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NO. 65071-8-I

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

REC'D
AUG 30 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHAM GHE,

Appellant.

2010 AUG 30 PM 3:56
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

It is a natural human tendency to conclude that, “once a criminal, always a criminal.” To avert this problem and ensure that juries base verdicts only on proof of the elements beyond a reasonable doubt, and not on supposed criminal propensity, whenever evidence of uncharged misconduct is admitted at trial, the court must instruct the jury as to its limited purpose. Reversal of appellant’s convictions is required because the court failed to give a limiting instruction when it admitted evidence of previous assaults against the same victim. Alternatively, if the court deems this issue waived by counsel’s failure to request an instruction, that failure constituted ineffective assistance of counsel. There can be no possible strategic reason for allowing the jury to infer guilt based on criminal propensity.

Instructional error also requires reversal of the jury’s special verdict on aggravated domestic violence. A jury’s failure to agree on a special verdict is equivalent to a finding the aggravator was not proved beyond a reasonable doubt. The court’s instruction that the jury must be unanimous to answer “no” is structural error.

Finally, the court’s findings regarding the rapid recidivism aggravator were made in violation of appellant’s constitutional right to a jury trial and are insufficient to justify an exceptional sentence. The mere assertion by counsel that appellant waived a jury, without any personal

expression by appellant personally, was not a knowing, intelligent, and voluntary waiver of the constitutional right to a jury trial. Additionally, the court did not find that a pattern of similar offenses indicated a greater than usual disregard for the law. Without this additional finding, the rapid recidivism aggravator is merely based on criminal history (already used to calculate the standard range) and cannot justify an exceptional sentence.

B. ASSIGNMENTS OF ERROR

1. The court erred in failing to give a limiting instruction for evidence admitted under ER 404(b).

2. Appellant received ineffective assistance of counsel.

3. Appellant's Sixth Amendment right to a jury trial was violated when an aggravating factor was tried to the court instead of the jury.

4. The trial court erred when it accepted defense counsel's assertion as a waiver of appellant's jury trial right.

5. The trial court's findings of fact and conclusions of law omit essential elements of the rapid recidivism¹ aggravator.

6. The court erred in imposing an exceptional sentence.

7. The court erred in instructing the jury it must be unanimous to answer "no" to the special verdict form on aggravated domestic violence.

¹ Under RCW 9.94A.535(3)(t), an exceptional sentence may be justified if the offense was committed "shortly after release from incarceration."

Issues Pertaining to Assignments of Error

1. Over defense counsel's objection, the court admitted testimony regarding other uncharged assaults. Did the court commit reversible error in failing to give a limiting instruction for evidence of prior misconduct admitted under ER 404(b), where instruction was needed to prevent the jury from considering appellant's prior misconduct as evidence of his propensity to commit crime?

2. Was defense counsel ineffective in failing to request a proper limiting instruction to guide the jury's consideration of evidence of prior misconduct?

3. Under Blakely v. Washington,² appellant had a Sixth Amendment right to have a jury decide the rapid recidivism aggravating factor. Instead, this matter was tried to the court after defense counsel stated that, after consultation, appellant waived his right to a jury trial. However, the court failed to require a written waiver as required by CrR 6.1(a) and failed to conduct any colloquy with the defendant to confirm whether he understood or agreed with the waiver. Under these circumstances, did the court err in finding appellant knowingly, intelligently and voluntarily waived his constitutional right to a jury trial?

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

4. To justify an exceptional sentence, the rapid recidivism aggravator requires not just that the offense was committed shortly after release from incarceration, but also that a pattern of similar offenses indicates a greater disregard for the law than would otherwise be the case. The court's findings of fact state only that appellant's offense was committed shortly after release from incarceration. Are the findings insufficient to justify departing from the standard range?

5. A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer "no" to the special verdicts?

C. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Ghe Cham with felony violation of a court order, unlawful imprisonment, felony harassment, and second-degree assault, all committed against his wife.³ CP 16-19. The State also alleged the crimes against his wife were aggravated domestic violence offenses and were committed shortly after release from incarceration. CP 16-19.

³ Cham was also charged with felony harassment and fourth-degree assault against his daughter. CP 18-19. The court dismissed the felony harassment charge against Cham's daughter, and the jury acquitted him of assaulting her. CP 68, 85.

Cham's first trial ended in a mistrial after a State's witness repeatedly violated a ruling in limine. CP 21. At the second trial, the court denied a mistrial motion when a different witness violated the same ruling. 7RP⁴ 65-69.

The jury found Cham guilty of the charges against his wife and found each was an aggravated domestic violence offense. CP 62-67, 69-70. The court found the offenses were committed shortly after release from incarceration and imposed an exceptional sentence totaling 74 months of confinement and 18 months of community custody. CP 87-88. Notice of appeal was timely filed. CP 72.

2. Substantive Facts

Ghe Cham came to this country with his wife in 1992. 7RP 58. The couple left their native Vietnam, traveling first to the Philippines and later settling in Seattle. 7RP 56, 58-59. Neither parent speaks fluent English. 7RP 4, 61.

The couple now has four children including ranging in age from 19 to 5. 7RP 60. Until recently, the entire family lived in a one-bedroom apartment, with the children sharing the only bedroom and the parents

⁴ There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 28, 2010; 2RP – Feb. 1, Feb. 3, Feb. 4, 2010; 3RP – Feb. 3, 2010 (Reporter Pete Hunt); 4RP – Feb. 3, 2010 (Reporter Linda Owen); 5RP – Feb. 3, 2010 (Reporter Mike O'Brien); 6RP – Feb. 8, 2010; 7RP – Feb. 9, 2010; 8RP – Feb. 10, 2010; 9RP – Feb. 16, 2010; 10RP – Feb. 17, 2010; 11RP – Feb. 18, 2010; 12RP – Mar. 12, 2010.

sleeping on a floor mat in the living room. 7RP 62, 76; 8RP 99. Cham often argued with his 16-year-old daughter about her many facial piercings. 8RP 132-33.

In the last several years, the couple often argued about money and infidelity, with the fights occasionally becoming physical on both sides. 8RP 99-102. In 2008, after one such fight, Cham was convicted of second-degree assault and ordered to have no contact with his wife for ten years. Ex. 8. His wife testified that on July 5, 2008, the couple returned to the apartment after a party. 7RP 75. She testified that because she was tired and did not want to have sex, Cham jumped on her, tore her clothes, and strangled her. 7RP 75. Eventually, she told him she was thirsty, so he left the room to get her some water. 7RP 78. She used the opportunity to call 911. 7RP 79.

Cham was imprisoned on this prior conviction until February 23, 2010 when he was released on probation. Ex. 24A. He was jailed again for a community placement violation on March 12, 2009. Ex. 24B.

On March 31, 2009, he was released from the King County jail at 6:59 a.m. and tried to go home. Ex. 24C. He arrived at the apartment around 8 a.m. 7RP 95. When he knocked, his wife opened the door. 7RP 95. His wife testified that their five-year-old son, happy and excited to see his father, also came to the door. 7RP 95. Cham was likewise happy to see his children, and initially visited with the children. 7RP 96.

However, at some point, things deteriorated. His wife testified that when he appeared at the door, she told him the police said he had no right to be there. 7RP 82-83. Cham said he was her husband and asked her why she was afraid of the police. 7RP 83. She claimed Cham asked her what the police would do, and pushed her into the children's bedroom where he kicked her and told her if she ran out, he would beat her more. 7RP 85. Nevertheless, she tried to push him toward the door a couple of times. 7RP 96.

The couple's daughter testified Cham also punched his wife, pulled her hair, and hit her head against the wall. 8RP 108-09. She testified her mother tried to run outside, but Cham pulled her back in. 8RP 108. She testified she tried several times to pull him away and protect her mother. 8RP 107-08, 109, 111. She also testified her five year old brother was sometimes in the room as the fight was going on. 8RP 109.

Approximately three hours later, when the apartment manager knocked on the door, things had calmed down. 8RP 114-15, 135. He wanted to collect the family's rent and replace their blinds. 9RP 28. He testified Cham's daughter answered the door looking worried or scared. 9RP 29. She told him her father was beating up her mother and asked him not to leave. 9RP 30. At some point Cham came to the door, and when the manager asked to see his wife, Cham told him she was sleeping. 9RP 31.

When the manager threatened to call the police, Cham left, taking his wife's purse, which had forty dollars and her cell phone in it. 7RP 89; 9RP 31. Cham's wife was taken to the hospital at her request. 8RP 21. Her right eye was swollen shut and she had cheek abrasions and pain in her neck and head. 7RP 16; 8RP 18, 38-39.

D. ARGUMENT

1. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE.

Over defense objection, the trial court admitted evidence of Cham's prior altercations with his wife for the limited purpose of demonstrating whether her fear was reasonable and whether he knew of the order prohibiting contact. 1RP 36; 9RP 55. In addition to Cham's wife's testimony about the July 5, 2008 incident and his daughter's testimony of physical violence on many occasions over the years, the court admitted his wife's 911 call from July 5, 2008 and a recording of his arraignment, both of which were played for the jury. 7RP 74-79; 8RP 99-105; 9RP 70-71. This evidence should not have been admitted without instructing the jury as to its limited purpose.

Regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. Saltarelli, 98 Wn.2d 358, 362,

655 P.2d 697 (1982). “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). “Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.” Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002). The purpose of a limiting instruction is to prevent the jury from basing its verdict on the “once a criminal, always a criminal” reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362. A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). “Once the trial court strikes the balance in favor of admission and states tenable grounds, the court should give limiting instructions to direct

the jury to disregard the propensity aspect of the evidence” and focus solely on its permissible evidentiary effect. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 18 n.2, 21, 74 P.3d 119 (2003).

While defense counsel did not request a limiting instruction, the court nonetheless erred in failing to give an instruction, sua sponte. State v. Russell, 154 Wn. App. 775, 777, 225 P.3d 478 (2010), review granted, ___ Wn.2d ___ (July 6, 2010). Washington courts have long placed the duty on the trial court, independent of any request by the defense, to give a limiting instruction when evidence of prior bad acts is admitted under ER 404(b). See, e.g., State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989) (“[T]he trial court should explain to the jury the purpose for which the evidence is admitted and should give a cautionary instruction that the evidence is to be considered for no other purpose or purposes.”); State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (“[I]t should also be the court’s duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.”) The Supreme Court recently reiterated that “a limiting instruction *must be given* to the jury” if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added).

In Russell, Division Two of this Court reversed a conviction because the jury was permitted to consider evidence of prior bad acts as criminal propensity. 154 Wn. App. at 777. Russell was convicted of first-degree rape of a child. Id. Evidence of prior sexual abuse against the same child was admitted under ER 404(b) to show Russell's "lustful disposition" toward the child. Russell, 154 Wn. App. at 781-82. Citing Foxhoven, among other authorities, this Court explained that when ER 404(b) evidence is admitted, a limiting instruction must be given. Russell, 154 Wn. App. at 784. Russell did not request a limiting instruction, but the court concluded the issue was preserved for appeal because Russell objected to the evidence as overly prejudicial. Id. at 783. The court concluded the failure to give the instruction had particular impact because the prosecutor drew attention to the prior crimes in closing argument and because the jury was instructed it must consider all the evidence. Id. at 786. Despite Russell's failure to request it, the court held the trial court abused its discretion in failing to give a limiting instruction and reversed Russell's conviction. Id.

As in Russell, evidence of prior misconduct against the same victim was admitted for a limited purpose, in this case to show Cham's wife's reasonable fear. 1RP 36. As in Russell, that evidence was specifically relied on during the State's closing argument. 10RP 15. As in Russell, defense counsel strenuously objected to the admission of the evidence, but failed to

request a limiting instruction. CP 11; 1RP 35-36; 2RP 44-45. This Court should reach the same conclusion it did in Russell: admission of ER 404(b) evidence without a limiting instruction requires reversal.

The court erred in failing to fulfill its obligation to give a limiting instruction. The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of other misconduct against the same person as evidence of Cham's propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822. Cham's convictions should be reversed.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A PROPER LIMITING INSTRUCTION.

If this Court finds defense counsel waived the instructional error by failing to request the instruction, then counsel's failure constitutes ineffective assistance of counsel. Every criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel may be considered for

the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is ineffective when (1) the attorney’s performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel’s performance, the result would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Cham’s other criminal acts as evidence of his propensity to commit crime. Cham had the right to limiting instructions on this evidence. State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006); Donald, 68 Wn. App. 543; ER 105. There was no legitimate reason not to propose proper limiting instructions when the extremely prejudicial testimony described prior assaults against the same person. Allowing the jury to

convict Cham on the basis of bad character did nothing to advance his defense.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The “reemphasis” theory is inapplicable here. Evidence that Cham committed other acts of misconduct against the same victim in the past was not the type of evidence the jury could be expected to forget or naturally minimize. This evidence formed a central piece of the State’s case and the prosecutor emphasized it in closing argument. 10RP 15. This is not a case where a limiting instruction raised the specter of “reminding” the jury of briefly referenced evidence.

Defense counsel unsuccessfully objected to the evidence before trial under ER 404(b). CP 11; 1RP 35-36; 2RP 44-45. Having lost the battle to prevent the jury from hearing this evidence, it was incumbent upon counsel to prevent the jury from using it for an improper purpose.

Prejudice created by evidence of prior bad acts is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). “[J]urors are presumed to follow instructions.” State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). To presume otherwise is to “inevitably conclude that a trial by jury is a farce.” Id. (citation omitted). In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to propose a proper limiting instruction. Even if the error was not preserved, Cham’s convictions should be reversed because he did not receive effective assistance of counsel.

3. THE EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE DEFENSE COUNSEL’S ASSERTIONS WERE NOT A VALID WAIVER OF CHAM’S RIGHT TO A JURY TRIAL ON THE AGGRAVATING FACTOR.

The Sixth Amendment to the United States Constitution guarantees the right to a jury trial on any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the standard range. U.S. Const amend. VI; Blakely v. Washington, 542 U.S. 296, 302-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under Blakely, Cham had a constitutional right to have a jury determine whether the offenses at issue were committed “shortly after release from incarceration.” Because Cham never personally expressed any desire to waive this right, the exceptional sentence violates Cham’s Sixth Amendment jury trial right.

The right to jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Blakely, 542 U.S. at 306. Thus, since Blakely, Washington courts have carefully guarded a defendant’s right to a jury trial on facts supporting an exceptional sentence. See, e.g., In re Pers. Restraint of Beito, 167 Wn.2d 497, 499-500, 220 P.3d 489 (2009) (Blakely error could not be harmless). Even before Blakely, Washington courts consistently demonstrated “strong resistance to implied waiver of jury trial.” Bellevue v. Acrey, 103 Wn.2d 203, 208, 691 P.2d 957 (1984) (discussing Seattle v. Williams, 101 Wn.2d 445, 680 P.2d 1051 (1984); Seattle v. Crumrine, 98 Wn.2d 62, 653 P.2d 605 (1982); State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979)).

The State bears the burden of establishing a valid waiver of the right to a jury trial. Wicke, 91 Wn.2d at 645. The adequacy of a jury trial waiver is constitutional in nature, and the issue can be raised for the first time on appeal.⁵ See, e.g., Wicke, 91 Wn.2d at (considering validity of jury waiver for the first time on appeal); State v. Hos, 154 Wn. App. 238, 249, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010) (same); RAP 2.5(a). Review of the validity of a jury trial waiver is de novo. Hos, 154 Wn. App. at 250.

⁵ CrR 6.1 also requires that jury trial waivers be in writing. However, this rule has been interpreted as evidentiary in nature and the failure to comply is not of constitutional magnitude. State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010). Thus, Cham’s challenge rests not on the court rule, but on the constitutional standard.

Additionally, “a court must indulge every reasonable presumption against waiver of fundamental rights. Acrey, 103 Wn.2d at 207 (citing Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

When determining the validity of a waiver, courts look at all the facts and circumstances to determine whether the waiver was knowing, intelligent, and voluntary. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994); State v. Hochhalter, 131 Wn. App. 506, 523, 128 P.3d 104 (2006). At a bare minimum, there must be an affirmative personal expression by the defendant of the desire to waive the right to a jury trial. Stegall, 124 Wn.2d at 725; Acrey, 103 Wn.2d at 211. Mere inaction by the defendant, without an express waiver in writing, is not sufficient to waive this fundamental constitutional right. Acrey, 103 Wn.2d at 205.

Counsel’s assertion that the defendant waives his right to jury trial is also insufficient. Wicke, 91 Wn.2d at 644-45; Hos, 154 Wn. App. at 249. The client, not counsel, controls the decision whether to waive the right to a jury trial. Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); Hos, 154 Wn. App. at 250-51. “Absent express authority or an informed consent or ratification, attorneys may not waive, compromise or bargain away a client’s substantive rights.” Morgan v. Burks, 17 Wn. App. 193, 200, 563 P.2d 1260 (1977). The court may not “simply accept defense counsel’s representations,” regarding waiver. See State v. Ramirez-

Dominguez, 140 Wn. App. 233, 242, 165 P.3d 391 (2007) (waiver valid where court also inquired of defendant personally).

Recently, the court reversed a conviction because counsel's representation was not a valid jury trial waiver in Hos. 154 Wn. App. 238. Hos's attorney informed the court Hos intended to proceed by way of stipulated bench trial to preserve a suppression issue for appeal. Id. at 244. There was no written waiver and no discussion with Hos regarding whether she discussed the waiver with her attorney or agreed to it. Id. On appeal, Hos argued the record failed to establish a knowing and voluntary waiver of her right to a jury trial. Id. at 249. The state argued Hos either ratified her attorney's implied waiver by failing to object or she failed to preserve the error. Id.

This Court rejected both of the state's arguments. Although the rule-based right in CrR 6.1(a) might be waived by acquiescence in an attorney's oral statement,⁶ the constitutional right required an express personal waiver, which the record did not contain:

Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving.

⁶ The court declined to decide this issue. Hos, 154 Wn. App. at 250.

Id. at 244. As in Hos, counsel's statement that Cham waived his jury trial right was not a valid waiver.

Inaction by the defendant in the face of counsel's representations does not alter this analysis. See Wicke, 91 Wn.2d at 641, 645. Like Cham, Wicke stood by while his attorney orally waived his right to counsel without objection. Id. at 641. Even though there was likely an implicit waiver, the court concluded, "the record we have before us does not demonstrate this fact to the extent of the constitutional standard." Id. at 645. Other jurisdictions have similarly required the state to provide a record showing at least an express acknowledgement of an attorney's statement that the case would be tried to a judge, not a jury. State v. Gore, 288 Conn. 770, 777-78, 955 A. 2d 1 (2008) (respondent's passive silence is not sufficient to establish a valid waiver); Jackson v. Commonwealth, 113 S.W.3d 128, 133 (Ky. 2003) (absent written waiver, valid waiver requires oral waiver "from Appellant's own mouth").

As in Hos and Wicke, the record in this case does not contain a constitutionally valid waiver of the right to a jury trial because the record contains no personal expression that Cham wanted to waive his right to a jury trial. The only indication of waiver was defense counsel's statement that, "Mr. Cham, after consultation, has waived the presence of the jury for a decision on the aggravating factor of rapid recidivism." 11RP 4-5. No one

inquired on the record if Mr. Cham agreed. No written waiver was executed. The record is constitutionally insufficient to show waiver of the jury trial right, and the exceptional sentence should be reversed. Wicke, 91 Wn.2d at 645; Hos, 154 Wn. App. at 244.

4. THE FINDINGS OF FACT DO NOT SUPPORT THE COURT'S APPLICATION OF THE RAPID RECIDIVISM AGGRAVATOR.

The SRA mandates that sentencing courts impose sentences within the presumptive standard range, unless "substantial and compelling" reasons justify a departure. RCW 9.94A.535. Whenever a court imposes a sentence outside the standard range, it must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. An exceptional sentence should be reversed on appeal when: (1) The reasons are not factually supported by the record or are clearly erroneous, (2) The factually supported reasons do not justify an exceptional sentence as a matter of law, or (3) The sentence is clearly excessive. RCW 9.94A.585; see also State v. Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001) (interpreting Former RCW 9.94A.210).

The determination of whether the judge's reasons justify an exceptional sentence is a question of law subject to de novo review. Ferguson, 142 Wn.2d at 646. In reviewing the adequacy of the trial court's reasons for imposing an exceptional sentence, the appellate court must

“independently determine as a matter of law, if the sentencing judge’s reasons justify the imposition of an exceptional sentence.” State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996) (citing State v. Nordby, 106 Wn.2d 514, 581, 723 P.2d 117 (1986)). When a sentence is based on reasons insufficient to justify departure from the standard range, it is not authorized by law and the matter must be remanded for resentencing within the standard range. Ferguson, 142 Wn. App at 649.

In this case, the court failed to make findings that there was a pattern of similar offenses showing heightened culpability and a greater disregard or disdain for the law than would otherwise be the case, as required by cases interpreting the rapid recidivism aggravator. Without these additional findings, the court’s finding that the offense was committed shortly after release from incarceration does not justify the exceptional sentence as a matter of law and the exceptional sentence should be reversed.

Under the so-called “rapid recidivism” aggravator, the court may impose an exceptional sentence if the jury finds the offense was committed “shortly after release from incarceration.” RCW 9.94A.535(3)(t). However, more than this is required to justify an exceptional sentence. Long before this aggravating factor was codified into statute, the court recognized it as an aggravating circumstance justifying an exceptional sentence. State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994). In Butler, the court explained

mere recidivism alone does not justify an exceptional sentence. In order to be distinguishable from mere criminal history, which is already taken into account in calculating the standard range, the immediate reoffense must “reflect a disdain for the law so flagrant as to render him particularly culpable.” Butler, 75 Wn. App. at 54. The court relied on its earlier holding that an exceptional sentence was justified when a defendant committed a crime while on parole because that fact indicated “a greater disregard for the law than would otherwise be the case.” Butler, 75 Wn. App. at 54 (citing State v. George, 67 Wn. App. 217, 224, 834 P.2d 664 (1992)).

Shortly after Blakely, the Washington Supreme Court held the rapid recidivism factor must be found by a jury beyond a reasonable doubt. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Critically, Hughes relied on Butler to hold this factor required a factual finding beyond criminal history and was therefore an essential element pursuant to Blakely. Hughes, 154 Wn.2d at 141-42 (citing Butler, 75 Wn. App. at 53-54). The Hughes court observed the circumstances of recidivism “demonstrated a flagrant disregard for the law and complete lack of remorse” similarly to the findings in Butler that the quick re-offense indicated disregard and disdain for the law. Hughes, 154 Wn.2d at 141-42. “The conclusions go well beyond stating Hughes’ prior

convictions. Indeed if that was all the aggravating factor was based on, it could not support an exceptional sentence under Washington law.” Id. Instead, the court noted, this factor must consider “the combination of the various similar offenses and the heightened harm or culpability that pattern indicates.” Id. at 142.

When the Legislature codified the rapid recidivism factor, it expressed its intent “to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.” Laws of 2005, ch. 68, § 1; RCW 9.94A.535(3). At that time, the rapid recidivism factor was already well-defined by the courts as not merely reciting the fact of prior convictions and the number of hours before recidivism, but actually requiring a pattern of similar prior offenses indicating particular “harm or culpability” and “disregard and disdain for the law.” Hughes, 154 Wn.2d at 141-42.

This Court’s 2007 decision in State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007), affirmed this analysis. In Saltz, the defendant stipulated the offense was committed “shortly after being released from incarceration.” 137 Wn. App. at 584. This court upheld the exceptional sentence because, in addition to the stipulation, the sentencing court found greater disregard for the law than would otherwise be the case, because the current offense was the same crime against the same victim as the last offense for which he was

incarcerated. 137 Wn. App. at 585-86. Without findings as to these non-statutory elements, the court's findings of fact do not support imposition of an exceptional sentence as a matter of law. Saltz, 137 Wn. App. at 585; but see State v. Combs, 156 Wn. App. 502, 232 P.3d 1179 (2010).

In this case, the trial court merely found Cham's offenses were committed "shortly after release" based on the timing alone. CP 94, 96, 97. The trial court made no finding of the additional elements from Butler, Hughes and Saltz. The court did not find there was a pattern of similar crimes indicating greater culpability or disdain for the law than would otherwise be the case. Without the additional findings required by the case law interpreting rapid recidivism as an aggravating factor, the court's findings are insufficient to justify the exceptional sentence as a matter of law.

5. THE COURT ERRED IN INSTRUCTING THE JURY IT MUST BE UNANIMOUS TO ANSWER "NO" TO THE SPECIAL VERDICT FORM.

The jury instruction accompanying the special verdicts in this case informed the jury as follows:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 60. Under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), this instruction was in error.

When a jury cannot reach a unanimous decision on a special verdict, this is equivalent to a final determination that the State has not proved the special finding beyond a reasonable doubt. Bashaw, 169 Wn.2d at 146. While the jury must be unanimous to answer “yes” to a special verdict, unanimity is not required to find that the State failed to prove its case. Id. at 147.

This error is not harmless merely because this jury apparently reached unanimity under the incorrect instruction. Id. at 147-48. In Bashaw, the court clarified that the error is the procedure by which the jury arrived at its verdict. Id. at 147. “The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction.” Id. Thus, despite the jury’s unanimous “yes” answer to the special verdict in Bashaw, the court could not conclude the instructional error was harmless beyond a reasonable doubt and vacated the sentence enhancements. Id. at 148. The same result is compelled here. Cham’s exceptional sentence should be reversed.

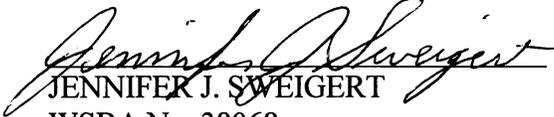
E. CONCLUSION

The failure to limit the jury's consideration of propensity evidence requires reversal of Cham's convictions. Alternatively, the errors impacting both aggravating factors require reversal of his exceptional sentence.

DATED this 30th day of August, 2010.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65071-8-I
)	
GHE CHAM,)	
)	
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 30TH DAY OF AUGUST, 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] GHE CHAM
DOC NO. 770938
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*