

No. 63303-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

QUINTIN DESHAUN RAINES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Quintin Raines was convicted of first degree burglary based on an underlying assault and received an exceptional sentence after the jury found two aggravating factors: that the victim was present in the building when the burglary was committed, and that Raines knew or should have known that the victim was particularly vulnerable. But the victim will be present any time a person assaults another during the course of a burglary. Because the victim's presence is a necessary component of the underlying crime, the court erred in relying on that factor to impose an exceptional sentence. Second, the statutory term "particularly vulnerable," used in the jury instructions, required the jury to engage in an imprecise comparative evaluation of the facts without any fixed standards of reference. The statute and the jury instructions are vague in violation of due process, and the court erred in relying on that aggravating factor. The exceptional sentence must be vacated.

B. ASSIGNMENTS OF ERROR

1. The court exceeded its statutory authority in imposing an exceptional sentence based on the aggravating factor that the victim was present in the building at the time of the burglary.

2. The statute and jury instruction permitting an exceptional sentence to be imposed based on the aggravating factor of particular victim vulnerability are vague in violation of due process.

3. The court erred in imposing an exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the victim's presence is a necessary component of the crime of first degree burglary based on an underlying assault, precluding the imposition of an exceptional sentence on that basis.

2. Whether RCW 9.94A.535(3)(b), permitting an exceptional sentence to be imposed where "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance," is vague in violation of due process.

3. Whether special verdict form A, asking, "Did the defendant know, or should the defendant have known, that the victim was particularly vulnerable or incapable of resistance," is vague in violation of due process. CP 51.

D. STATEMENT OF THE CASE

Quintin Raines was charged with one count of first degree burglary and one count of attempted robbery in the first degree, arising out of an incident that occurred on March 11, 2008. CP 62-

64. For the burglary charge, the State alleged two aggravating factors: (1) that "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance"; and (2) that "the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed." CP 63.

At the jury trial, 71-year-old Wilma Boyden testified that on March 11, 2008, she was home alone in her house in Coupeville, sick with the shingles. 3/10/09RP 29-30. At some point in the morning, the doorbell rang and she answered it. 3/10/09RP 30. When she opened the door a little bit, a man pushed his way into the house, put a nylon stocking over his head, and pointed what appeared to be a gun at her. 3/10/09RP 31-32, 34. The two walked into the hallway and the man said he needed money. 3/10/09RP 32. They went into the kitchen, where Ms. Boyden got her purse and started counting out money. 3/10/09RP 35. She handed him the money, but the man said he could not take it, having apparently changed his mind. 3/10/09RP 36. Ms. Boyden unplugged the telephone as the man asked. 3/10/09RP 37. The man then tucked the nylon stocking up into his cap, put the gun away, and left out the front door. 3/10/09RP 37.

Ms. Boyden recognized the man as Mr. Raines, someone she had hired some time earlier to detail her car. 3/10/09RP 54. Ms. Boyden had met Mr. Raines and his wife at a business exposition, where they were selling car detailing services. 3/10/09RP 55-58. Mr. Raines and his wife had come to her house, picked up her car and driven it away, and then returned it a few days later after performing the detailing services. 3/10/09RP 57-58.

Mr. Raines also testified at the trial and admitted committing the burglary and attempted robbery. 3/11/09RP 181. He explained he had been carrying a pellet gun and not a real gun and did not intend to hurt Ms. Boyden. 3/10/09RP 134; 3/11/09RP 182. He could not explain why he committed the crime, but admitted he was having financial problems and was going through a divorce at the time. 3/10/09RP 130; 3/11/09RP 180, 188. He also admitted he knew Ms. Boyden and that he was aware her husband was probably not at home that day. 3/11/09RP 192-93. He explained he did not take Ms. Boyden's money because he could not bring himself to go through with it. 3/11/09RP 183, 197.

Mr. Raines presented a defense of diminished capacity and an expert testified that he had post-traumatic stress disorder. 3/13/09RP 219-52. Defense counsel argued Mr. Raines's mental

disorder impaired his ability to form an intent to commit the crimes.
3/13/09RP 340-44.

The jury was instructed that if it found Mr. Raines guilty as charged of first degree burglary, it was to fill out two special verdict forms. CP 51-52. Special verdict form A asked, "Did the defendant know, or should the defendant have known, that the victim was particularly vulnerable or incapable of resistance?" CP 51. Special verdict form B asked, "Was the victim of the burglary present in the building or residence when the crime was committed?" CP 52.

The jury found Raines guilty as charged of both first degree burglary and attempted first degree robbery. CP 49-50. Also, the jury answered "yes" to both special verdict forms. CP 51-52.

At sentencing, the trial court concluded there were substantial and compelling reasons to impose an exceptional sentence upward for count 1.¹ CP 18. The court found the exceptional sentence was justified by the two aggravating factors found by the jury. CP 18. The standard sentence range for count 1 was 26-34 months. CP 10. The court imposed an exceptional sentence of 60 months for count 1, and a standard range sentence of 40.5 months for count 2. CP 13.

¹ A copy of the trial court's written findings of fact and conclusions of law for the exceptional sentence is attached as an appendix.

E. ARGUMENT

1. BECAUSE THE VICTIM'S PRESENCE IS A NECESSARY COMPONENT OF THE CRIME OF FIRST DEGREE BURGLARY BASED ON ASSAULT, THE COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE ON THAT BASIS

- a. The presence of the victim cannot justify an exceptional sentence for the crime of first degree burglary based on assault. It is settled law that “[a]n element of the charged offense may not be used to justify an exceptional sentence.” State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001). The rationale for this rule is that some factors are

inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type.

Id. (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (alterations in original)). Thus, a trial court may not base an enhanced sentence on factors the Legislature necessarily considered in setting the sentence range for the *type* of offense, although the court may consider other factors unique to the crime that establish the elements in the particular case. Chadderton, 119 Wn.2d at 395.

Similarly, "the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." State v. Owens, 95 Wn. App. 619, 624, 976 P.2d 656 (1999) (citation omitted). Under this prong of the analysis, "a 'typical' offense is defined by the elements of the charged crime." Id. The relevant question is whether the Legislature "contemplated" the asserted factor in setting the standard range for the crime, that is, whether the factor "fall[s] within the scope of the statutory definition of the crime." State v. Bourgeois, 72 Wn. App. 650, 662, 866 P.2d 43 (1994).

Appellate courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" fell within the scope of the statutory definition of the underlying offense. State v. Gore, 143 Wn.2d 288, 320, 21 P.3d 362 (2001), rev'd on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (planning and preparation used to commit rapes did not distinguish crimes from many other rapes and attempted rapes and thus did not justify exceptional sentence); Ferguson, 142 Wn.2d at 648 ("deliberate cruelty" finding inhered in jury's verdict for assault by intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); State v. Cardenas,

129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (injuries suffered by victim of vehicular assault were not particularly severe and therefore were of type envisioned by Legislature in setting standard range); State v. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in premeditation element of first degree murder and thus cannot justify exceptional sentence); State v. Armstrong, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on 10-month-old victim were injuries accounted for in offense of second degree assault and could not justify exceptional sentence); State v. Nordby, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986) (seriousness of injuries could not justify exceptional sentence for vehicular assault); Bourgeois, 72 Wn. App. at 662 (serious wounds inflicted on victims fell within scope of statutory definition of first degree assault); State v. Baker, 40 Wn. App. 845, 848-49, 700 P.2d 1198 (1985) (planning inhered in verdict for attempted first degree escape).

Here, the State prosecuted Raines for first degree burglary based on an underlying assault. CP 62-64 (information); CP 33, 36 (jury instructions). RCW 9A.52.020(b) provides:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in

the building or in immediate flight therefrom, the actor or another participant in the crime . . . assaults any person.

In accordance with the statute, the jury was instructed it could convict Raines if it found he entered or remained unlawfully in a building with an intent to commit a crime, and "[t]hat in so entering or while in the building or in immediate flight from the building the defendant assaulted a person." CP 36.

Although RCW 9.94A.535(3)(u) permits an exceptional sentence based on the aggravating factor that "[t]he current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed," the presence of the victim cannot justify an exceptional sentence where the crime is first degree burglary based on an underlying assault. Plainly, an assault cannot occur unless the victim is present, and therefore the victim's presence is a necessary component of the crime. In other words, the presence of the victim does not distinguish the crime from others in the same category.

The aggravating factor relied upon here reflects the view that a burglary occurring within the victim's presence is more egregious than the typical burglary. See State v. Smith, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993), overruled on other grounds by State v.

Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005). In Smith, the court affirmed an exceptional sentence based on that factor, explaining that "[c]onsideration of the victim's presence is an appropriate aggravating factor when meting out an exceptional sentence for burglary." Id. But in Smith, the defendant was prosecuted for the crime of *second* degree burglary, which does not require proof of the victim's presence. Id.; RCW 9A.52.030 ("A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling"). Where the crime is second degree burglary, the presence of the victim in the building is sufficiently substantial and compelling to distinguish the crime from others in the same category, as "the presence of victims makes it more likely that a serious injury might result from the commission of a burglary." Smith, 123 Wn.2d at 57.

But where the crime is first degree burglary based on assault, the same justification does not apply. The presence of victims, and the potential for serious injury, is a necessary component of the crime and has been accounted for by the Legislature in setting the higher standard range. Thus, the

presence of the victim could not justify the exceptional sentence imposed in this case.

b. The sentence must be reversed and remanded for imposition of a standard range sentence. Where an exceptional sentence is based on reasons insufficient to justify the sentence as a matter of law, the sentence must be reversed and remanded for resentencing within the standard range. Ferguson, 142 Wn.2d at 649; State v. Batista, 116 Wn.2d 777, 793, 808 P.2d 1141 (1991). Here, the court relied on two aggravating factors in imposing the exceptional sentence. As discussed above and more fully below, both factors were improper as a matter of law and therefore the sentence must be reversed and remanded for resentencing within the standard range.

Alternatively, if this Court determines only one of the aggravating factors is improper, remand for resentencing is the appropriate remedy. Remand for resentencing is necessary where a sentencing court places significant weight on an improper factor or where some factors are improper and the sentence significantly deviates from the standard range. Ferguson, 142 Wn.2d at 649 & 649 n.81 (citing State v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990)); Smith, 123 Wn.2d at 58. Under such circumstances,

remand is appropriate even if the trial court states in its written findings that that each of the aggravating factors relied upon is a substantial and compelling reason justifying an exceptional sentence. Smith, 123 Wn.2d at 58 n.8.

The court in this case imposed an exceptional sentence of 60 months, twice the standard range of 26-34 months, for the first degree burglary. CP 10, 13. Yet the first aggravating factor relied upon, that the victim was present during the burglary, was already accounted for in the standard range and was clearly improper. Although the jury found the victim was "particularly vulnerable," she was only 71 years old and not especially infirm, being sick at home with shingles. Further, Raines was convicted of another felony, attempted first degree robbery, which increased his standard range for the burglary, although Raines voluntarily withdrew from the robbery and no one was injured. Finally, Raines never denied his involvement in the crime. Given the facts of the case, the clearly erroneous aggravating factor relied upon, and the sentence Raines received, which significantly deviated from the standard range, this Court cannot be sure the trial court would have imposed the same sentence based only on the single factor of the victim's

vulnerability. Thus, even if this Court concludes only the first factor relied upon is improper, Raines is entitled to be resentenced.

2. THE STATUTE AND INSTRUCTION PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT THE VICTIM OF THE CURRENT OFFENSE WAS PARTICULARLY VULNERABLE OR INCAPABLE OF RESISTANCE" ARE VAGUE IN VIOLATION OF DUE PROCESS

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.

Although judges are expected to recognize what is truly "exceptional" and what is not, jurors are presumed only to follow the instructions they are given. Further, judges may draw upon their experience adjudicating similar cases to decide whether the facts before them are "typical," but jurors have no such basis for

comparison. Thus, statutory aggravating factors and jury instructions that require the jury to engage in an imprecise comparative analysis of the facts of a given case lack ascertainable standards of guilt and run the risk of being impermissibly vague.

Here, the jury was instructed to decide whether Raines "knew or should have known that the victim [of the burglary] was particularly vulnerable or incapable of resistance," which mirrors the language of the statute. CP 44; RCW 9.94A.535(3)(b). The jury was further instructed that "[a] victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of Burglary in the First Degree," and if the victim's vulnerability is "a substantial factor in the commission of the crime." CP 46. But the jury was not instructed as to the characteristics of a "typical" burglary victim, or as to what standards apply in deciding whether the victim was *particularly* vulnerable. An ordinary person could honestly believe that every victim who is assaulted during a burglary is "particularly vulnerable." Thus, the statute and the jury instructions do not provide ascertainable standards for determining guilt and are impermissibly vague.

a. The void-for-vagueness doctrine applies to statutes that authorize increased punishment based on factual findings by juries. Before Blakely¹, in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), the Washington Supreme Court held that "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." Baldwin, 150 Wn.2d at 458 (quoting State v. Jacobsen, 92 Wn. App. 958, 966, 965 P.2d 1140 (1999)). The court concluded that the due process² vagueness doctrine did not apply to statutory aggravating factors, reasoning, "before a state law can create a liberty interest, it must contain 'substantive predicates' to the exercise of discretion and 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" 150 Wn.2d at 460 (quoting In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). Relying on this premise, the court concluded that sentencing guidelines "do not define conduct . . . nor do they vary

¹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

² The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend 14; Const. art. 1, § 3.

the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[.]" and so found the void-for-vagueness doctrine "[has] no application in the context of sentencing guidelines." Baldwin, 150 Wn.2d at 459.

In light of Blakely and related cases, however, the opposite is true. In other words, if "laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot," Baldwin, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on factual findings by juries. The void-for-vagueness doctrine must be applied to Washington's statutory aggravators.

Indeed, after Blakely, this conclusion is inescapable. The United States Supreme Court has repeatedly made clear that the right to a jury determination of facts essential to punishment arises from statutory schemes, like Washington's, that constrain a judge's sentencing discretion by requiring it be based on particular findings of fact. Blakely, 542 U.S. at 304-05 & 305 n.8. This rule is closely tied to the other foundational premise of Blakely, Apprendi, and the many decisions applying Apprendi's rule: because they increase the maximum punishment to which an accused person would otherwise

be exposed, aggravating circumstances are elements. Blakely, 542 U.S. at 306-07; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). If a fact "increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). As such, aggravating factors unquestionably "proscribe or prescribe conduct," Baldwin, 150 Wn.2d at 458, and are therefore subject to the void-for-vagueness doctrine.

Citing Baldwin, Division Three has concluded that "the void for vagueness doctrine does not apply to a sentencing scheme." State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008), rev. granted, 165 Wn.2d 1035 (2009).³ But Stubbs does not take account of Apprendi, Blakely and related cases and therefore this Court should not follow it.

³ The Washington Supreme Court granted review in Stubbs, No. 81650-6, but has not yet scheduled oral argument.

b. The statute and instructions requiring the jury to decide if the defendant knew or should have known the victim "was particularly vulnerable or incapable of resistance" are vague in violation of due process. While judges may understand what "particularly vulnerable" means, the term is so imprecise that it carries no commonsense meaning that could consistently be applied by jurors. Although Raines's jury was instructed a victim is "particularly vulnerable" if he or she is "more vulnerable . . . than the typical victim," this definition added little clarity because it left the jury only to guess as to the characteristics of a "typical victim." Without further instruction, there is no way to ascertain how the jury determined the degree of vulnerability of a "typical victim" or what characteristics render a victim "particularly vulnerable."

A criminal statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," is unconstitutional. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

After California's determinate sentencing scheme was struck down in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2006), the California Supreme Court addressed

the problems with submitting factors typically decided by judges to juries:

[T]o the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to 'provid[e] criteria for the consideration of the trial judge.' . . . It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are 'framed more broadly than' criminal statutes and necessarily 'partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.' . . . Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether '[t]he victim was particularly vulnerable,' whether the crime 'involved . . . a taking or damage of great monetary value,' or whether the 'quantity of contraband' involved was 'large.'

People v. Sandoval, 41 Cal. 4th 825, 161 P.3d 1146, 1155-56

(2007) (emphasis in original).

In the Eighth Amendment context, vague aggravators such as the one at issue here have consistently been stricken. In Tuilaepa v. California, 512 U.S. 967, 974-75, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), the Court explained,

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Those concerns are mitigated when a factor does not require a yes or no answer to a specific question, but only points the sentencer to a subject matter.

The aggravating circumstance submitted to this jury asked for a "yes or no" answer to a question that required "an imprecise quantitative or comparative evaluation of the facts." Cf. Sandoval, 161 P.3d at 1156. As such, it created an "unacceptable risk of randomness," Tuilaepa, 512 U.S. at 974, in violation of due process. This Court should conclude RCW 9.94A.535(3)(b) is void for vagueness.

The standard for clarity in jury instructions is even higher than for statutes, because juries lack the interpretive tools employed by courts to understand confusing language. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). An instruction that sets forth language of a statute is proper only if the statute is applicable, reasonably clear, and not misleading. Bell v. State, 147

Wn.2d 166, 177, 52 P.3d 503 (2002). Jury instructions must make the applicable legal standard manifestly clear. LeFaber, 128 Wn.2d at 902.

Furthermore, now that juries find aggravating factors, we can no longer rely on a trial judge's knowledge of typical cases in determining whether a victim is *particularly* vulnerable relative to other victims of the crime. See State v. Cardenas, 129 Wn.2d 1, 10, 914 P.2d 57 (1996). Minnesota—whose sentencing scheme is similar to Washington's—has recognized this problem:

When trial judges relied on their collective experience or collegial knowledge of typical cases, a definition of 'particular cruelty' was unnecessary. . . . With sentencing juries, however, 'particular cruelty' is a relative term that requires a uniform meaning irrespective of the jurors' lay understanding of the term. The failure to define 'particular cruelty' raises a multitude of problems

State v. Weaver, 733 N.W.2d 793, 802-03 (Minn. 2007). In Weaver, the court held the instruction directing the jury to find "whether the victim . . . was treated with particular cruelty for which the defendant should be held responsible," failed to provide the jury with sufficient guidance. Id.

The United States Supreme Court has similarly noted:

To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever

that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Maynard v. Cartwright, 486 U.S. 356, 364, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (finding instruction unconstitutionally vague under Eighth Amendment in capital case). Likewise, to say that a person is "particularly vulnerable" merely suggests that the individual jurors should determine that the person is more than just "vulnerable," whatever that means. An ordinary person could honestly believe that every victim who is assaulted during the course of a burglary is "particularly vulnerable."

The special verdict form in Raines's case parroted the language of RCW 9.94A.535(3)(b), i.e., that the defendant "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." CP 44. But as with the terms "particular cruelty" and "especially heinous," the phrase "particularly vulnerable" is necessarily a relative term that calls for a uniform definition. Absent a precedential frame of reference, Raines's jury was not equipped to determine whether the victim was *particularly* vulnerable. Thus, the statute and the jury instructions were vague in violation of due process, and the court erred in relying upon that factor to impose an exceptional sentence.

c. The constitutional violation cannot be cured by constitutional harmless error analysis or de novo review. The Ninth Circuit has explained that when a sentence is based on an unconstitutionally vague aggravating circumstance, the state appellate court may affirm the sentence in three ways, only two of which are relevant here.⁴ Valerio v. Crawford, 306 F.3d 742, 756-57 (9th Cir. 2002), cert. denied sub nom., McDaniel v. Valerio, 538 U.S. 994 (2003).

First, the court may find the error harmless under Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Valerio, 306 F.3d at 756. Under this method, the sentence may be affirmed only if the court finds beyond a reasonable doubt the same result would have been obtained without the unconstitutional aggravating circumstance. Id. (citing Clemons v. Mississippi, 404 U.S. 738, 752-53, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). Here, the exceptional sentence was based on two aggravating factors. As discussed above, the first aggravating factor inhered in the jury verdict for the crime and was therefore invalid. Thus, elimination of the second factor, particular victim vulnerability, requires remand for a standard range sentence.

⁴ The third method, which permits an appellate court to cure a penalty-phase instructional error by "reweighing" aggravating and mitigating

With respect to the second method—de novo review of the evidence under a narrowed construction of the aggravator—the Court in Valerio found this violates the defendant's Sixth Amendment jury trial guarantee. 306 F.3d at 756-57. The court reasoned that, in performing such an analysis, "the state appellate court is not reviewing a lower court finding for correctness; it is, instead, acting as a primary factfinder." Valerio, 306 F.3d at 756-57. Thus, de novo review cannot be undertaken without violating the Sixth Amendment.

F. CONCLUSION

Because Raines's exceptional sentence was based on two improper aggravators, the exceptional sentence must be vacated and Raines resentenced within the standard range. Alternatively, if this Court upholds one of the aggravators, Raines is entitled to be resentenced.

Respectfully submitted this 28th day of August 2009.



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circumstances is relevant only in capital cases. See Valerio, 306 F.3d at 757.

APPENDIX

**Superior Court of Washington
County of Island**

State of Washington, Plaintiff,

No. 08-1-00053-3

vs.
QUINTIN DESHAUN RAINES,
Defendant.

**Findings of Fact and Conclusions of Law for
an Exceptional Sentence
(Appendix 2.4 Judgment and Sentence)
(Optional)
(FNFL)**

The court imposes upon the defendant an exceptional sentence [x] above [] within [] below the standard range based upon the following Findings of Fact and Conclusions of Law:

Findings of Fact

- I. The exceptional sentence is justified by the following aggravating circumstances:
 - (a) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance;
 - (b) Count I is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.
- The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

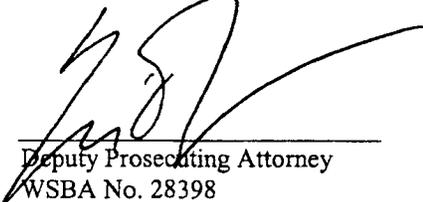
II. _____

Conclusions of Law

- I. There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

II. _____

Dated this 18th day of March, 2009.


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 Judge/Print Name: Vickie I. Churchfill

 Defendant
 Print Name: Quintin D. Raines

