

63929-3

63929-3

NO. 63929-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID LANGE,

Appellant.

REC'D
FEB 26 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by basing appellant's exceptional sentence on the jury's special verdict that the complainant's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime because the instructions addressing the aggravating factor did not make the legal concepts manifestly clear and the instructions were unconstitutionally vague as applied to the facts of appellant's case.¹

2. The trial court erred by imposing an exceptional sentence.

3. The trial court erred by failing to enter written findings of fact and conclusions of law in support of its exceptional sentence.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible constitutional error by failing to define the aggravating factor or to inform jurors of the common law prerequisites to finding the existence of the aggravating factor?

2. Were the trial court's instructions regarding the aggravating factor unconstitutionally vague when they merely parroted the language of the statute listing the various aggravating factors jurors must find beyond a reasonable doubt?

¹ Similar challenges to this aggravator were rejected in State v. Stubbs, however a petition for review in that case was granted. State v. Stubbs, 144 Wn. App. 644, 184 P.3d 660 (2008), review granted, 165 Wn.2d 1039 (2009).

3. Did the trial court violate RCW 9.94A.535 by failing to support its exceptional sentence with written findings of fact and conclusions of law?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged David Lange with one count of second-degree assault, alleging he recklessly inflicted substantial bodily harm on his former girlfriend Donna Oakley. CP 4. The State also alleged the aggravating factor that Oakley's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault. CP 4. The jury found Lange guilty and answered yes to the special verdict form on the aggravating factor. CP 9, 11. The court imposed an exceptional sentence of 15 months. CP 41.

2. Substantive Facts

Both Lange and his former girlfriend Donna Oakley are homeless and reside in the Auburn area. RP 194. After dating on and off and living together in an abandoned trailer for several months, the pair broke up and the trailer was towed away. RP 198. The evening of January 16, 2009, Lange ran into Oakley and her friend Cher in the park. RP 204-05. It was disputed whose idea it was, but the threesome returned to where Lange had a tarp as a makeshift shelter. RP 96-97, 206-07.

Lange testified the three planned to all have sex together, but as things progressed, Oakley grew jealous and knocked him off of her friend Cher. RP 206-07. Oakley claimed Lange initially said he wanted to talk to her about getting back together, but instead began having sex with Cher. RP 100. Cher denied there was any sex at all and testified she awoke to the sound of Lange and Oakley arguing. RP 159.

Lange testified that when Oakley knocked him off Cher, he thought she was playing. RP 208-09. When he did not stop what he was doing, he testified, Oakley tackled him and hit him in the ribs three or four times. RP 208-09. Then she pushed him, knocking him down and re-injuring his bad right knee. RP 209. When she came at him again, he grabbed her and slapped her several times on the chin to calm her down. RP 212, 219.

Oakley testified both she and Lange “got hostile.” RP 100. Then, she claimed, he grabbed her and hit her left cheek three times with a closed fist. RP 100, 104. She denied ever striking Lange at all. RP 104.

The next morning, Oakley’s friend called police because it became clear her face was badly injured. RP 105, 108. At Harborview Medical Center, it was determined Oakley’s face was fractured in four or five places consistent with blunt force trauma to the face. RP 183, 189-90. Surgery was required to insert a metal plate and seven screws into Oakley’s face. RP

186-87. Without the surgery, she would have suffered significant deformity and double vision. RP 187.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY RELYING ON THE AGGRAVATOR THAT THE INJURIES WERE MORE SERIOUS THAN THOSE TYPICALLY RESULTING FROM THIS OFFENSE BECAUSE THE VERDICT FORM AND INSTRUCTIONS ARE UNCONSTITUTIONALLY VAGUE.

The state must prove and a jury must find the existence of an aggravating factor beyond a reasonable doubt. State v. Suleiman, 158 Wn.2d 280, 288-289, 143 P.3d 795 (2006). A trial court may impose an exceptional sentence if it finds substantial and compelling reasons to support a departure from the standard range. RCW 9.94A.535. A sentencing court may rely on the jury's finding of an aggravating factor if it finds substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.537.

RCW 9.94A.210(4) governs appellate review of exceptional sentences and requires an appellate court to address three issues. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). First, the evidence in the record must support the reason for departure. The court's reasons are reviewed under the "clearly erroneous" standard. Second, the reason must justify a departure from the standard range. In other words, the reason must distinguish the crimes at issue from others in the same category. State v.

Law, 154 Wn.2d 85, 93-94, 110 P.3d 717 (2005). This review is de novo. Id. at 93. Third, the sentence cannot be clearly excessive. Sentence length is reviewed for an abuse of discretion. State v. Ferguson, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

The trial court in this case imposed an exceptional sentence based the aggravating factor outline in RCW 9.94A.535(3)(y), which states, “The victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” The jury was not instructed as to the legal definition of this aggravator at all. CP 12-36. It was merely instructed, if it found Lange guilty of second-degree assault, to answer the question in special verdict form C. CP 36. Special verdict form C read,

We, the jury return a special verdict by answering as follows:

Question: Did the injuries of Donna Oakley sustained during the commission of the crime of Assault in the second degree as charged substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree?

Answer: Yes

CP 11. The exceptional sentence should be reversed for two reasons. First, the verdict form and instructions do not make clear the legal standard that it is insufficient to find merely that the level of harm exceeded the *minimum* required for the crime. Second, the verdict form defining the aggravating factor was unconstitutionally vague.

a. The Verdict Form Setting Forth the Aggravator Failed to Make the Legal Concepts Clear.

In the past, when judges made the relevant factual findings in support of exceptional sentences, courts reasonably assumed the judge would understand the legal standards for finding an aggravating factor. But the days are now behind us when reviewing courts sought refuge in the experience and measured discretion of the trial courts. A good example of such reasoning can be found in State v. Solberg, 122 Wn.2d 688, 861 P.2d 460 (1993). The Solberg court reviewed the Court of Appeals reversal of an exceptional sentence based on former RCW 9.94.390(2)(d) (recodified as RCW 9.94A.535(3)(e)); Solberg, 122 Wn.2d at 702.

The Supreme Court observed a high degree of sophistication or planning may justify an exceptional sentence only if of a type not typically associated with the commission of the crimes at issue. Solberg, 122 Wn.2d at 707. The court held, “Trial courts, having more familiarity with day-to-day drug violations, are in the best position to identify drug violations which are more sophisticated than usual.” Solberg, 122 Wn.2d at 707.

Juries now determine whether crimes involve a high degree of sophistication and planning, or whether the injuries substantially exceed the level of bodily harm required to satisfy the elements of the offense. RCW 9.94A.535(3). Reviewing courts may therefore no longer rely on trial

judges' experience and familiarity with the parameters of an ordinary crime. As a result, the need for definitive jury instructions is of paramount importance. For this reason, a verdict form that merely restates the statutory language is insufficient. The standard for clarity in jury instructions is far higher than that for statutes because the jury lacks the tools of statutory construction. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996).

This has been recognized by the Minnesota courts, which is significant given our Legislature chose to pattern the Sentencing Reform Act (SRA) after Minnesota's structured sentencing scheme. In re Personal Restraint of Myers, 105 Wn.2d 257, 266, 714 P.2d 303 (1986). Minnesota decisions therefore offer especially persuasive authority for Washington Courts. State v. Nordby, 106 Wn.2d 514, 521 n.1, 723 P.2d 1117 (1986) (Utter, J. dissenting).

The Minnesota Court of Appeals recently held a trial court erred by failing to define the term "particular cruelty" in the jury instructions. State v. Weaver, 733 N.W.2d 793, 802-803 (2007). The court's rationale is illuminating and is especially pertinent here:

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 -803 (2007) (citation omitted)

The same can be said for the aggravating factor that the victim's injuries "substantially exceed the level of bodily harm necessary to satisfy the elements of the crime." RCW 9.94A.535(3(y)). This aggravator calls for a uniform definition. Supplemental clarifying instructions would bridge the gap between judicial and jury fact-finding. Absent a precedential frame of reference, Lange's jury was not equipped to determine whether Oakley's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault.

A fact may not be an aggravating factor unless it is substantially compelling enough to distinguish the particular crime from others in the same category. State v. Cardenas, 129 Wn.2d 1, 8-9, 914 P.2d 57 (1996). A fact does not meet that standard if it was necessarily considered in computing the presumptive range for the offense. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

To amount to an aggravating factor, conduct must not simply be greater than required in order to commit the minimum version of the charged crime. State v. Bourgeois, 72 Wn. App. 650, 652-53, 866 P.2d 43 (1994). Instead, it must be so much more egregious that it exceeds that which is typical for the average crime of the same category, distinguishing the crime significantly from others. Grewe, 117 Wn.2d at 218. Thus, in Cardenas,

although there were multiple severe injuries, an exceptional sentence could not be upheld on those grounds because such injuries were “often” the result of the crime and did not “distinguish the crime from the typical vehicular assault.” 129 Wn.2d at 9-10. As noted above, the jury does not have the expertise or experience to determine whether the injuries in this case were substantially beyond what is average for second-degree assault. The trial court’s failure to define the term warrants reversal of Lange’s exceptional sentence.

Lange anticipates the state will argue he may not challenge the court’s failure to define the aggravating factor because trial counsel did not object to the instructions. RP 252. Lange urges this Court to reject any such contention.

The general rule prohibits a challenge to a definitional instruction or the failure to define a term. See, e.g., State v. Scott, 110 Wn.2d 682, 691, 757 P.2d 492 (1988) (defendant who does not propose definitional instruction waives challenge to trial court’s failure to define particular term because constitution does not require meanings of particular instructional terms be defined). This rule, however, is not absolute.

“[A]n alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). Due process requires jury

instructions to define every element of the offense charged and failing to do so is error of constitutional magnitude. State v. Haberman, 105 Wn. App. 926, 935, 22 P.3d 264 (2001). An instruction that improperly defines an element may be raised for the first time on appeal. State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005). Aggravating circumstances are the functional elements of a greater offense that must be charged and proven beyond a reasonable doubt. State v. Goodman, 150 Wn. 2d 774, 785-786, 83 P.3d 410 (2004). An instruction that sets forth the 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).

The aggravator in this case must be treated as an element, despite the fact it need not appear in the to-convict instruction. In Lange's case, the verdict form, which mirrors the statutory language of RCW 9.94A.535(3)(y), runs afoul of the rule in Bell. The statute merely identifies the following as an aggravating factor: "The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y). Although the words themselves may be reasonably clear, their application to the facts of a given case is not. The constitutional right to have a jury determine the existence of aggravating factors would be a hollow right if courts are required to do no more than instruct jurors in the language of RCW 9.94A.535(3).

The trial court violated Lange's constitutional right to a jury trial by failing to provide meaningful guidance so jurors could properly apply the legal concepts necessary to determine whether the complainant's injuries substantially exceeded the level of bodily harm necessary for second-degree assault.

The trial court's error is not harmless. A constitutional error is harmless only if the state can show beyond a reasonable doubt any reasonable juror would reach the same result without the error. State v. Williams, 158 Wn.2d 904, 920, 148 P.3d 993 (2006). The state cannot meet its burden here. Lange respectfully requests this court reverse the trial court's exceptional sentence and remand for resentencing within the standard range.

b. The Verdict Form Addressing Particular Vulnerability Was Unconstitutionally Vague.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of our state constitution requires statutes give citizens fair warning of prohibited conduct and protect them from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not

provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). When a challenged provision does not involve First Amendment rights, it must be evaluated as applied. Id. at 182.

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, violates due process. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). The verdict form defining the aggravating factor violated due process vagueness prohibitions because the requirements that the jury find the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of second-degree assault, with no guidance from established case law, is unconstitutionally subjective.

Aggravating factors must be sufficiently clear that they provide real guidance to channel the jury's decision and, thus, genuinely narrow the class of defendants exposed to the most severe penalty. Adamson v. Ricketts, 865 F.2d 1011, 1030 (9th Cir. 1988). In this case, the prosecutor argued that a mere broken finger would be sufficient to find second-degree assault. RP 263. Therefore, under the prosecutor's argument, any injury more serious than a broken pinky merits an exceptional sentence. The jury was given no guidance as to how much more severe the injury must be in order to

“substantially” exceed the broken pinky. The aggravator is subject to arbitrary enforcement because the scope of conduct that may constitute second-degree assault under the “substantial bodily harm” prong is enormous. RCW 9A.04.110(4) (b) (“Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.”) Without proper guidance, most of those injuries could be construed as meriting an exceptional sentence. The class of defendants exposed to the exceptional sentence is virtually all of them.

Under current case law, defendants may not challenge aggravating factors on due process vagueness grounds. State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003); State v. Jacobson, 92 Wn. App. 958, 966, 965 P. 2d 1140 (1998), review denied, 137 Wn.2d 1033 (1999). The rationale for this rule is the SRA’s limitation on judicial discretion does not implicate due process vagueness concerns because there is no constitutional right to sentencing guidelines and because the guidelines do not set penalties. Baldwin, 150 Wn.2d at 459-61; Jacobson, 92 Wn. App. at 966.

Aggravating factors are now, however, treated differently under the law. The factors are treated as elements of a higher offense that must be found by a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.

S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Benn, 161 Wn.2d 256, 263, 165 P.3d 1232 (2007). This seismic change in the law now mandates application of a due process vagueness inquiry.

In the death penalty context, the Supreme Court has held jury instructions regarding aggravating factors must clearly articulate “all facets of the sentencing process.” Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), overruled in part by Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. Walton, 497 U. S. at 653.

A challenged provision is unconstitutionally vague in violation of the Eighth Amendment if it fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). A vague sentencing factor creates “an unacceptable risk of randomness,” Tuilaepa v. California, 512 U.S. 967, 974, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), and for this reason the “channeling and limiting of the sentencer’s discretion. . . is a fundamental constitutional requirement for

sufficiently minimizing the risk of wholly arbitrary and capricious action.”

Cartwright, 486 U.S at 362 (citations omitted).

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.

Id. at 364.

Considering similar undefined aggravators, the Ninth Circuit held the problem created by the failure to narrow a vague aggravator is not cured by de novo appellate review, the remedy prescribed by the Walton Court. Valerio v. Crawford, 306 F.3d 742, 756-57 (2002), cert. denied sub nom., McDaniel v. Valerio, 538 U.S. 994 (2003). The court reasoned an appellate court violates the defendant’s Sixth Amendment jury trial right by performing the narrowing construction because “[i]n performing a Walton 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.

The Supreme Court has not yet resolved whether an appellate court may, consistent with Ring, cure the finding of a vague aggravating circumstance by applying a narrower construction. See Bell v. Cone, 543 U.S. 447, 453- 54, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (declining to

reach issue). The Valerio court, however, concluded Walton's prescription for de novo review where the jury was the factfinder cannot be undertaken without violating the Sixth Amendment. As in Valerio, this Court should conclude the trial court's failure to narrow the vague verdict form for the aggravating factor cannot be corrected by applying a narrowing construction on appeal. This Court should reverse Lange's sentence and remand for resentencing within the standard range.

2. THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS TO SUPPORT ITS EXCEPTIONAL SENTENCE.

A trial court must enter written findings of fact and conclusions of law in support of an exceptional sentence. RCW 9.94A.535; In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." Breedlove, 138 Wn.2d at 311. The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of the findings. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

The sentencing court did not enter written findings and conclusions explaining the reasons for Lange's exceptional sentence. The findings and

conclusions are necessary for review of the sentence. This Court should remand for entry of written findings of fact and conclusions of law.

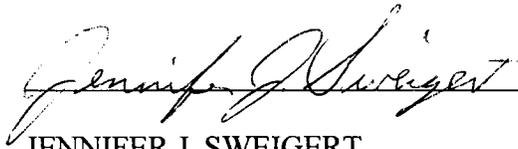
D. CONCLUSION

Lange requests this Court reverse his exceptional sentence because the verdict form defining the aggravating factor was unconstitutionally vague. Alternatively, this Court should remand for entry of findings of fact and conclusions of law supporting the exceptional sentence.

DATED this 26th day of February, 2010.

Respectfully submitted,

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63929-3-I
)	
DAVID LANGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID LANGE
C/O MORIAH BOGGS
25908 196TH AVENUE SE
COVINGTON, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF FEBRUARY, 2010.

x *Patrick Mayovsky*