rapid recidivism aggravating circumstance, on March 15, 2005. Senate Bill Report, SB 5477 (2005). On April 12, 2005, the House passed the law as amended, and on April 14, 2005, the Senate concurred in the amendments. Id. The Hughes opinion was issued that same day, April 14, 2005. Hughes, 154 Wn.2d at 118. The Saltz decision was issued on March 15, 2007. 137 Wn. App. at 576.

sentence on appeal. Saltz stipulated to his prior conviction release date, the date of the commission of his new crime, and that the new crime was committed "shortly after being released from incarceration." Id. at 584. On appeal, Saltz did not dispute the sufficiency of the stipulation as a factual basis for the exceptional sentence, but contended that the reasons stated by the sentencing court did not support an exceptional sentence. The Court of Appeals held that, as a matter of law, the rapid recidivism justified an exceptional sentence, noting that it "shows a disdain for the law...." Id. at 585. Given that the defendant in Saltz did not stipulate to the factual findings that Williams argues are necessary, Saltz cannot be read as requiring any additional factual findings beyond what is set forth in the statute.

Finally, Hughes analogizes this case to State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), where this Court held that the trial court's instructions failed to properly set forth the elements of two aggravating circumstances. Gordon is easily distinguishable. Both statutory aggravating circumstances at issue in the case, deliberate cruelty and particularly vulnerable victim, were included in the SRA from its inception, and long-standing caselaw had further defined them. Id. at 530. Here, as noted

above, the one published decision on the rapid recidivism aggravating circumstance did not require the additional elements claimed by Williams. This Court should reject Williams's challenge to the jury instruction defining the rapid recidivism aggravating circumstance.

3. SUFFICIENT EVIDENCE SUPPORTED THE RAPID RECIDIVISM AGGRAVATING CIRCUMSTANCE.

Williams claims that the evidence was insufficient to support the rapid recidivism aggravating circumstance, and asks the court to dismiss the aggravating circumstance with prejudice. This argument is premised on the assumptions that (1) the State was required to establish numerous implied "elements" and (2) based upon the evidence at trial, a rational trier of fact could not have found these "elements" beyond a reasonable doubt. Neither assumption is accurate.

First, as argued above, Williams's claim that the legislature intended that the jury find numerous additional "elements" is without merit. Second, even if this Court agrees with Williams concerning the additional implied "elements," a rational trier of fact could easily have found them. The evidence established that

Williams intentionally assaulted a police officer on the same day he was released from jail. Rather than express remorse, Williams continued to threaten the police after he was arrested. The record also reveals that Williams had been released for committing the same crime: third-degree assault. CP 3, 42, 50. Based upon this evidence, a rational trier of fact could have found that Williams demonstrated a heightened threat or culpability, and that his recidivism demonstrated greater than usual disregard for the law.

There was sufficient evidence supporting the aggravating circumstance, even considering Williams's additional "elements."

4. THE TRIAL COURT DID NOT VIOLATE WILLIAMS'S RIGHT TO A JURY TRIAL.

For the first time on appeal, Williams claims that the trial court violated his right to a jury trial by entering certain findings of fact and conclusions of law. Because Williams did not object to entry of these findings, this Court should hold that Williams has waived this claim. Even if the claim is not waived, the trial court's findings did not violate Williams's constitutional right to a jury trial.

a. Relevant Facts

Prior to imposing the sentence, the trial judge stated that, "It is significant to me that the jury found [the rapid recidivism aggravating circumstance]." RP(3/13/09) 13. When discussing Williams's recidivism, the court commented, "You don't get much faster than this." RP(3/13/09) 15. The court then imposed an exceptional sentence of 36 months. RP(3/13/09) 20.

The prosecutor prepared and the court signed findings of fact and conclusions of law. CP 51-52. These provided:

A. FINDINGS OF FACT

The defendant was previously convicted of multiple felony assaults in both Washington State and Alaska. His last assault third conviction was reduced from an original charge of assault second degree.

He was in custody in the King County Jail within 24 hours of when this offense occurred.

He assaulted a police officer without provocation in this incident.

He used a weapon to do so.

The court incorporates all of its oral rulings into this document as well.

B. CONCLUSIONS OF LAW -- SUBSTANTIAL AND COMPELLING REASONS FOR IMPOSING EXCEPTIONAL SENTENCE

1. The defendant committed this assault within a day of release from jail on his last incarceration. This qualifies as rapid recidivism.
2. He used a weapon to commit this assault.
3. He committed this assault without provocation.
4. The defendant was previously convicted of assault third degree in 2001 in Alaska, 2003 in Alaska, 2007 in King County, and was sentenced on 9/28/07 on his latest assault third degree conviction. He was just released on that conviction when he committed this offense on 9/14/2008.

CP 42-43. These findings of fact and conclusions of law were attached to the judgment and sentence, but they were not discussed on the record. While Williams argued against the imposition of an exceptional sentence, nothing in the record indicates that Williams made any specific objections to the individual findings.²

² The findings are erroneously dated March 7, 2009. CP 43. The sentencing hearing occurred on March 13, 2009, and the findings were obviously prepared after sentence was imposed, given that they accurately include the length of the exceptional sentence imposed. CP 42.

b. Williams Has Waived Any Challenge To The Findings.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id. Williams does not address this standard nor can he satisfy it.

Williams claims that the court's various written findings of fact violated his constitutional right to a jury trial. They did not. Under the Sixth Amendment, findings of fact that increase a defendant's punishment beyond the relevant statutory maximum sentence for a crime must be admitted by the defendant or found by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 303. The "statutory maximum" is the "maximum sentence a judge may

impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Id.

Here, after the jury found the rapid recidivism aggravating circumstance, Williams's relevant statutory maximum was the five-year statutory maximum of third-degree assault, a Class C felony, set forth in RCW 9A.20.021. Prior to the court's imposition of sentence, Williams acknowledged that the court had the discretion to impose up to 60 months of confinement. RP(3/13/09) 8-9. The court's additional factual findings had no effect on Williams's relevant statutory maximum.

While Williams complains that the trial court's written findings were not found by the jury, he cites no authority for the proposition that a court's factual findings violate a defendant's constitutional right to a jury trial when the findings do not have the legal effect of increasing the relevant statutory maximum. The Arizona Supreme Court has explained:

The Supreme Court's recent Sixth Amendment jurisprudence... leads inexorably to the conclusion that the Sixth Amendment does not remove from a trial judge the traditional sentencing discretion afforded the judge, so long as the judge exercises that discretion within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by a defendant. Once a jury finds the facts legally essential to expose a defendant to a

statutory sentencing range, the sentencing judge may consider additional factors in determining what sentence to impose, so long as the sentence falls within the established range.

State v. Martinez, 210 Ariz. 578, 583, 115 P.3d 618 (2005).

Williams has not shown how this asserted error qualifies as a *constitutional* error with practical and identifiable consequences in the case. Accordingly, the Court should hold that the claim is waived.

c. The Trial Court's Additional Findings Did Not Violate Williams's Constitutional Rights.

Even if Williams has not waived the issue, this Court should hold that he has failed to establish a constitutional violation. As discussed above, Williams's constitutional rights are not implicated because the challenged findings did not have the legal effect of increasing the statutory maximum punishment that he faced. Instead, these factual findings related to the circumstances of the crime and the defendant's criminal history, typical facts that a trial judge considers when deciding what length of sentence to impose. Williams's constitutional challenge is without merit.

5. THE TRIAL COURT WAS NOT REQUIRED TO PROVIDE A SECOND INSTRUCTION ON THE PRESUMPTION OF INNOCENCE.

For the first time on appeal, Williams claims that the trial court erred at the “aggravating factor” phase of the trial by not re-instructing the jury on the presumption of innocence. As a factual matter, this claim is incorrect. The court expressly instructed the jury that their instructions from the earlier phase of the trial, which included the presumption of innocence instruction, continued to apply during the “aggravating factor” phase of the trial. Moreover, this claim is not properly before this Court because it is not a manifest error affecting his constitutional rights and Williams did not object below. Finally, reversal is not warranted because the underlying purposes of the presumption of innocence instruction were served by the court’s instructions to the jury.

a. Relevant Facts

The trial court instructed the jury as to the presumption of innocence during the guilt phase of the trial. This instruction provided in part:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 16. The next day, during the trial on the aggravating circumstance, the court provided the jury with two supplemental instructions. CP 27-30. Williams did not request any additional instructions. RP(1/16/09) 2-6. The first supplemental instruction stated:

All jury instructions read to you previously apply when you are making the determination of special verdict just as they did when you were making the determination of verdict in this case.

CP 28. When the jury deliberated, they were given the original jury instructions and the supplemental instructions. RP(1/16/09) 5.

- b. The Court Provided The Jury With The Presumption Of Innocence Instruction At The Second Phase Of The Trial.

At the outset, this Court can dispose of Williams's claim as factually inaccurate. The record makes clear that, before deliberating on the aggravating circumstance, the trial court provided the jury with two supplemental instructions and the original instructions, including the presumption of innocence instruction. The court further instructed that the previous instructions continued to apply at the "aggravating factor" phase of the case. The underlying premise of Williams's claim is incorrect.

Williams acknowledges that the court instructed the jury that the original instructions continued to apply, but speculates that the jurors would have disregarded these instructions because there was duplication in the two sets of instructions, and that the jurors would have assumed any omissions in the second set of instructions were intentional. This argument does not withstand scrutiny. The second set of jury instructions consisted of only *two* instructions: an introductory instruction and an instruction defining the aggravating circumstance. There was no duplication of instructions. Moreover, the jury was expressly told that the original instructions continued to apply, and they are presumed to have followed these instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). This Court should hold that Williams's claim concerning the presumption of innocence is factually unfounded.

- c. Because Williams Did Not Request A Second Presumption Of Innocence Instruction, He Failed To Preserve This Issue For Review.

As noted above, as a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); O'Hara, 167 Wn.2d at 97-98. Williams did not propose a second presumption of

innocence instruction and has not established that the failure to give a second instruction constitutes a manifest error affecting his constitutional rights.

The purposes of a presumption of innocence instruction are to emphasize to the jury that the State bears the burden of proof beyond a reasonable doubt and that it must arrive at its conclusion solely from the evidence advanced at trial. United States v. Velez-Vasquez, 116 F.3d 58, 61 (2nd Cir. 1997); United States v. Payne, 944 F.2d 1458, 1465-66 (9th Cir. 1991). The United States Supreme Court has described the presumption of innocence instruction as “an inaccurate, shorthand description” of these rights. Taylor v. Kentucky, 436 U.S. 478, 483 n.12, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The Court has noted that “use of the particular phrase ‘presumption of innocence’-or any other form of words-may not be constitutionally mandated....” 436 U.S. at 485.

The Court has explained:

The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478, 484, n. 12, 98 S.Ct. 1930, 1934, n. 12, 56 L.Ed.2d 468 (1978). *But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense.* Kentucky v. Whorton, 441 U.S. 786,

789, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979) (*per curiam*). An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a “genuine danger” that the jury will convict based on something other than the State’s lawful evidence, proved beyond a reasonable doubt. *Ibid.* (quoting *Taylor, supra*, 436 U.S., at 488, 98 S.Ct., at 1936).

Delo v. Lashley, 507 U.S. 272, 278, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993) (emphasis added); *see also Kentucky v. Whorton*, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (“the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution”).

Under the facts of this case, the failure to include a second presumption of innocence instruction in the supplemental instructions was not a manifest error affecting a constitutional right. The totality of the circumstances does not establish a “genuine danger” that, absent a second presumption of innocence instruction, the jury would base its decision on the aggravating circumstances on something other than the evidence, proved beyond a reasonable doubt. *Delo*, 507 U.S. at 278. The court instructed the jury that the previous instructions, which included the presumption of innocence instruction, continued to apply at the “aggravating factor” phase of the trial. CP 28. The court further

reminded the jury that the burden of proof for the aggravating circumstance was proof beyond a reasonable doubt. CP 30.

Moreover, even had the trial court failed to provide the original presumption of innocence instruction to the jury at the "aggravating factor" phase of the trial, Williams would be barred from raising the issue for the first time on appeal. The United States Supreme Court has recognized that the "inaccurate, shorthand" presumption of innocence instruction is not required at the penalty phase of a criminal case. See Delo, 507 U.S. at 279.³ Most recently, in State v. Sao, No. 38164-8-II, 2010 WL 1857060 (Wash. Ct. App. 5/11/2010), Division II held that the appellant waived any claim that the trial court erred in failing to instruct the jury about the presumption of innocence during the penalty phase of the bifurcated trial. The court explained:

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." [Citations omitted]. Characterizing an issue as "constitutional" does not automatically mandate review of an issue a criminal defendant has failed to raise below. [Citations omitted]. On the

³ See also State v. Benn, 120 Wn.2d 631, 668, 845 P.2d 289 (1993) (holding that the presumption of innocence does not apply to the penalty phase of a criminal trial); United States v. Cheever, 423 F.Supp.2d 1181, 1195-96 (D.Kan. 2006) (observing that a presumption of innocence instruction at a penalty phase could confuse jurors, given that they already found the defendant guilty of the underlying charge).

contrary, Sao must show actual prejudice in order to establish that the claimed error is “manifest.”

...

The law in Washington is well settled that “[t]he presumption of innocence does not apply to the penalty phase in special sentencing proceedings.” State v. Benn, 120 Wn.2d 631, 668, 845 P.2d 289 (1993), cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). See also State v. Finch, 137 Wn.2d 792, 865, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). Because failure to instruct the jury about the presumption of innocence during the penalty phase was not error, Sao has demonstrated neither a constitutional nor a manifest error warranting our review.

2010 WL 1857060 at *5.

Because Williams has not shown that the failure to give a second presumption of innocence instruction at the “aggravating factor” phase of the trial constituted a manifest error affecting his constitutional rights, this Court should hold that his claim on this issue is not preserved on appeal.

d. Any Error Was Harmless.

Should this Court conclude that Williams has established that the failure to provide a second presumption of innocence instruction was a manifest error affecting his constitutional rights, it should nevertheless hold that any error was harmless.

Williams argues that the error should be deemed structural and not subject to harmless error analysis. However, the Washington Supreme Court has rejected the claim that an error in failing to instruct on the presumption of innocence is per se reversible error. State v. Liles, 100 Wn.2d 224, 228-29, 668 P.2d 581 (1983).⁴ Similarly, the federal courts have found that a trial court's failure to give a presumption of innocence instruction does not constitute plain error justifying reversal when the other instructions given thoroughly articulated the principles underlying the presumption instruction. Velez-Vasquez, 116 F.3d at 60-62; Payne, 944 F.2d at 1464-68; United States v. DeJohn, 638 F.2d 1048, 1056-59 (7th Cir. 1981).

⁴ Williams cites two Washington Supreme Court cases for the proposition that the failure to submit instructions on the presumption of innocence is structural error. Appellant's Opening Brief at 38. However, neither case involved only a missing presumption of innocence instruction. In State v. McHenry, 88 Wn.2d 211, 558 P.2d 188 (1977), the court not only failed to instruct on the presumption of innocence, but did not instruct on the burden of proof or the definition of reasonable doubt. The court focused on these two later omissions in reversing the conviction and held that "[t]he failure of the court to state clearly to the jury the definition of reasonable doubt and the concomitant necessity for the state to prove each element of the crime by that standard is far more than a simple procedural error, it is a grievous constitutional failure." 88 Wn.2d at 214. In State v. Cox, 94 Wn.2d 170, 171, 615 P.2d 465 (1980), the trial court failed to instruct the jury that the burden of proof in a criminal case is upon the State. The appellate court found the error harmless. 94 Wn.2d at 174-75. After Cox and McHenry, the Supreme Court recognized that an error concerning the presumption of innocence instruction alone did not merit automatic reversal. Liles, 100 Wn.2d at 228-29.

Any error was clearly harmless because the instructions given by the court fulfilled the purposes of the presumption of innocence instruction. The jury was instructed and reminded of the burden of proof at the “aggravating factor” phase. CP 30. The prosecutor accurately discussed the burden of proof during opening statement and closing arguments at the “aggravating factor” phase. RP(1/16/09) 7, 11-12. Moreover, the evidence was overwhelming that the aggravating circumstance was present -- the undisputed testimony established that Williams had been released from jail earlier that same day. RP(1/16/09) 9. This Court should conclude that any error in failing to include a second presumption of innocence instruction at the “aggravating factor” phase was harmless.

6. WILLIAMS HAS FAILED TO ESTABLISH THAT THE AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE.

Williams claims that the rapid recidivism aggravating circumstance is unconstitutionally vague under the Due Process Clause. Appellant's Opening Brief at 50-58. However, the Washington 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. This Court is bound by that decision, which Williams does not discuss.

Even if a vagueness challenge could be brought, Williams has failed to meet his burden of establishing unconstitutional vagueness. Because Williams's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him. Williams was on notice that the aggravating circumstance that he "committed the current offense shortly after being released from incarceration" could apply when he assaulted a police officer on the same day that he was released from jail.

a. The Aggravating Circumstance Is Not Subject To A Due Process Vagueness Challenge.

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 Washington Supreme Court has 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 461.⁵

Williams does not cite or discuss Baldwin. Instead, he acknowledges some earlier Court of Appeals decisions on the issue and argues that, in light of Blakely, aggravating circumstances are

⁵ The Washington Supreme Court is considering this issue in State v. Stubbs, 144 Wn. App. 644, 184 P.3d 660 (2008), rev. granted, 165 Wn.2d 1035 (2009). In that case, the defendant has challenged an aggravating circumstance as unconstitutionally vague. Stubbs was argued on March 9, 2010.

subject to vagueness challenges. However, a decision by the Washington Supreme Court is binding on this Court, and it is error not to follow directly controlling authority by the Supreme Court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009).

In any event, the Supreme Court's analysis in Baldwin remains valid after Blakely. The fact that a jury, rather than a judge, now makes the finding of whether an aggravating circumstance accompanied the commission of the crime does not establish that Baldwin is faulty. 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. The Supreme Court's analysis in Baldwin remains valid.

b. The Aggravating Circumstance Is Not Unconstitutionally Vague.

Even if Williams could challenge the aggravating circumstance for vagueness, his claim should 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 is vague if it either fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). 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. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The Supreme Court has recognized that some measure of vagueness is inherent in the use of language. Id.

Because Williams's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating

circumstances are unconstitutionally vague as applied to him. 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 statute at issue provides that the aggravating circumstance exists if "[t]he defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.535(3)(t). Williams claims that the terms "shortly after" and "released from incarceration" are unconstitutionally vague. However, it is readily apparent that the aggravating circumstance is not unconstitutionally vague when considered in the context of Williams's conduct.

With respect to the term "shortly after," Williams assaulted the police officer on the same day that he was released from jail. A person of ordinary intelligence would understand that a person who commits a new crime on the same day that he is released from jail has acted within the scope of this aggravating circumstance.

Williams claims that "released from incarceration" is vague because it is unclear whether the aggravator applies to someone released pending trial or upon acquittal. While Williams may question whether the aggravating circumstance *should* apply under such circumstances, the language in the statute is not vague as applied to his conduct. Here, Williams was released from jail after having completed his sentence for a third-degree assault conviction. CP 3. A person of ordinary intelligence would understand that a person who commits an assault on the same day that he is released from jail after serving a sentence on an assault conviction has acted within the scope of this aggravating circumstance.

7. THE TRIAL COURT PROPERLY DENIED WILLIAMS'S MOTION FOR A MISTRIAL.

Williams claims that the trial court erred by denying his motion for mistrial on the aggravating circumstance based upon some statements to jurors made by someone purporting to be Williams's relative. The trial court acted well within its discretion in denying the motion. The court had instructed the jury to disregard

extraneous matters, and there is no reason to believe that the jury did not follow the court's instructions.

a. Relevant Facts

After finding Williams guilty of third-degree assault, the jury returned the next day and heard brief testimony regarding the rapid recidivism aggravating circumstance. RP(1/16/09) 12. After the jury reported that they had reached a decision on the aggravating circumstance, the trial judge advised the parties that some jurors had reported to the bailiff that, as they were returning to court that morning, individuals outside the courtroom had made some comments. RP(1/16/09) 15-16. The reported comments were, "I am really mad" and "You put my son in jail." RP(1/16/09) 15-16.

After hearing this information, defense counsel, while expressing concern that this contact could influence the jury, stated that he did not have a motion to make. RP(1/16/09) 17-18. The prosecutor then suggested that after the verdict was taken, the court inquire of the jurors whether they had been able to be fair and impartial during this portion of the case. RP(1/16/09) 18. In response, defense counsel stated that, "I have no problem with that," but then asked the court to strike the jury panel and empanel

a new jury to decide the aggravating circumstance. RP(1/16/09) 18-19. The court denied this motion. Id.

After the jury's verdict was taken, the trial judge asked the jurors whether the contact with "individuals who may have some relationship to this case" affected "any juror's ability to be fair and impartial." RP(1/16/09) 22-23. No juror responded in the affirmative. RP(1/16/09) 23.

b. Williams Did Not Establish That A Mistrial Was Necessary In Order To Insure A Fair Trial.

In determining whether a trial court abused its discretion in denying a motion for mistrial, this Court will find abuse only if no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Id. In determining the effect of an irregular occurrence during trial, the court examines "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." Id.

and that the "gesture here could be viewed as a threat directed at [the witness], which was intended to deter her from testifying against Bourgeois." Id. at 409. However, the court concluded that a mistrial was not warranted. "We cannot say, however, that the misconduct was so significant that the defendant will have been treated unfairly unless granted a new trial." Id. The court observed that the trial judge had instructed the jury to consider only the testimony of the witnesses and the exhibits admitted into evidence, and concluded that "[w]e assume that the jury followed this instruction and therefore disregarded extraneous matters." Id.

Here, as in Bourgeois, the trial court had instructed the jury to disregard extraneous matters. The court instructed the jury that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, stipulations and exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." CP 10. Prior to deliberating on the special verdict, the court advised the jury that this and all of the earlier instructions applied. CP 28. This Court presumes that the jurors follow the court's instruction to disregard

inadmissible material. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

In addition, there is no reason to believe the comments made to some jurors would have affected their deliberation on the special verdict. The only question before the jury was whether the defendant had committed the crime "shortly after being released from incarceration." CP 26. The evidence was so overwhelming on this issue -- Williams had been released from jail earlier that same day -- that defense counsel did not present an opening statement or closing argument. RP(1/16/09) 7, 12. Under these circumstances, Williams has not shown that he was so prejudiced that nothing short of a new trial could ensure that he would receive a fair trial.

Williams argues that the behavior in this case was more prejudicial than that in Bourgeois because "there can be no doubt that the interfering spectators were associated with Mr. Williams." Appellant's Opening Brief at 67. Yet the gun gesture in Bourgeois was much more threatening than the comments in this case and was apparently performed by a spectator who was allied with the defendant. Similarly, the misbehaving spectator in Johnson clearly identified herself as the defendant's mother, yet the Supreme Court

did not hold that the outburst was so prejudicial as to require a mistrial. The trial court properly acted within its discretion in denying Williams's motion for a mistrial.

D. CONCLUSION

For all the foregoing reasons, Williams's conviction and sentence should be affirmed.

DATED this 19th day of May, 2010.

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 Vanessa Lee, 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. TALIFERRO WILLIAMS, Cause No. 63213-2-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.

U Brame
Name
Done in Seattle, Washington

5/20/10
Date