

L. 67238-0

67238-0

No 67238-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDWARD ALBERT THAVES,

Appellant.

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

The Honorable Barbara Mack

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting the complainant's recorded statement to Officer Rankin as an excited utterance.
2. The trial court erred in admitting the complainant's recorded statement to Officer Rankin as a recorded recollection.
3. The trial court erred in entering Conclusion of Law 6 with respect to the State's motion to admit Erica Dawson's statements at trial. CP 274.
4. The State failed to sufficiently prove the facts to support the jury's special verdict on the aggravating circumstances.
5. RCW 9.94A.535(3)(h)(i) violates Thaves' due process right to notice safeguarded by the Fourteenth Amendment and article I, section 3 of the Washington Constitution.
6. Court's Instruction on the Law #4 defining "ongoing pattern of abuse" is unconstitutionally vague, in violation of due process. CP 113.
7. The aggravating circumstance was proven in a proceeding that did not comply with the rules of evidence, in

violation of the due process requirement that the evidence used to convict a person be reliable.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Hearsay, or out-of-court statements offered for their truth, is generally inadmissible. The “excited utterance” rule contained in ER 803(a)(2) is a narrow exception to the prohibition on hearsay. This exception requires that a statement relate to a startling event or condition and be made under circumstances that establish the declarant was so under the stress of the startling event or condition as to immunize the statement from fabrication. Where the complainant participated in a lengthy formal recorded interview with an investigating officer that was conducted in strict question and answer format, gave statements relating to past events as well as the charged incident, and her statements were not spontaneously given as required by cases interpreting the rule, was the trial court’s ruling finding the statements admissible erroneous?

(Assignments of Error 1 and 3)

2. The “recorded recollection” exception to the hearsay requirement precludes admission of a statement introduced under

the rule as an exhibit unless it is offered against an adverse party.

Did the trial court err in admitting a recording of the complainant's interview where she was not an adverse party to the State, the recording's proponent? (Assignments of Error 2 and 3)

3. The Sentencing Reform Act of 1981 (SRA) defines "victim" as someone who has suffered harm as a result of the current offense. The State alleged as an aggravating circumstance with respect to Thaves' current offenses of assault in the second degree and unlawful imprisonment that Thaves had engaged in an ongoing pattern of physical, psychological or sexual abuse against a victim or multiple victims. The State did not present evidence of prior abuse of the victim of the current offense, however, but only of prior convictions involving other women. Did the State fail to present sufficient evidence to support the aggravating circumstance? (Assignment of Error 4)

4. The void-for-vagueness doctrine of the due process clause of the Fourteenth Amendment applies to laws that channel a sentencing judge's discretion. Should this Court conclude that the "pattern of abuse" aggravator permits imposition of an exceptional

sentence based upon factual determinations that are neither quantifiable nor predictable, in violation of due process? Should this Court also conclude that the vague aggravating circumstance fails to provide the notice of what conduct may cause an accused person to run afoul of the law that is required by due process?

(Assignments of Error 5 and 6)

5. The due process clauses of the Fourteenth Amendment and article I, section 3 require that the evidence used to convict a person of a crime be reliable. Because aggravating circumstances alleged under RCW 9.94A.535 and RCW 9.94A.537 operate as elements of the substantive offense and must be found by a jury beyond a reasonable doubt, ER 1101's provisions exempting certain proceedings from compliance with the rules of evidence are inapplicable to fact-finding proceedings under the statute. Where the State presented only inadmissible hearsay in support of its allegation that Thaves' convictions were aggravated crimes of domestic violence, did the proceeding, jury finding, and resultant exceptional sentence violate due process? (Assignment of Error 7)

C. STATEMENT OF THE CASE

In the late evening hours of January 19, 2011, Kent police officers responded to a 9-1-1 call from a woman who reported that she had been choked and assaulted. 1RP 131-32, 162-63.¹ When the officers arrived at the residence and knocked on the door, there was no answer but they could hear what sounded like a struggle within. 1RP 133, 165-66. Officer Scott Rankin kicked down the door and saw Erica Dawson in the hallway with appellant Edward Thaves standing behind her. 1RP 136. Thaves was arrested and, after participating in a tape-recorded interview with Rankin, Dawson was transported to St. Francis Hospital in Federal Way.

At St. Francis, a CT scan was conducted of Dawson's neck. A radiologist diagnosed fractures of her hyoid bone and cricoid cartilage. 2RP 48-50. Based upon the radiology report, Dana Pope, the attending emergency room physician, determined it would be advisable for Dawson to remain in in-patient care, and

¹ Four volumes of transcripts are cited herein as follows: a transcript containing hearings between April 11 and April 14, 2011 is cited as "1RP" followed by page number. A transcript containing hearings between April 18 and April 21, 2011, is cited as "2RP" followed by page number. A transcript containing hearing on April 22, 2011 is cited as "3RP" followed by page number. A transcript containing a sentencing hearing on May 20, 2011 is cited as "4RP" followed by page number.

recommended transfer to Harborview for trauma coverage. 2RP 63-65. Pope discussed this transfer with Dawson, but before it could be arranged, Dawson fled the hospital. 2RP 66.

Dawson initially maintained contact with a victim advocate from the King County prosecutor's office, but, not wishing to assist in Thaves' prosecution, she did not respond to efforts by law enforcement and members of the prosecution team to contact her.² 2RP 92. Dawson ultimately was arrested on a material witness warrant and testified at Thaves' subsequent trial. Id.

In her trial testimony, Dawson professed only a vague memory of the events of January 19, 2011. 2RP 147. She did not remember calling 9-1-1 or the reason for her call. 2RP 151. She remembered going to the hospital, and refusing to be transferred to Harborview, but said she only learned she had broken bones in her neck "after the fact." 2RP 148.

A jury rejected the State's charge of assault in the first degree and convicted Thaves of assault in the second degree. CP 62-64.

The jury also acquitted Thaves of felony harassment, but convicted

² While in custody in the King County Jail, Thaves had several telephone conversations with Dawson that were the basis of a witness tampering conviction. That conviction is not at issue in this appeal.

him of unlawful imprisonment, witness tampering, and two counts of violating a court order. CP 65-68.

By special verdict in a bifurcated proceeding, the jury also found that the assault and unlawful imprisonment convictions were aggravated domestic violence offenses pursuant to RCW 9.94A.535(3)(h)(i), in that they were “part of an ongoing pattern of psychological, physical, or sexual abuse of multiple victims manifested by multiple incidents over a prolonged period of time.” CP 68-71, 113.

At sentencing, the State sought an exceptional sentence. The court concluded the jury’s special verdict established substantial and compelling reasons to depart from the standard sentencing range, and imposed the statutory maximum on both the assault and unlawful imprisonment convictions, and ran the sentences consecutively to one another, for a total term of confinement of 180 months.³ Thaves appeals.

³ Thaves’ sentence for tampering with a witness was run concurrently with the exceptional sentence, and the two convictions for violating a court order were misdemeanors.

D. ARGUMENT

1. DAWSON'S RECORDED STATEMENT'S DURING HER INTERVIEW WITH OFFICER RANKIN WERE INADMISSIBLE AS EXCITED UTTERANCES OR AS A 'PAST RECOLLECTION RECORDED.'

- a. The trial court admitted Dawson's taped interview as an excited utterance and alternatively as a past recollection recorded. Believing that it would not be able to produce Dawson as a witness at trial, the State moved pretrial to admit the tape recording of her interview with Officer Rankin under the forfeiture by wrongdoing doctrine. 1RP 73. The court granted the State's motion. 1RP 98. The court entered written findings of fact and conclusions of law in support of its ruling, and alternatively concluded the recording was admissible as an excited utterance and in the alternative as a "past recollection recorded." CP 274.

The recording was admitted as Exhibit 9.⁴ The recording, which is approximately 15 minutes long, is conducted in question and answer format. Ex. 9. The recording commences with a

⁴ The recording itself has been designated for purposes of review. Additionally, a transcript of the interview that was prepared at the time of trial by the prosecuting attorney is being filed by the agreement of the parties and will be designated for appeal. It is referenced in this brief as "Transcript of Interview" followed by page number. For the Court's convenience, a copy of the transcript is attached as an Appendix to this brief.

lengthy introduction of the interview by Rankin, in which he identifies the nature of the crime being investigated and the purpose of the recording. Id.; Transcript of Interview at 1. In response to questions, Dawson first identifies herself in a calm, measured voice. Ex. 9; Transcript of Interview at 2. Rankin then interviews her about the circumstances surrounding her relationship with Thaves and asks her to describe her history with him. In response, Dawkins provides a detailed account of past events. Transcript of Interview at 3-5. During this statement she becomes somewhat emotional. Ex. 9. The last topic of discussion is the instant offense. Again in question-and-answer format, she describes the events leading to her 9-1-1 call. Transcript of Interview at 6-10. While describing the charged event, she calms herself and is able to recount what allegedly happened to her in even, measured tones. Id.; Ex. 9. Many of the officer's questions are leading. The interview concludes with Rankin obtaining Dawson's consent to sign a medical release at the hospital. Transcript of Interview at 11.

b. The statements were inadmissible as excited utterances. Subject to narrow exceptions, hearsay, or out-of-court statements offered for the truth of the matter asserted, is inadmissible. Under ER 803(a)(2), the “excited utterance” exception to the hearsay rule, a hearsay statement may nevertheless be admissible if it relates to a startling event or condition and was “made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2).

Discussing the history and origin of rule, the Washington Supreme Court recently reiterated its narrow confines:

The modern “excited utterance” exception to the hearsay rule arose out of the “res gestae” doctrine, which was recognized at the time our state constitution was adopted. Hearsay statements were frequently admitted under the “res gestae” exception notwithstanding the state constitution’s confrontation clause. “Res gestae” “is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event.”

State v. Pugh, 167 Wn.2d 825, 837, 225 P.3d 892 (2009) (quoting Beck v. Dye, 200 Wash. 1, 10-11, 92 P.2d 1113 (1939)).

Thus, historically, the res gestae rule as it applied to hearsay statements required the following:

(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Pugh, 167 Wn.2d at 839 (quoting Beck, 200 Wash. at 9-10).

A crucial component of this analysis, and a principal justification for finding the statements admissible irrespective of the declarant's availability, is their character as spontaneous statements. Pugh, 167 Wn.2d at 840. The key determination is whether the statement was made "while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Williams, 137 Wn. App. 736, 748, 154 P.3d 322 (2007). This Court reviews the admission of a

statement under the “excited utterance” exception to the bar on hearsay for an abuse of discretion. State v. Chapin, 118 Wn.2d 681, 688, 826 P.2d 194 (1992).

In considering whether a statement admitted as an excited utterance should have been excluded, one factor the Court considers is whether prior to making the statement, the declarant was calm, as in this circumstance there is an increased danger of fabrication. Chapin, 118 Wn.2d at 689. An additional factor to be considered is whether the statement was made in response to a question, as this “raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.” Id. at 690.

In this case, Dawson made the statements the trial court admitted as excited utterances at the conclusion of a formal police interview regarding the charged event. The formality of the interview was made plain to Dawson by Rankin’s introduction of the case by likely criminal charge, and by his obtaining her consent to the recording of the interview.

In ruling that the statements were admissible, the trial court did not distinguish between past and current events, but in fact Dawson made many “statements” that should have been separately evaluated for admissibility under the rule. Dawson extensively discussed past incidents of alleged abuse before describing the events that allegedly led to her contacting law enforcement on the night of the interview. Under no legitimate construction of the excited utterance rule were the statements about past events admissible. Dawson had been in a relationship with Thaves for three months when she called the police and the timing of the past events in relation to the interview was never explained. Compare Chapin, 118 Wn.2d at 689 (unacceptable risk of fabrication presented where alleged victim was calm and resumed normal activities before making the alleged “excited utterance,” and timing of statement in relation to past event was not clear).

By the time that Dawson spoke of the alleged events that led to her telephone call to 9-1-1, she had been speaking to Rankin in strict question and answer format for several minutes. Ex. 9. At one point, while discussing the charged event, Dawson became

emotional, but this factor does not inexorably, or even naturally, point to the conclusion that Dawson was so under the stress of the event that the statement was immune from fabrication. Compare Chapin, 118 Wn.2d at 689 (“Anger might accompany the sort of nervous excitement ER 803(a)(2) requires, but anger alone does not ensure reliability”).

In sum, the statements do not satisfy the rule’s key requirement of spontaneity such that this Court may conclude their admission obviates the necessity of cross-examination. Pugh, 167 Wn.2d at 840 n. 8. This Court should conclude that the trial court abused its discretion in admitting the recorded interview as an excited utterance.

c. The statements failed to meet the requirements of the “recorded recollection” rule. Under ER 803(a)(5):

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a)(5) (emphasis added).

The trial court concluded that Dawson's interview with Rankin was admissible as a recorded recollection "because Ms. Dawson formerly had knowledge of what occurred, at trial denied any memory of the January 19 incident, and Ms. Dawson adopted her recorded recollection as true on the day it was given as reflected in the recording." CP 274. In so ruling, the court missed a critical part of the rule: namely the requirement that the record "may not . . . be received as an exhibit unless offered by an adverse party." ER 803(a)(5); see also Wilson v. Key Tronic Corp., 40 Wn. App. 802, 814, 701 P.2d 518 (1985).

Thus, even assuming for the sake of argument that the State met the foundational requirements of ER 803(a)(5), because Dawson was not an adverse party to the State, the trial court erred in permitting the recording of the interview to be played for the jury and admitted as an exhibit. At most, the recording could have been read into the record by a party. It was inadmissible under the recorded recollection exception to the prohibition on hearsay, and the trial court's ruling was an abuse of discretion.

d. The error in admitting the recording requires reversal of Thaves' convictions for assault in the second degree and unlawful imprisonment. An evidentiary error will require reversal of a conviction if, within reasonable probability, "the outcome of the trial would have been materially affected had the error not occurred." State v. Everybodytalksabout, 145 Wn.2d 456, 464-65, 39 P.3d 294 (2002) (citation omitted).

The court's error in admitting the interview recording meets this standard. The State relied upon the interview to provide the detail needed to support the charged incident. The jury undoubtedly relied on the recording to flesh out the substance of the State's allegations. Indeed, but for the admission of Dawson's recorded statement, the State would have had difficulty proving the charges against Thaves, as Dawson professed an absence of memory regarding the events at trial. This Court should conclude that the admission of the recording prejudiced Thaves by materially affecting the outcome of the trial. Thaves' convictions for assault in the second degree and unlawful imprisonment should be reversed.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE AN ONGOING PATTERN OF ABUSE OF A VICTIM OR MULTIPLE VICTIMS AS REQUIRED BY THE SRA.

a. The State must prove the existence of aggravating circumstances adduced in support of an exceptional sentence beyond a reasonable doubt. Under Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and following amendments to the Sentencing Reform Act of 1981 (SRA), juries must find the existence of aggravating circumstances beyond a reasonable doubt. RCW 9.94A.535; 537. Only an affirmative jury finding authorizes the trial court to exceed the standard sentencing range otherwise authorized by the SRA. RCW 9.94A.537(3); Blakely, 542 U.S. at 301; see also Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Whether the reasons supplied by the sentencing court in support of an exceptional sentence justify a sentence outside the standard range is reviewed de novo. State v. Stubbs, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). A challenge to the sufficiency of the evidence adduced to prove an aggravating circumstance is reviewed according to the same standard as a challenge to the

sufficiency of the proof of the elements of the underlying crime. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). The appellate court must view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

b. The State presented insufficient evidence to prove a pattern of abuse against a “victim” as that term is defined by the SRA. RCW 9.94A.537 permits the State to allege an aggravating circumstance where the crime involved domestic violence and “[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.537(3)(h)(i). As the term “victim” is defined by the SRA, the State presented insufficient evidence to prove the aggravating circumstance.

i. The statutory definition of “victim” supplied in the SRA requires the State to prove that the person has suffered harm as a direct result of the crime charged. RCW 9.94A.030, the

definitional section of the SRA, specifies that “[u]nless the context clearly requires otherwise,” the term “victim” is defined as follows:

“Victim” means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

RCW 9.94A.030(53).

Legislative definitions included in a statute are controlling. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002). The definition of “victim” supplied in RCW 9.94A.030 is unambiguous and the same definition must be applied to the term as it is utilized in RCW 9.94A.537(3)(h)(i). There is no “context” that would suggest an alternative construction of “victim,” let alone a context that would “clearly suggest otherwise.”

ii. The State did not present evidence of a “pattern of abuse” involving Dawson. To prove the alleged aggravating circumstance, the State submitted special interrogatories to the jurors that asked them to determine whether Thaves had “committed an act of psychological, physical, or sexual abuse” against the following three individuals: Michelle Coates, Lori Helmstreet, and Holly Traub. CP 69. Each of these women was the

subject of one of Thaves' prior convictions, over a time period spanning more than 15 years.

The State did not present evidence of a "pattern of abuse" involving Dawson, nor was the State's request for an exceptional sentence predicated on any facts other than Thaves' prior abuse involving Coates, Helmstreet, and Traub. 3RP 7-10. The State specifically argued to the jury,

Between 1995 and today, the defendant has assaulted, physically abused four different women, and has been convicted of all of those [sic]. That is a pattern of abuse of these women manifested over a prolonged period of time.

3RP 10.

At sentencing, the court considered and referenced each of these convictions and imposed an exceptional sentence "[b]ased on the aggravating circumstances that the jury found, based on the facts of this case at trial, [and] based on the fact that Mr. Thaves has a very clear pattern of seriously abusing women[.]" 4RP 18. The State did not prove and the court did not consider a "pattern of abuse" involving Dawson. The prior convictions fail to establish the aggravating circumstance set forth in RCW 9.94A.537(h)(3)(i) because they do not involve Dawson and thus do not involve the

person who suffered injury “as a direct result of the crime charged.” RCW 9.94A.030(53) (emphasis added).

iii. The remedy is reversal of the exceptional sentence and remand for imposition of a sentence within the standard range.

An appellate court must reverse an exceptional sentence where “the reasons supplied by the sentencing court . . . do not justify a sentence outside the standard range for that offense[.]” RCW 9.94A.585(4). Thaves’ exceptional sentence is invalid and Thaves is entitled to be resentenced. The exceptional sentence must be reversed.

2. THE STATUTE AND INSTRUCTION PERMITTING IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED UPON A “PATTERN” OF . . . ABUSE” VIOLATE DUE PROCESS VAGUENESS PROHIBITIONS.

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.

a. The void-for-vagueness doctrine applies to statutes that authorize increased punishment based on factual findings by juries. Juries must find the existence of aggravating circumstances beyond a reasonable doubt. Blakely, 542 U.S. at 300-01; RCW 9.94A.535; 537. Only an affirmative and unanimous jury finding permits the court to deviate from the standard sentencing range. Id.; State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010).

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, rev. denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). The Court concluded that the due process 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 Personal 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 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. Since Blakely, Division Two has followed this reasoning in State v. Chanthabouly, 164 Wn. App. 104, 142, 262 P.3d 144 (2011) (holding “destructive and foreseeable impact” on other victims aggravating circumstance “does not define conduct, authorize arrest, inform the public of criminal penalties, or vary legislatively defined criminal penalties”).

In light of Blakely and its progeny, however, the opposite is true. I.e., 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 statutory aggravating circumstances.

Indeed, after Blakely, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges’ discretion - not the other way around. Blakely, 542 U.S. at 304-05. 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, 530 U.S. at 476-77. 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).

b. The statute and instruction requiring a jury to decide whether there is an "ongoing pattern of abuse" violate due process vagueness prohibitions. The jury in this case was asked to decide whether Thaves' prior convictions constituted "an ongoing pattern" of abuse, pursuant to RCW 9.94A.535(3)(h)(i). CP 112. For purposes of this determination, the jury was instructed, "[a]n 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time." Id.; see RCW 9.94A.535(3)(h)(i); WPIC 300.17.

The jury was also provided a special interrogatory with regard to Thaves' prior offenses that asked it to determine whether Thaves had "committed an act of psychological, physical, or sexual abuse" against the following three individuals: Michelle Coates, Lori Helmstreet, and Holly Traub. CP 69. The jury's determination

of this question was based not on testimony but on the certifications for determination for probable cause in each of these prior offenses. Last, with respect to the convictions for assault in the second degree and unlawful imprisonment, the jury was given special verdict forms that asked, "Was this crime an aggravated domestic violence offense?" CP 70-71. The jury answered "yes" to both special verdicts. Id.

By defining "pattern" simply as "multiple incidents of abuse over a prolonged period of time," the trial court failed to narrow the jury's consideration and permitted entry of a special verdict based simply on the fact of Thaves' criminal history.

The use of the word "multiple" permitted entry of a special verdict if a juror found that Thaves had suffered more than two, or even more than one, prior convictions. This was a constitutional error, and violative both of Thaves' right to fair notice of what conduct might cause him to run afoul of the law.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part by Ring, 536 U.S. at 609.

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, 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.

Tuilaepa, 512 U.S. at 974-75.

The aggravating circumstance submitted to this jury asked for a “yes or no” answer to a question that required an “an imprecise quantitative or comparative evaluation of the facts.” Cf. Sandoval, 161 P.3d at 1156. It therefore created an “unacceptable risk of randomness,” Tuilaepa, 512 U.S. at 974, in violation of due

process. This Court should conclude that the “pattern of abuse” aggravator is void for vagueness.

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.⁵ 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 a single aggravating

⁵ The third method, which permits an appellate court to cure a penalty-phase instructional error by “reweighing” aggravating and mitigating circumstances is relevant only in capital cases. See Valerio, 306 F.3d at 757.

circumstance; thus, the elimination of the improperly-considered aggravating circumstance requires remand for a standard range sentence.

With respect to the second method – de novo review of the evidence under a narrowed construction of the aggravator, as prescribed in Walton – the Court in Valerio found this violates the defendant’s Sixth Amendment jury trial guarantee. 306 F.3d at 756-57. The Court reasoned, “[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. On this basis, the Court found it “inescapable that this aspect of Walton is invalid under the rationale of Ring.”

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. However, the Valerio Court properly concluded that de novo review where the jury was the factfinder cannot be undertaken without violating the Sixth Amendment. Because Thaves’ sentence was based on a single, unconstitutional,

aggravator and neither a constitutional harmless error analysis nor a Walton analysis may cure the error, Thaves must be resentenced within the standard range.

4. THE PROCEEDING IN WHICH THE AGGRAVATING CIRCUMSTANCES WERE DETERMINED FAILED TO COMPLY WITH THE RULES OF EVIDENCE, IN VIOLATION OF DUE PROCESS.

Principles of due process require that the evidence used to convict a person be reliable. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability”); U.S. Const. amend. XIV; Const. art. I, § 3.

In a recent opinion, the Washington Supreme Court rejected the contention that a fact-finding hearing conducted pursuant to RCW 9.94A.535 and RCW 9.94A.537 was a “sentencing” hearing exempt from the rules of evidence under ER 1101(c)(3). State v. Griffin, __ Wn.2d __, __ P.3d __, 2012 WL 19751 at 1 (January 5, 2012).

The Court noted that RCW 9.94A.537

created a special category of sentencing hearing, which involves jury fact finding (unless a jury is waived). The trier of fact at a section .537 hearing must find the defendant “guilty” of committing the aggravator.

Id. at 4.

The aggravating circumstance operates as an “element” of the substantive offense. Blakely, 542 U.S. at 300-01. For this reason alone, the evidence used to support the “conviction” on the aggravating circumstance must be reliable. If the record is devoid of reliable evidence supporting the finding, the invalidity of the conviction is clearly implied. Stone-Bey v. Barnes, 129 F.3d 718, 722 (7th Cir. 1997), overruled on other grounds, Dewalt v. Carter, 224 F.3d 607 (7th Cir. 2000).

In this case, the State did not present any testimony or, indeed, any competent evidence whatsoever to support the aggravating circumstances except the judgment and sentences from the prior convictions. The jury had to answer the question whether Thaves had “committed an act of psychological, physical, or sexual abuse” against Michelle Coates, Lori Helmstreet, and Holly Traub based not on their sworn testimony but on certifications for determination of probable cause – i.e., upon inadmissible hearsay. Under Griffin, the aggravating circumstances portion of the proceeding failed to comply with the rules of evidence and

permitted a jury finding based upon evidence that was fundamentally unreliable. See Griffin, 2012 WL 19751 at 5. The findings must be stricken.

E. CONCLUSION

This Court should conclude that because the trial court erroneously admitted the recording of Rankin's interview with Dawson, Thaves did not receive a fair trial. Thaves' conviction should be reversed. In the alternative, this Court should conclude that the State presented insufficient evidence to prove the aggravating circumstance utilized to support Thaves' exceptional sentence, and that the aggravator is vague, in violation of due process. Thaves should be resentenced within the standard range.

DATED this 31st day of January, 2012.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
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State v. Thaves, No. 67238-0-I
Appendix

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 11-1-01173-5 KNT
vs.)	
)	TRANSCRIPT OF INTERVIEW WITH
EDWARD ALBERT THAVES,)	ERICA DAWSON
)	
)	Defendant.
)	
)	
)	

DAWSON: I don't wanna go to Auburn I work there.

OFFICER: Okay this statement concerns an investigation of the crime of Assault in the Second Degree - Domestic Violence which occurred on January 19th, uh 2011, approximate time of probably around uh 09:20 hours.

DAWSON: It was uh at, at last call.

OFFICER: At uh 530 3rd Avenue South in the city of uh Kent, Washington. Kent Police case report number is 11-734. The interview is being conducted at the residence 530 3rd Avenue South. Today's date is January 19th, 2011, and approximate time of uh 09:45 hours. The interviewing officer is Officer Rankin. Ma'am are you aware this statement is being recorded?

1 DAWSON: Yes.
2 OFFICER: Are you willing to have it recorded?
3 DAWSON: Yes.
4 OFFICER: What is your true name please?
5 DAWSON: Erica Leann Dawson.
6 OFFICER: Erica what's your present address and phone number?
7 DAWSON: 530 South Third Street, uh Kent, Washington, 980 I think 32.
8 OFFICER: Your uh age and age of birth?
9 DAWSON: It's uh I'm 37 and it's 10/2/73.
10 OFFICER: And I'm sorry did you give your phone number?
11 DAWSON: Uh I just have a cell phone it's 253-3335-6961.
12 OFFICER: Okay uh did you have an occasion to call 911 this, this morning?
13 DAWSON: Yes I did.
14 OFFICER: Okay can you tell me uh first of all have you called 911 in the past?
15 DAWSON: Nnno.
16 OFFICER: Okay uh what concerned you enough that you had to call 911 today?
17 DAWSON: Uh I was feeling that uh Ed would uh kill me.
18 OFFICER: Okay.
19 DAWSON: Or go over so far with the physical violence that I would die.
20 OFFICER: Okay and who is Ed?
21 DAWSON: Edward Albert Thaves he's my boyfriend.
22 OFFICER: Okay how long have you guys been in a relationship?
23 DAWSON: I would say since October of last year.

24

1 OFFICER: Okay and how long uh have you, I'm assuming you both live here?
2 DAWSON: Yes.
3 OFFICER: How long have you guys lived together?
4 DAWSON: I'm gonna guess like a month maybe and a half we're rarely here though.
5 OFFICER: Okay and what happened uh you said that you were concerned that he was gonna
6 go overboard with the abuse. What does that mean is there a history of abuse?
7 DAWSON: Yes he's uh once he fell in love with me, once that was kind a clear it was
8 completely black and white and that's when the physical abuse started. And the
9 last uh he's gone overboard where I've passed out and lost consciousness and
10 woke up with him just on top of me staring in my eyes with a more relaxed face.
11 OFFICER: What, what do you lose consciousness from?
12 DAWSON: Like he gave, him choking me, suffocating me, pushing, putting pressure on my,
13 on my trachea.
14 OFFICER: Okay so you're uh making a gesture right now uh with your hand uh to where
15 you're kind a taking one hand over your...
16 DAWSON: Uhmm (yes).
17 OFFICER: ...esophagus and, and squeezing.
18 DAWSON: Uhmm (yes).
19 OFFICER: Is that what happens uh regularly?
20 DAWSON: Yeah he's more of a push, gets me on the ground and then pushes. He puts both
21 hands around my trachea like the thumb on one side and the four fingers on the
22 other pushes down, and down, and...
23 OFFICER: Until you lose consciousness?

24

TRANSCRIPT OF INTERVIEW WITH
ERICA DAWSON - 3

1104-017R

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

1 DAWSON: Yes.

2 OFFICER: How often has that occurred...

3 DAWSON: It's...

4 OFFICER: ...and...

5 DAWSON: ...well we've only dated, or he fell in love with me probably around Christmas.

6 Did, or before Christmas and uh and probably since then uh it, he chokes me

7 probably every other day but losing consciousness I've only completely lost

8 consciousness once.

9 OFFICER: Okay.

10 DAWSON: And, but it I don't know I get really close, I feel like I'm getting close 'cause I'm

11 it's everything's darkening and then like pinprick tingly all to my toes, from my

12 head to my toes.

13 OFFICER: How often would you say this occurs?

14 DAWSON: Probably every other day probably.

15 OFFICER: And have you ever called 911 before?

16 DAWSON: Not for this no.

17 OFFICER: No okay, never for the abuse between...

18 DAWSON: I'm scared.

19 OFFICER: ...on you?

20 DAWSON: (Unintelligible).

21 OFFICER: No okay.

22 DAWSON: No.

23 OFFICER: So then why did you call today?

24

1 DAWSON: And it's weird 'cause I wouldn't have had a problem doing it as much because of
2 the severity of it but I've been Kmart and like knew that when I got home
3 something was gonna happen and he just, it's, I, he's just got complete
4 psychological control and I've thought that that could ever happen to me. And I
5 didn't understand how women would just leave and I get it now. 'Cause it's scary.
6 He says he'll kill me. And he's chased me out a, he's caught me when I tried to
7 get away and brought me in. And then there was a car over here in the
8 intersection and I'm like looking at the car and it's so obvious he's grabbing me.
9 He's like you better come right now. He said you're, I'm gonna kill you if you
10 don't. And I'm caught between screaming and yelling and hoping the car helps
11 me. And, and just cooperating hoping he won't kill me 'cause if I scream, and
12 yell, and resist maybe he, nobody'll help and he'll kill me.

13 OFFICER: So then, and let me ask you uh why did you uh what concerned you so much
14 today? What happened today that led you to call 911?

15 DAWSON: I just knew I wasn't, it's just the way he was talking and stuff and it was starting so
16 early and based on how he was, how severe it was yesterday. He was throwing
17 knives at me and...

18 OFFICER: That was yesterday?

19 DAWSON: ...throwing yeah last night but I didn't have an opportunity to call.

20 OFFICER: Okay what happened uh today? You'd made mention that he was punching you, I
21 see that you have...

22 DAWSON: He said...

23 OFFICER: ...blood around your mouth. Uh...

24

1 DAWSON: ...he said that uh he said that I was dying today. He heard me on the phone with a
2 friend and I was really on the phone with 911. I was gonna have a friend, I set
3 this up last where a friend was gonna keep, come get me and take me to the
4 doctor, a clinic 'cause I said I was pregnant but I'm not 'cause I hoping he would
5 stop hurting me 'til I could get away. I told him a friend was coming to get me
6 this morning last night. Then when uh it was just perfect I'm like I'm Gail should
7 be coming but I'm supposed to call her. He was on the toilet yelling at me saying
8 I was gonna get a stick, there's a stick over there he was gonna get and shove it
9 down my throat. And uh I called and pretended like I was talking to Gail and
10 trying to give you guys an address here and, and then I said hurry, I said kind of
11 watching him and I was whispering hurry, hurry, and he heard me. And that's
12 when he just fucking grabbed me and just got on, and just started throw, punching
13 me, and just...

14 OFFICER: Where'd he punch you?

15 DAWSON: The sides of the jaw just boom, boom.

16 OFFICER: How hard would you say he was punching you?

17 DAWSON: I don't know, I don't know hard he's, uh harder than he ever has and that's weird
18 'cause I probably I don't know.

19 OFFICER: Does your jaw hurt right now.

20 DAWSON: Yes it does hurt. I know it's not broken though. It just feels like it, it needs to,
21 it's, it kind a like...

22 OFFICER: I, I noticed there's blood on the sides, what is the blood from did you bite your
23 tongue or something or what?

24

TRANSCRIPT OF INTERVIEW WITH
ERICA DAWSON - 6

1104-017R

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
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Kent, Washington 98032-4429

1 DAWSON: I don't know.

2 OFFICER: Don't know.

3 DAWSON: I had my lip split before and he re-split it I think a little bit.

4 OFFICER: Yeah, uh how else was he assaulting, was he saying anything...

5 DAWSON: Choking me...

6 OFFICER: ...when he assaulted you?

7 DAWSON: ...I'm gonna kill, you're dying today. You're dead, and you're a piece, just and

8 I'm just like screaming did you, I don't know if you guys heard any of it 'cause it

9 kind a let up just for a second like right before you guys knocked so I'm so glad

10 you guys kicked that door in 'cause I'm like, but it, what was weird is I was scared

11 that you, when you guys started kicking he'd know I did it and try to kill me.

12 'Cause he's told, said before if you ever call the police I'm killing you before they

13 get in the door.

14 OFFICER: Do you believe him?

15 DAWSON: I did believe him. Oh yeah uh 'cause he said he has nothing lose. He told me if I

16 leave he's gonna kill me. He's told me he's gonna take my fingernails out one by

17 one. He tells me, this thing that scares me is I'm not scared of dying I'm, he tells

18 me he's gonna torture me.

19 OFFICER: What uh you said that he was choking you today. Uh can you describe for me

20 how he was doing that?

21 DAWSON: Just pushing, and just I'm just sitting there I can't do anything. I'm trying to grab

22 his hands. And then I just say I can't, and I'm trying to just spin with my feet uh

23

24

1 with my feet and I just, I just feel I don't know that I just said I can't get away so I
2 just go limp hoping he'll let go.

3 OFFICER: Okay.

4 DAWSON: And he switched to punching me again so I don't know.

5 OFFICER: Now when he was grabbing you with uh a hand and he was applying pressure is
6 that right?

7 DAWSON: Yeah pushing and...

8 OFFICER: Was it obstructing your ability to breathe?

9 DAWSON: Oh yes, yes I couldn't breathe at all.

10 OFFICER: Did you feel like you were ever at a point gonna lose consciousness?

11 DAWSON: Yeah, yeah I got the, I got the tingling sensation from head to my toes.

12 OFFICER: Okay did you to your knowledge...

13 DAWSON: And it kind a starts to blacken a little but I usually before I completely blackout
14 I'd close my eyes, trying to pretend like it's, I'm already at that stage.

15 OFFICER: Yeah kind a play, play dead so to speak?

16 DAWSON: Yes play dead.

17 OFFICER: Uh...

18 DAWSON: And then last night when I did lose consciousness it was weird it seemed like it
19 was forever and when I woke up it seemed like maybe I'd been sleeping for hours.
20 And I was so, and I remember seeing my kids swimming, and I remember feeling
21 so at peace, and I just, it was weird and I, when I opened my eyes it didn't take me
22 a second I saw his eyes and I'm like, and then it just hit me what happened.

23 OFFICER: Where...

24

1 DAWSON: And I just cry because it was like so peaceful.

2 OFFICER: Where were you, where were, where in the house were you where this assault was
3 occurring?

4 DAWSON: Which one? The one...

5 OFFICER: Just...

6 DAWSON: ...today?

7 OFFICER: ...yes.

8 DAWSON: In the living room.

9 OFFICER: Okay and that's where I thought I heard you guys right before we showed up was
10 in the living room?

11 DAWSON: Yeah.

12 OFFICER: Is that, is that right?

13 DAWSON: Right over there yeah.

14 OFFICER: Okay, when we knocked on the door uh and announced ourselves what happened?

15 DAWSON: He was like come on, come on...

16 OFFICER: Did he say anything?

17 DAWSON: ...come on and he was like we're gonna get something for your face, or I don't
18 know what he was, yeah I just was like oh my god I'm like and I'm playing it off.
19 I'm like I don't want you to go to jail I, 'cause I'm thinking that it's a war, he's
20 thinking it's probably for a warrant. He's been waiting for the cops to come get
21 him on a warrant, a felony warrant or something. And I'm like I don't want you to
22 go to jail. I'm like hide, get away, I'm just like playing the fricking, because I'm
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24

1 scared if he has any idea that I had called and it was about what he was doing to
2 me that he would hurt me again.

3 OFFICER: Okay.

4 DAWSON: I'm so scared it's like every time I think about calling the cops I'm scared the cops
5 won't even be able to help me. That's how scary he is.

6 OFFICER: Okay uh so he knew it was the police outside?

7 DAWSON: Yeah but I saw them knock.

8 OFFICER: Uhhh (yes), and he didn't come to the door?

9 DAWSON: Hmm (no), no.

10 OFFICER: In fact, he pushed you in a back bedroom is that right?

11 DAWSON: Yeah he told me to come to the back bedroom and hide.

12 OFFICER: Uh so it's clear that he was uh hindering our ability to get in and help you?

13 DAWSON: Yes, yes.

14 WARNER: Uh is there anything else...

15 DAWSON: He wanted me to hide because he was scared that like...

16 OFFICER: And you...

17 DAWSON: ...that I would tell the police.

18 OFFICER: ...and you're...

19 DAWSON: You guys have been here before when he was abusing me but it was on a stolen
20 car from a car named Lyle, one of his, I don't even know Lyle. But I guess Lyle
21 had gone out and put his car in my garage.

22 OFFICER: And today you're going to the, the hospital is that right?

23 DAWSON: Yes.

24

1 OFFICER: Okay to go get checked out? Uh is there anything else you feel is important to
2 add to this statement?

3 DAWSON: No I don't, I don't know, I know that, I don't know.

4 OFFICER: And you're uh willing to sign a medical release so that we can get...

5 DAWSON: Uhmm (yes).

6 OFFICER: ...the doctor's assessment of what's going on with you?

7 DAWSON: Yeah.

8 OFFICER: Okay uh is all the information given in this statement true to the best of your
9 knowledge?

10 DAWSON: Yes.

11 OFFICER: Alright this statement is gonna end on uh January 19th, 2011, uh approximate time
12 is gonna be uh 09:57 hours.

13 End of Statement

14

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67238-0-I
v.)	
)	
EDWARD THAVES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> EDWARD THAVES 720927 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JANUARY, 2012.

X _____ 

**FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 31 PM 4:47**

Washington Appellate Project
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1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710