

SUPREME COURT NO. 90336-1

NO. 69227-5-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
RESPONDENT

v.

JAMES EDWARD HUDEN
PETITIONER

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
JUN 28 PM 4:13

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

THE HONORABLE VICKIE J. CHURCHILL, JUDGE

PETITION FOR REVIEW

JAMES EDWARD HUDEN
#360361

PETITIONER, PRO SE
WA. ST. PENITENTIARY
1313 No. 13 AVENUE FWZS
WALLA WALLA, WA 99362

FILED
JUN - 6 2014

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CPJ

A. IDENTITY OF PETITIONER/DECISION BELOW

HUDEN REQUESTS THIS COURT GRANT REVIEW

PURSUANT TO RAP 13.4 OF THE UNPUBLISHED

DECISION OF THE COURT OF APPEALS IN STATE V.

HUDEN, No. 69227-5-1, FILED FEBRUARY 3,

2014. A COPY OF THE DECISION IS ATTACHED AS

APPENDIX B.

B. ISSUES PRESENTED FOR REVIEW

1. DEFENDANTS VIDEO-TAPED POLICE INTERROGATION WAS ADMITTED INTO EVIDENCE AT TRIAL. RECENT UNITED STATES SUPREME COURT DECISIONS CLASSIFY INTERROGATIONS AS "TESTIMONIAL" IN NATURE. COMMON LAW RULES DO NOT PERMIT TESTIMONIAL EXHIBITS TO GO TO THE JURY ROOM. DID THE COURT ERR WHEN IT SENT A TESTIMONIAL EXHIBIT TO THE JURY ROOM?

2. TRIAL COURTS HAVE DISCRETION TO SUBMIT ALL EVIDENCE TO THE JURY. BUT IT MUST ENSURE THAT AN EXHIBIT BEARS DIRECTLY ON THE CHARGE AND IS NOT UNDULY PREJUDICIAL. DEFENDANTS VIDEO CONTAINED NO SUBSTANTIVE EVIDENCE THAT BEARS DIRECTLY ON THE CHARGE. DID THE COURT ERR WHEN IT SENT UNDULY

PREJUDICIAL EVIDENCE TO THE JURY?

3. TRIAL COURTS MUST BE AWARE OF THE POTENTIAL TO OVEREMPHASIZE ONE PIECE OF EVIDENCE OVER OTHERS. THE COURT HERE SENT A VIDEO EXHIBIT TO THE JURY ALONG WITH THE OTHER EXHIBITS, BUT WITHOUT A MEANS TO VIEW IT.

DID THE COURT ERR WHEN IT ANSWERED THE JURY'S REQUEST FOR A VIDEO PLAYER?

C. STATEMENT OF THE CASE

PLEASE SEE BRIEF OF APPELLANT,
ATTACHMENT "D", PAGE 2
"STATEMENT OF THE CASE"

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. HUDEN WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

HUDEN ASKS THIS COURT TO GRANT REVIEW BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO BALANCE THE PROBATIVE VALUE OF A VIDEO EXHIBIT AGAINST UNFAIR PRESUDICE TO THE DEFENDANT. WHETHER HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND PUBLIC INTEREST. RAP 13.4(b)(3),(4). REVIEW IS ADDITIONALLY WARRANTED BECAUSE THE COURT OF APPEALS DID NOT HAVE A COPY OF THE VIDEO NOR A TRANSCRIPT IN THE RECORD AND REJECTED

HUDEN'S CLAIM OF ABUSE OF DISCRETION SINCE IT

COULD NOT DISTINGUISH HUDEN FROM THIS

COURT'S OPINION IN STATE V. ELMORE, 139 W.

2d, 250, 293-298, 985 P.2d 289. [FNO]

THE CLASSIFICATION OF AN EXHIBIT AS

"TESTIMONIAL" OR "NONTESTIMONIAL" PRESENTS

A SIGNIFICANT QUESTION OF COMMON LAW.

TRADITIONALLY UNDER COMMON LAW THE

TRIAL COURT DOES NOT SUBMIT TESTIMONIAL

EXHIBITS TO THE JURY FOR UNSUPERVISED

REVIEW, EVEN IF THE EXHIBIT IS PROPERLY

ADMITTED INTO EVIDENCE. [FN]

THERE ARE TWO LIMITS TO THIS RULE:

1) THE RULE DOES NOT APPLY TO NON-
TESTIMONIAL EVIDENCE

~~THE~~

2) THE RULE IS NOT APPLIED WHERE THE JURY'S REVIEW OF THE EVIDENCE WAS IN OPEN COURT WHEN THE PARTIES ARE PRESENT OR WHERE THE COURT CONTROLLED THE NUMBER OF TIMES THE EXHIBIT IS REVIEWED.

[FN2]

THE REASONING BEHIND THIS LIMIT ON THE RULE HAS BEEN THAT WHEN THE COURT HAS NOT ALLOWED THE JURY UNRESTRICTED ACCESS TO THE TESTIMONIAL MATERIALS, THE RISK THAT THE JURY MIGHT GIVE THE EVIDENCE UNDUIS EMPHASIS DOES NOT EXIST. [FN2]

2. HUDEN WAS PREJUDICED BY THE TRIAL COURT'S DECISION TO SEND HIS TESTIMONIAL VIDEO EXHIBIT TO THE JURY ROOM.

POLICE CAME TO HUDEN'S HOME AND ACCUSED HIM OF MURDER. ^[FN3] HE VOLUNTARILY WENT TO THE POLICE STATION TO BE INTERROGATED.

DURING TRIAL, THE VIDEO WAS ENTERED INTO EVIDENCE AND PLAYED DURING THE STATE'S CASE IN CHIEF. ^[FN4]

THE VIDEO WAS SUBMITTED TO THE JURY WITH THE OTHER EXHIBITS, BUT WITHOUT A MEANS TO VIEW IT. WHEN THE DELIBERATING JURY REQUESTED A PLAYER, THE COURT SENT THEM ONE.

1. HUDEN'S VIDEO WAS OF AN INTERROGATION

THE UNITED STATES SUPREME COURT

ACKNOWLEDGES THAT VARIOUS DEFINITIONS OF
"INTERROGATION" EXIST. BUT A "RECORDED
STATEMENT, KNOWINGLY GIVEN IN RESPONSE
TO STRUCTURED POLICE QUESTIONING,
QUALIFIES [AS INTERROGATION] UNDER ANY
CONCEIVABLE DEFINITION." [FNS]

2. INTERROGATIONS ARE TESTIMONIAL IN NATURE

ALTHOUGH "LEAV[ING] FOR ANOTHER DAY ANY

EFFORT TO SPELL OUT A COMPREHENSIVE

DEFINITION OF 'TESTIMONIAL,'" CRAWFORD

NOTED THAT "AT A MINIMUM", IT INCLUDES

"PRIOR TESTIMONY AT A PRELIMINARY HEARING,

BEFORE A GRAND JURY, OR AT A FORMER

TRIAL; AND.. POLICE INTERROGATIONS."

[FNS]

THE COURT OF APPEALS, CITING ELMORE AS RULING ITS REJECTION OF HUDEN'S APPEAL, WAS UNABLE TO DISTINGUISH HUDEN'S INTERROGATION FROM ELMORE'S CONFESSIONS OF GUILT.

THE ELMORE COURT CLASSIFIED HIS TAPED CONFESSION AND INTERVIEW AS NONTESTIMONIAL AND SUBMITTED THE TAPES AND A PLAYER TO THE JURY. [EN7] IN HIS DISSSENT, J. SANDERS ARGUED THAT THE TAPES WERE TESTIMONIAL EXHIBITS AND SHOULD NOT HAVE BEEN SENT TO THE JURY [F8]

THE MAJORITY, HOWEVER, ADDED "[EVEN IF THERE WAS ERROR IN THE TRIAL COURT'S FAILURE TO MAKE A SPECIFIC RULING ON THE USE OF THESE EXHIBITS, ANY ERROR WAS HARMLESS ...

THE TAPES WERE RELEVANT TO THE JURY'S INQUIRY.

AS THE TRIAL COURT NOTED, THE RECORDING OF ELMORE'S

LENGTHY CONFESSION WAS ESSENTIALLY THE CASE

FOR BOTH SIDES... [FN9]

THIS COURT RULED IN FRAZIER THAT

CONFESSIONS MAY GO TO THE JURY IF, IN

THE SOUND DISCRETION OF THE TRIAL JUDGE,

THE EXHIBITS BEAR DIRECTLY ON THE CHARGE

AND ARE NOT UNDUPLY PREJUDICIAL. [FN10]

HUDEN IS DISTINGUISHED FROM ELMORE'S

CONFESSION. HUDEN'S INTERROGATION YIELDED

NO CONFESSIONS OF GUILT, NO SUBSTANTIVE

EVIDENCE. [FN11]

ELMORE'S CONFESSION "[COULD] HARDLY BE

SAID TO BE A PIECE OF EVIDENCE WHICH WAS,

SMALL IN COMPARISON TO THE REST OF THIS
CASE AND, THEREFORE, SUSCEPTIBLE TO BE
OVEREMPHASIZED." [ENIZ]

TESTIMONIAL EXHIBITS ARE NOT SENT
TO THE JURY, TO REMOVE ANY DANGER OF
OVEREMPHASIS. HUDEN'S INTERROGATION
VIDEO SHOULD NOT HAVE GONE TO THE JURY
ROOM.

2. HUDSON WAS PREJUDICED WHEN THE TRIAL COURT ALLOWED AN EXHIBIT THAT DID NOT BEAR DIRECTLY ON THE CHARGE AND WAS UNDUPLY PREJUDICIAL, TO GO TO THE JURY ROOM.

EXHIBITS GO TO THE JURY ROOM IF, IN THE SOUND DISCRETION OF THE TRIAL JUDGE, THE EXHIBIT BEARS DIRECTLY ON THE CHARGE AND ARE NOT UNDUPLY PREJUDICIAL. [FN 13]

THIS COURT RULED IN CASTELLANDS "WHILE TRIAL COURT JUDGES SHOULD CONTINUE TO BE AWARE OF THE POTENTIAL FOR OVEREMPHASIZING THE IMPORTANCE OF SUCH EVIDENCE [TAPES] AND SHOULD PREVENT SUCH EXHIBITS FROM GOING TO THE JURY IF UNDUPLY PREJUDICIAL, WE THINK THAT DECISION IS BEST LEFT TO THE SOUND DISCRETION OF THE TRIAL JUDGE." [FN 14]

THE TRIAL COURT SENT HUDSON'S INTERROGATION VIDEO TO THE JURY) ALONG WITH THE OTHER EXHIBITS, BUT WITHOUT A MEANS TO VIEW IT. IN ANTICIPATION THAT THE JURY WOULD REQUEST TO REVIEW IT, THE STATE CITED ELMORE, CASTELLANOS AND GREGORY) FOR THE COURT TO FOLLOW WHEN THE REQUEST CAME. [FN15] [FN16] [FN17]

BESIDES ELMORE'S CONFESSION, THE COURT CONSIDERED CASTELLANOS' RECORDING BY BODY WIRE OF A DRUG TRANSACTION, AND GREGORY'S VIDEO OF THE CRIME SCENE. [FN18] [FN19]

HUDSON'S INTERROGATION VIDEO IS DISTINGUISHED FROM THESE CASES. IN HIS CLOSING STATEMENT, THE PROSECUTOR CHARACTERIZED IT FOR THE JURY: " WELL, THERE'S A LOT TO BE

LEARNED FROM WATCHING [HUDSON'S] BEHAVIOR, HIS REACTIONS IN THE VIDEO; PERHAPS MORE SO THAN EVEN ANYTHING HE HAD TO SAY." [FN 20]

THIS COURT, IN CASTELLANOS, RULED THE TEST FOR PREJUDICE IS IF EVIDENCE STIMULATES AN EMOTIONAL RESPONSE, NOT A RATIONAL RESPONSE. [FN 21]

DEFENSE COUNSEL DID NOT OFFER AN ADVERSARIAL VIEW OF THE VIDEO, TO THE JURY, IN HIS CLOSING STATEMENTS.

"REVIEWING A VIDEOTAPE MAY INADVERTENTLY EMPHASIZE ASPECTS OF THE TRIAL THAT ARE NOT REALLY EVIDENCE SUCH AS THE DEFENDANT'S Demeanor..." [FN 22]

HUDSON'S VIDEO MEETS THE TEST FOR PRE-

JUDICE. THE COURT ERRED WHEN IT ALLOWED
THE JURY UNSUPERVISED ACCESS TO THE VIDEO,
KNOWING THEY WOULD BE INCLINED TO VIEW
HUDEN'S DEMEANOR AS EVIDENCE OF GUILTY,
AGAINST THE RATIONALITY OF WHAT HE
HAD TO SAY.

3. HUDSON'S VIDEO WAS OVEREMPHASIZED WHEN THE COURT ANSWERED THE JURY'S REQUEST FOR A VIDEO PLAYER.

THE ELMORE TRIAL COURT BUNDLED A PLAYER WITH HIS TAPES AND SENT THEM, ALONG WITH THE OTHER EXHIBITS, TO THE JURY. [FN23]

THE FRAZIER TRIAL COURT SENT HIS TAPES TO THE JURY WITHOUT A PLAYER. IN THIS MANNER, THE COURT COULD MAINTAIN SOME DEGREE OF CONTROL OVER HOW MANY TIMES THE JURY REVIEWED IT. [FN24]

HUDSON'S TRIAL COURT DID NEITHER. THE VIDEO WAS SENT INTO THE JURY ROOM WITHOUT A MEANS TO VIEW IT. WHEN THE JURY ASKED FOR A VIDEO PLAYER, ONE WAS DELIVERED TO THEM.

WITHHOLDING A PLAYER FOR THE SOLE PURPOSE OF REQUIRING THE JURY TO ASK FOR IT UNDULY ELEVATES ITS PROMINENCE.

THE COURT SHOULD HAVE BEEN AWARE THAT THE PROSECUTOR HAD URGED THE JURY TO RELY ON HIS INTERPRETATIONS OF HUDSON'S MANNERISMS.

[FN25] THE COURT SHOULD HAVE BEEN EQUALLY AWARE THAT DEFENSE COUNSEL FAILED TO MENTION THE VIDEO IN HIS CLOSING.

EVEN IF A "JURY DOES NOT UNDERSTAND THE PROSECUTOR TO REFER TO HIS KNOWLEDGE OF FACTS OUTSIDE THE RECORD, THE JURY COULD HAVE CONSTRUED THE STATEMENTS OF OPINION AS "EXPERT TESTIMONY" BASED ON HIS PERSONAL KNOWLEDGE AND HIS PRIOR EXPERIENCE WITH OTHER CASES." [FN26]

THE COURT SHOULD HAVE BEEN AWARE THAT THE STATE HAD VIRTUALLY OWNED THE COURTROOM. THE STATES OPENING, CASE IN CHIEF AND CLOSING OCCUPIED ABOUT 15 1/2 HOURS; DEFENSE WAS 3 1/2 HOURS. THE STATE RECORDED 14 MINUTES OF REDIRECT AND 2 MINUTES OF RECROSS. [FN 27]

A VIDEO EXHIBIT WHOSE PROBATIVE VALUE AGAINST THE CHARGE LIES IN THE DEMEANOR OF THE INTERROGATED DOES NOT BEAR DIRECTLY ON THE CHARGE AND IS UNDULY PREJUDICIAL.

THE COURT GAVE THE JURY THE OPPORTUNITY TO PLAY MOMENTS ON THE TAPE REPEATEDLY, UNTIL THEY WERE PERSUADED THAT HUDEN'S DEMEANOR AND MANNERISMS LOOKED LIKE WHAT THE PROSECUTOR TOLD THEM TO WATCH FOR.

COURTS HAVE A CONSTITUTIONAL OBLIGATION TO ENSURE A FAIR & IMPARTIAL JURY. THE TRIAL COURT MUST BALANCE UNFAIR PREJUDICE AGAINST THE PROBATIVE VALUE OF THE EVIDENCE.

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO USE SOUND DISCRETION IN ITS DECISION TO SUBMIT HUDSON'S INTERROGATION VIDEO TO THE JURY, ALLOWING THEM TO VIEW IT WITHOUT SUPERVISION. THE COURT ALSO DID NOT USE SOUND DISCRETION IN THE MANNER IN WHICH THE VIDEO AND PLAYER WERE SUBMITTED TO THE JURY.

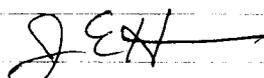
E. CONCLUSION

THE COURT OF APPEALS OPINION CONFLICTS
WITH DECISIONS OF THIS COURT AND PRESENTS
SIGNIFICANT QUESTIONS OF LAW AND PUBLIC
INTEREST. HUDEN REQUESTS THIS COURT
GRANT REVIEW UNDER RAP 13.4(b)(1), (3), (4).

DATED THIS 21ST DAY OF MAY, 2014.

RESPECTFULLY SUBMITTED.

JAMES E. HUDEN
360361 FW225
WA ST. PENITENTIARY
1313-N. 13TH AVENUE
WALLA WALLA, WA. 99362


PETITIONER, PRO SE

FOOTNOTES

- FN0 - COURT OF APPEALS OPINION-ATTACHMENT "B" (9-10)
FN1 - STATE V. MONROE, 27 P.3d 1249, 1251 (DIV I 2001)
FN2 - ID.
FN3 - BRP-923
FN4 - BRP-839-43
FN5 - CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004)
FN6 - MICHIGAN V. BRYANT, 131 S.Ct 1143
(QUOTING CRAWFORD AT 68)
FN7 - STATE V. ELMORS, 985 P.2d 289, 315-316 (WASH 1999)
FN8 - ELMORS AT 327
FN9 - ELMORS AT 316
FN10 - STATE V. FRAZIER, 661 P.2d 126, 130
FN11 - VIDEO TRANSCRIPT - ATTACHMENT A"
FN12 - ELMORS AT 316
FN13 - ID. (QUOTING FRAZIER 99 WASH. 2d 180, 188)
FN14 - STATE V. CASTELLANOS, 935 P.2d 1353, 1354
FN15 - STATE V. ELMORS 139 W.N. 2d 250, 293-298
FN16 - STATE V. CASTELLANOS, 132 W.N. 2d 94
FN17 - STATE V. GREGORY, 158 W.N. 2d 759, 847-848
FN18 - CASTELLANOS, 935 P.2d AT 1357
FN19 - GREGORY, 147 P.3d 1201, 1247 (2006)
FN20 - 10RP-1238
FN21 - CASTELLANOS AT 1356
FN22 - STATE V. MORGENSEN, 148 W.N. APP. ~~637~~⁸¹, ~~638~~⁹⁰ (2008)
(CITING STATE V. MONROE, 107 W.N. APP. 637, 638 (2001))
FN23 - ELMORS AT 315
FN24 - CASTELLANOS AT 1354 (CITING FRAZIER AT 190),
FN25 - 10RP 1038-1041
FN26 - UNITED STATES V. MCKOY, 771 F. 2d 1209, 1210 (C.A. 9 (N.D.) 1985)
FN27 - SEE MINUTES OF TRIAL - ATTACHMENT "C"

ATTACHMENT "A"

TRANSCRIPT OF HUDEN'S

INTERROGATION

1 *****Beginning of Tape, Side A*****

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MP: I'm gonna assume that's recording now. Um, my name is Detective Mark A. Plumberg with the Island County Sheriff's Office. The date is August the forth, two thousand four. It's seventeen oh nine or five oh nine p.m. We're at the Punta Gorda Police Station. Also present in the room is Commander Mike Beech of the Island County Sheriff's Office and James Huden. Mister Huden, would you mind for the tape recording just stating your full name and date of birth?

JH: James Edward Huden. August twenty-sixth, nineteen fifty-three.

MP: OK. Um, and what's your home address now?

JH: Two oh six Yucca, Y-U-C-C-A Street, Punta Gorda, Florida three three nine five five.

MP: OK. And, uh, we were already talking with you at your house about this. I, I read your constitutional rights to you at the house and you agreed to come down to the police station and speak with us.

JH: Yes.

MP: Uh, I'm gonna go ahead and just, because we're doing a tape recording, you understand this is being taped?

JH: Yes.

MP: OK. I'm gonna go ahead and just advise you of your rights again. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right at this time to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I've explained to you?

JH: Yes.

MP: OK. With these rights in mind will you talk to us now?

JH: Yes.

MP: Give us a taped statement? OK.

JH: Absolutely.

MP: OK. Um, we'd discussed some issues at the house. Uh, and I, while we're, while we're on tape, I just want to go back over some issues that seemed kind of critical to me while we were talking. Um, first off, would you tell us again how you and Peggy got to Washington from Las Vegas?



1 MB: Kay, can I interrupt for one second?

2 MP: Sure, yeah

3 MB: Jim, I don't know if you understand. In, in Florida, and s-, I'm sure you can see the sign on the
4 room, that there's, this is being video taped as well.

5 JH: Oh, that's fine.

6 MB: In Washington, you know, same with, with, uh, the audio taping, they get your, your consent to do
7 that. So just for the tape, now for the video portion, you understand we're being video taped and audio
8 taped while we have this conversation.

9 JH: Yes.

10 MB: OK. That's all I need to know.

11 MP: Um, yeah, the part about you and, and Peggy and how you got, can you tell us where you started
12 and how you got here and how Peggy got here. Just run back over that with me.

13 JH: Um, I left Florida in May or June of, uh, late May or early June of two thousand three. I drove to
14 Las Vegas, uh, met Peggy, a-, or no, actually, uh, she flew down to Dallas and I picked her up at the
15 Dallas Airport. Uh, drove to Vegas, um, stayed there while sh-, he was house hunting a few days. Flew
16 up to Whidbey, or Seattle and stayed on Whidbey Island from, I guess that would still be in June, uh,
17 two oh three to, or two thousand three. Um, left the island late July two thousand three with a truck load
18 of furniture and, uh, moved into a, uh, home in Henderson, Nevada. Uh, I believe that was the first of
19 August. Uh, I stayed there with her, uh, until early two thousand four and came back here to Florida and
20 I'm still here.

21 MP: OK. Um, specifically when we talked about Christmastime, do you remember I asked you about
22 Christmastime of last year?

23 JH: Yes.

24 MP: Can you tell us about the travel with you and Peggy?

25 JH: Abs-, Absolutely. Um, I still can't clear up the dates specifically for you, but I believe, uh, I left
26 Las Vegas on a Monday or a Tuesday, um, the week before Christmas. Drove to Seattle and stayed with
27 a friend there overnight, that would be Wednesday night. And this is all based on the fact, I think that,
28 uh, Peggy and the girls landed, uh, on Thursday. They may have landed on Wednesday and I might be
29 off a day, but, uh, next day picked Peggy and the girls up at the airport, uh, in the evening. Peggy and I
30 stayed at a hotel in, uh, Lynnwood I believe. A hundred ninety-six off of I-5. The first night, m-, uh,
31 went up to Whidbey Island and stayed at, uh, a friends house, uh, from that, uh, the next day, uh, Friday

1 until Monday or Tuesday of the, uh, following week. Um, after Peggy got off work, either that Monday
2 or Tuesday, we drove into, uh, uh, Seattle and stayed at an airport hotel, a nice airport hotel a couple of
3 blocks behind the, the Thirteen Coins, right down by the airport, and left, uh, left Seattle the day after
4 Christmas.

5 ? (inaudible)

6 MB: For the tape, Detective Plumberg has stepped out for a moment to answer the phone. According to
7 my watch it's seventeen sixteen hours. Where were we Jim now? You stayed, what was that last
8 sentence? Redo it for me if you would.

9 JH: Uh, s-, stayed in the motel, uh, that I don't recall the name of, uh, until the day after Christmas, and.

10 MB: And did?

11 JH: Go ahead.

12 MB: You guys flew out from there? Oh, you, oh.

13 JH: No, I had the car. Peggy flew up and rode back with me.

14 MB: OK. Seventeen seventeen and Detective Plumberg's back in the room.

15 MP: I'm sorry Mister Huden, I had to take that call.

16 JH: Not a problem.

17 MB: Um, uh, we were just at the point where he stayed at the hotel by the Thirteen Coins and left the
18 day after Christmas to drive back to Vegas.

19 MP: Kay. Uh, now, I just want to make sure that I cover this, cause we covered it at the house, I want
20 to make sure I have it right.

21 JH: Yes.

22 MP: You drove up here from Vegas.

23 JH: Correct.

24 MP: In which car?

25 JH: Uh, the Lexus.

26 MP: And that belongs to?

27 JH: Peggy.

28 MP: Peggy? OK. And Peggy flew up with her two kids?

29 JH: Yes.

30 MP: OK. And then, uh, you stayed at the hotel, a nice hotel, down by the airport, somewhere around
31 Thirteen Coins, a couple of blocks off ninety-nine. And then, go ahead, go ahead from there, I'm sorry.

1 JH: N-, n-, no, that's the end of it.

2 MP: Oh, OK.

3 MB: Yeah.

4 JH: Stayed up in, uh, uh, the one by Lynnwood there, a hundred ninety-six, I believe it's on. Uh, near
5 the freeway. Uh, that night, um, moved up to the island the next day, uh, which I believe would have
6 been Friday. Uh, stayed at my friend's house. Uh, left there Monday or Tuesday. Uh, that's when we
7 got the hotel down by the Thirteen Coins, behind it, and then we left the day after Christmas.

8 MP: OK. And, and the time of day that you left?

9 JH: Morning. I d-, I don't recall exactly what time it is.

10 MP: In the morning?

11 JH: Yes.

12 MP: Kay. Um, I just want to make sure we get the names right. At the house you told me when you
13 got here, the first night you stayed with a friend, and his name was what?

14 JH: Oh, when I got h-.

15 MP: When you first.

16 JH: When I got here by myself?

17 MP: Uh-huh.

18 JH: Yeah, I stayed at my friend's house, uh, Ron Young.

19 MP: Ron Young?

20 JH: Yes.

21 MP: OK. And then the friend on the Island, his name?

22 JH: Dick Deposit.

23 MP: Dick Deposit. OK. And he stays at the Useless Bay Colony? Uh, Useless Bay somewhere.

24 JH: That's, uh, yeah, that's his, uh, uh, recreational house, I guess.

25 MP: OK. While you were on the island, did you have any interaction at all with Russell Douglas?

26 JH: No.

27 MP: No interaction whatsoever with Russell Douglas?

28 JH: No.

29 MP: OK. While you were up there in the Northwest anywhere, did you interact with Russ Douglas
30 while you were in the, the Seattle area?

31 JH: Yes. 

- 1 MP: OK. Can you tell me about that?
- 2 JH: Yes. Um, the night, and here again it's that Monday or Tuesday thing, uh, the last night Peggy
3 worked we drove back to, uh, Seattle to get the, uh, hotel room. Um, I believe there was a couple of
4 conversations back a-, calls back and forth trying to get connected up with Russell. I can, can't
5 remember that, but that's what I'm recalling right now.
- 6 MP: And who made those calls?
- 7 JH: Uh, they, I think, traded turns. Um.
- 8 MP: Who's they?
- 9 JH: Russell and, and Peggy.
- 10 MP: Russell and Peggy called each other?
- 11 JH: Yes.
- 12 MP: OK.
- 13 JH: Uh, trying to hook up (inaudible), and with the purpose of, uh, Peggy getting a present to Douglas
14 to, uh, or pardon me, Russell to, uh, get to Brenna for Christmas by surprise. Uh, we got to the hotel
15 room. Uh, I volunteered to take the present over, and did so, and, that evening with, it's either Monday
16 or Tuesday evening. Um, and that's my interaction with, was, are you Brenna's husband? He said, yes.
17 I said, this is for you. He knew, apparently knew what I was doin' and, and, uh, uh, that was it.
- 18 MP: So he knew you were comin' with the present?
- 19 JH: Yes.
- 20 MP: OK.
- 21 JH: Well, and I don't, you know, eh, based on that, that point of contention that you brought out, I, I
22 can't say for sure that he knew who was gonna bring it. He just knew it was gonna be there.
- 23 MB: What was the present that you took his, for Bren-?
- 24 JH: It was wrapped.
- 25 MB: You don't know what Peggy bought for Brenna or didn't discuss it with her?
- 26 JH: Um, yeah, uh, it's, uh, it appeared to be cream and bath stuff.
- 27 MP: Um, now you told me at the house that you drove over and parked right in front of his apartment?
- 28 JH: Yes.
- 29 MP: In Renton?
- 30 JH: Yes.
- 31 MP: Kay. Um, you were in Peggy's car at that time? 

1 JH: Yes.

2 MP: The Lexus? Kay. And where was Peggy while you were delivering the present?

3 JH: She was at the motel.

4 MP: The motel?

5 JH: Hotel.

6 MP: And that's the one in?

7 JH: That's behind the Thirteen Coins.

8 MP: Behind the Thirteen Coins down by the airport. OK. So you drove up from the airport hotel to

9 come and bring the present to Russ up at his apartment in Renton?

10 JH: Yes.

11 MP: OK. And you said, earlier you said that you took it for Peggy just to be a nice guy cause she was

12 beat.

13 JH: That's true.

14 MP: What, what had she been doing?

15 JH: Uh, been on her feet all day.

16 MP: Doin' what?

17 JH: Cutting hair.

18 MP: Cutting hair?

19 JH: Yes.

20 MP: OK. Now you told me that you guys, and when you guys left the island, she didn't cut hair

21 anymore.

22 JH: That's right.

23 MP: That was the last day she cut hair.

24 JH: Uh, uh, no, I, I don't think I said that, cause that would be inaccurate. Several of her customers, uh,

25 were willing to make appointments with her during the, uh, Thanksgiving and Christmas holidays.

26 MP: Oh.

27 JH: We're gonna come back and do their hair for the holiday.

28 MP: Oh.

29 JH: So, so they worked, she worked that time, um, but, um, uh, that so far has been the last time.

30 MP: But you told me that the day you guys left the island and went to that hotel was.

31 JH: Oh, yes.

1 MP: The last day that Peggy cut hair.
2 JH: Yes. I'm sorry, I thought you were talking about when we were living up there.
3 MP: Mm-kay. Um, so excuse me just a second. I'm sorry, I gotta take this call again.
4 MB: Do you want some coffee Jim?
5 JH: I would love some.
6 MB: Officer ducked in and told me the coffee was ready so I'll just leave the tape running and grab that
7 coffee. I'll leave the door open. You want anything in it?
8 JH: No, just black please.
9 MB: Black coffee coming right up. Here's some black stuff.
10 JH: Terrific. Thank you.
11 MB: Grab one of them for me. These guys are treatin' us OK.
12 JH: A nice town to be in .
13 MB: Want some cream and sugar in your coffee? I'm like, yeah, I'll take a cheese Danish. Well, like I
14 said earlier, we've got detectives in, in Vegas right now working on talking to Peggy, so we're.
15 MP: I apologize again Mister Huden. I, I hate to keep running out of the room on ya. Um.
16 JH: No problem.
17 MP: So, um, yeah, we were talkin' about that you guys, you told me that you guys left the island and
18 went to the hotel on the last day that Peggy cut hair.
19 JH: That's correct.
20 MP: OK. And then you delivered the present to Russ at his apartment on a day when Peggy was
21 exhausted from cutting hair.
22 JH: That was the same night.
23 MP: That was the same night?
24 JH: Yes.
25 MP: OK. Now, w-, what, what gave you the feeling that, that, uh, that the present consisted of body
26 creams and soaps and stuff like that, or at your house you called it girly stuff. What, how'd you know
27 that?
28 JH: I, I had saw it before it was wrapped.
29 MP: Did ya? OK. And what was the reason again, y-, you said that there was a specific reason why,
30 uh, Peggy wanted it delivered after hours, what was that reason again?

1 JH: Well, she and Brenna apparently had made a pact not to exchange Christmas gifts. Peggy knew if
2 she gave her one at work that Brenna wouldn't let her leave with goin' out and get her one if she hadn't
3 done one already. And, uh, so, uh, she got one and had Russ take it up, uh, that, I think he was leavin'
4 that night, the night I dropped it off.
5 MP: OK. Wha-, and when you met Russ and dropped a present off with him what was, what was the
6 interaction between you guys?
7 JH: It was, are you Brenna's husband? And he said, yes. I says, here's her gift. And that was it. Or
8 something to that effect. It was a-, it was about that long.
9 MP: OK. Had you ever met before then?
10 JH: No.
11 MP: Did he know about you?
12 JH: Mm, I don't know. I di-, uh, if Brenna and Peggy talk about everything, then he probably knew of
13 me, yes.
14 MP: I mean, it, it just seems odd if he was, if he was talking on the phone all this time to Peggy and a
15 guy that he doesn't know and doesn't associate with Peggy shows up and he didn't even ask who you
16 were. I just, that seems a little out of sorts to me.
17 JH: Yeah.
18 MP: He just, he just took the pr-, you didn't say hi, I'm Peggy's friend, I'm Peggy's boyfriend, I'm, you
19 just, are you Brenna's husband? Here's a present?
20 JH: I just, I just wanted to make sure he was the right guy, yeah.
21 MP: OK.
22 MB: You know where Peggy bought that present, by any chance? Were you with her?
23 JH: No. Hm-mm. Somewhere on the island.
24 MP: Did, I don't know if I asked you this. Did Peggy call Brenna that night in those, between those
25 phone calls where she was talkin' to Russ?
26 JH: I, I don't know.
27 MP: Were you with Peggy while she was talkin' to Brenna back and forth about making the delivery?
28 JH: I'm not followin'.
29 MP: When, when Peggy, or I'm sorry.
30 JH: Your m-, you're talking about Russ.
31 MP: When Peggy and Russ.

1 JH: Yes. (inaudible).

2 MP: When Peggy and Russ were talking, you were together, you heard the conversations?

3 JH: Yes.

4 MP: OK. And now, when you guys left the island that day and went down to, uh, this hotel by the
5 airport, what time did you get to the hotel by the airport?

6 JH: Um, know, um, I was gonna it's dark, but I know in December that's most of the time, um, I think I
7 said before seven and ten, and, and that's probably about as close as I'm gonna get. Uh, you know, it
8 had to be like between seven and nine. Because I believe, if I'm recalling this correctly, somethin'
9 about ten o'clock, he was takin' off at ten o'clock if, if, uh, uh, oh man, I'm tryin', I'm trying to pick
10 this one out of my cobwebs. Something about ten o'clock and him made it imperative that that present
11 be there before he takes off. And we had to check in and wrap the present and go through, uh, uh,
12 holiday traffic to get there and, uh, I don't recall what time we got off the island, but, uh, I'm gonna say
13 between seven and nine.

14 MP: OK. And you, when you drove to deliver the present, you told me that Peggy was not with you, is
15 that correct?

16 JH: That's correct.

17 MP: Where was Peggy.

18 JH: At the hotel room.

19 MP: At the hotel room?

20 JH: Right.

21 MP: OK. Now at, at that point her two children were, were they with you or not?

22 JH: No, they were with their dad.

23 MP: With their dad. OK.

24 MB: The ho-, the hotel was paid for, from what you can recall, with Peggy's credit card?

25 JH: Yes.

26 MB: I think we talked you thought it might be the Radisson?

27 JH: Possibly. That sounds right, but I can't s-, swear to, they, they got a conference center there, what's
28 w-, what's another one that starts with a H?

29 MP: Hilton?

30 JH: Could be a Hilton.

31 MB: They're all right in there. 

- 1 MP: Yeah, there's the Hilton, the Holiday Inn, all there (inaudible).
2 JH: (inaudible) Yeah. It wasn't a Holiday Inn.
3 MP: Now when you guys left the hotel in, in the Alderwood, Mill Creek area and came up to the island.
4 JH: Yes.
5 MP: You, you thought that was maybe a Friday, Saturday?
6 JH: Um, it was the day after Peggy and the kids flew in, which would make it either Thursday or
7 Friday, I think.
8 MP: OK. And what day did she, what was she doin' up there on the island?
9 JH: Cuttin' hair.
10 MP: Cutting hair?
11 JH: Mm-hm.
12 MP: Where was she cutting hair?
13 JH: At Brenna's place.
14 MP: Brenna's salon?
15 JH: Right.
16 MP: Do you know the name of the salon?
17 JH: Yes, Just Be.
18 MP: Just Be. And you told me earlier I think, you think she had some appointments for haircuts on
19 Friday, is that correct?
20 JH: Yes.
21 MP: Kay. And this is the Friday before Christmas?
22 JH: Correct.
23 MP: OK. And run over with me again the days that you think she probably had haircut appointments.
24 JH: Uh, Saturday, uh, that Friday. Assuming that's Friday we got up there. I'm, I'm, the more we're
25 talking about this, I'm pretty sure that is the day.
26 MP: OK.
27 JH: Um, Saturday, Monday, and maybe Tuesday, the Tuesday before Christmas.
28 MP: Now you guys stayed on the island with, or not with but at Dick Deposit's house?
29 JH: Correct.
30 MP: There up by Useless Bay?
31 JH: Yes. 

1 MP: And you guys didn't get together with Brenna, as far as a social occasion?
2 JH: Correct.
3 MP: Kay. Um, but you, you mentioned to me, now I don't wanna put words in your mouth, I think you
4 mentioned to me that there had been a couple of attempts, is that right?
5 JH: Yeah, uh, that's my recollection, yeah. Um, I know we were busy and, uh, I just seem to think
6 there was a night when we thought we were gonna be able to go out and somethin' happened and we
7 didn't. But that, I could be mixin' that up with Thanksgiving.
8 MB: What was the reason for Peggy working those days?
9 JH: Well, she had a, a real loyal clientele and they, uh, uh, basically paid for the trip.
10 MB: Oh really?
11 JH: Yeah.
12 MP: Now when we talked earlier we, we talked about a few issues, uh, one of which was, uh, the, in
13 fact the, the question came from you, was is Peggy angry enough at me to implicate me in, in this issue,
14 in Russell's death? And I asked you, you know, well, why, why would she be that angry? Can you
15 explain kinda what's goin' on with you and Peggy and why she's angry?
16 JH: Well, sure. I'm a son-of-a-bitch, but I'm, I, I'm no killer. But I'm a son-of-a-bitch. Uh, when I left
17 here, um, to be with her, I had every intention of, um, uh, filing for divorce. And, uh, I didn't. And, uh,
18 I made Peggy believe that, that, uh, you know, my ex-wife is, pardon, her, my wife was part of my past
19 and that, and that we had a future together. And when, when we got home from Christmas, I explained
20 to her I had to come back here and, uh, wrap up some loose ends and, excuse me. And when I got back
21 my, my wife's mom was dying and, uh, the I.R.S. had put a lien on the business, because, because the
22 goddamn secretaries didn't make a deposit and didn't say anything about it. Uh, her number one
23 employee who took the most load off of her, she, she's a, uh, and I don't say this with any, any doubt
24 that she's the finest, uh, computer technician, uh, as far as like, you know, tyin' businesses and stuff
25 together, the, the stuff that's, that's, uh, kinda tyin' in stuff, the guy who took the most load off of her
26 ~~mind~~^{uh, this} in that regard, in addition to running a business and quit, uh, and here I was, just gonna say, you
27 know, uh, here's your divorce papers. I couldn't do it. And Peggy got a, of course, was expecting me to
28 come back and, uh, I'm still here. And, and your timing is just amazing to me, because, uh, somebody'd
29 asked me what day I was planning to leave and, uh, actually I had one more thing to do to help my wife
30 tomorrow and I was plannin' on leavin'. But I can't leave her like this. I'm sure she's even more scared
31 than me. This is quite a frightening experience. 

- 1 MP: Well, what is it that you're scared of?
- 2 JH: That you guys are h-, are here. Oh jeez, you don't just show up on my, somebody's doorstep with,
3 you know, without some idea of what you're doin'.
- 4 MP: That's true, we've explained that part to you.
- 5 JH: Yeah.
- 6 MP: We, we don't come across the country for, for nothin'.
- 7 MB: I wish the Sheriff was that liberal and we coulda made that trip to (inaudible).
- 8 JH: Uh-huh.
- 9 MB: What was that one, Thailand, we're lookin' at that?
- 10 MP: And I, I guess that's, and, and we talked about that afterwards. You, you explained to me already
11 kinda why Peggy was upset with ya.
- 12 JH: Yeah.
- 13 MP: Um, and you, but I mean of, of all the people that coulda come to your mind to ask me about that
14 was, that was the question you asked, is, is Peggy upset enough with me to implicate me in this crime.
- 15 JH: I, I did, I did say that. And I also went on to, to tell ya I ca-, I don't believe it for a minute that she
16 would but, uh, I'm just lookin' for a reason why li-, why I'm in this. And her name, and Brenna's name.
- 17 MP: We-.
- 18 JH: Somebody's doin' it.
- 19 MP: Who, who else do you think would be, and we've talked about this already, but have you come up
20 with any other names? You mentioned that your current wife's pretty upset with ya.
- 21 JH: Yeah, she'd never do that. Yeah, I've said the same thing about Peggy.
- 22 MP: And tell me again what, just kinda what's your relationship with Brenna.
- 23 JH: Just a friend of Peggy's. Um, that's it. I, uh, it, it's mostly a, uh, telephone relationship they have,
24 and I'm kinda just a guy in the room.
- 25 MP: OK.
- 26 JH: Hearin' one end of the conversation. Or I was.
- 27 MP: You mentioned earlier that you had heard about what happened to Russ.
- 28 JH: Yes.
- 29 MP: And what was your source of information about Russ?
- 30 JH: We were in Vegas and, uh, Peggy's mom called and said, uh, uh, I guess it was in the newspaper.
- 31 MP: Did she know who Russ was, Peggy's mom? 

1 JH: I don't know that. I assume so.
2 MB: What's drive time from Whidbey to Vegas? I've never driven it.
3 JH: Uh, about twenty hours.
4 MB: Really?
5 JH: Yeah.
6 MB: Thought it was longer than that.
7 JH: Oh no, no, excuse me, it's about fourteen hours.
8 MB: Fourteen hours?
9 JH: Yeah.
10 MP: Wow, that's not bad.
11 JH: No, I'm lying, it is twenty. It's about fourteen hundred miles.
12 MB: Mm. Depends how you drive I guess.
13 JH: Yeah, good (inaudible).
14 MB: Depends on what you are drivin'.
15 MP: Wh-, when Peggy's mom called, did she talk to you about Russ or to Peggy?
16 JH: No, talked to Peggy.
17 MP: What, what did Peggy tell you after she get off the phone with her mom?
18 JH: Uh, she sat there, as I recall, eh, just kind of like somethin' had hit, you can tell somethin' was hit.
19 And, uh, asked her what the deal was. She said, it was mom, Brenna's husband got killed.
20 MP: How did Peggy seem to handle that? I mean, you said it, it looked like she'd been hit, but, I mean,
21 was it?
22 JH: Oh, big shock. Uh, I would equate it to my wife being told I was leaving. That kind of impact.
23 She and Brenna are close, you know, so she, I think they have more phone time than anybody.
24 MB: Did she immediately hang up and call Brenna?
25 JH: You know, she asked what to do, and this is always bad, I did this with my best friend and, and
26 Peggy's sister, Sue, uh, when he got killed. You know, everybody in the world's callin' and comin'
27 over, and I said, you know, she'll understand, just don't be another phone call right now, cause it aint
28 gonna help.
29 MP: Do you know, did she heed that advice or did she go ahead and call Brenna?
30 JH: Uh, she did that day and I think, I think it, uh, a short while, a, eventually she called. I don't really
31 recall.

3
1 MP: And she called Brenna that day?
2 JH: Uh, no.
3 MP: Oh, she didn't?
4 JH: Did not call that day.
5 MP: Oh.
6 JH: She heeded my advice that day.
7 MP: OK.
8 MB: Do you have any idea how long after that you guys got back to Vegas that call came in?
9 JH: Eh, it wasn't a very long time. Uh, I don't, I don't really recall. Two, three, four days. Could've
10 been any of that.
11 MP: Did, did Brenna call her? Did Brenna call Peggy?
12 JH: Not to my knowledge.
13 MB: Did she call on Friday or anything before you guys hit the road?
14 JH: I don't (inaudible).
15 MB: (inaudible) much phone time together.
16 JH: Uh, were you asking me before we hit the road?
17 MB: Yeah.
18 JH: Uh, no, no, cause we got, we got out early, uh, the day we left.
19 MP: Yeah, Friday, the day you started back to Vegas, did she call you guys at all Friday?
20 JH: I don't remember.
21 MP: When we talked before about, uh, let me check my notes here. We've talked before about Peggy's
22 financial situation and I, I gave that as, you know, I wondered if that were part of the reason why she
23 would be angry at you if you had left her in any financial difficulty. You said you're having some
24 considerable financial problems.
25 JH: Personal yeah.
26 MP: Personal problems, yeah, financially? Um, but you also mentioned that your, your wife is, is in
27 good shape.
28 JH: Yes.
29 MP: What, I'm, I'm not sure I understand that. Can you explain that to me? You're still married, right?
30 JH: Yes.
31 MP: OK.

1 JH: A-, and, and I'm just talkin', you know, uh, my way of thinking, I don't know if, legally, that makes
2 sense or not, um, but, uh, after her mother passed away she received, she and her brothers received an
3 inheritance of substantial numbers, and I, I'm, I won't let her use it to pay off my, uh, stuff. We don't,
4 we don't, uh, w-, with the, uh, exception of the house, uh, we all have our, we have our own accounts,
5 our own, um, uh, cards and stuff.

6 MP: OK. And you'd mentioned that you discussed with your wife the fact that you're, you're leavin'
7 again?

8 JH: Yeah.

9 MP: How did she take that?

10 JH: Oh, it's been quite painful for her. Yeah. She's a sweetheart.

11 MB: How do you think she's takin' the fact that you're here answering questions about a homicide?

12 JH: Uh, that's what I'd like to know. I, I hope, uh, I get an opportunity to come back and be with her. I
13 kind of wish somebody would've stayed with her when, I know.

14 MP: You, you hope you get an opportunity to go back and be with her?

15 JH: Yeah.

16 MP: Why, why wouldn't you?

17 JH: I don't know. I haven't understood any of this so far, and I keep getting' further away from home.

18 MP: OK. W-, you mentioned that just apparently moments before we came, well maybe not moments, I
19 think you said, and again, I don't wanna put words in your mouth, but about an hour and a half before
20 we arrived at your house you had been on the phone with Peggy. Is that right? You called her?

21 JH: That's correct. Yeah, I'd called her and she was calling back.

22 MP: OK. What were y-, what was the topic of discussion on that with you and Peggy?

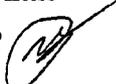
23 JH: I had asked her, uh, I have to give you a little background information here. In the course of my
24 time being here, uh, uh, Peggy and my wife had been introduced to each other. Uh, and have, uh,
25 conversations, uh, about me, I guess. Um, Jean had told me, uh, last night or the night before that, that
26 Peggy'd, uh, uh, the boyfriend I guess, would, uh, her dad had referred to him as his new son-in-law, or
27 soon to be son-in-law, something to that effect, and, and more importantly that, that the youngest
28 daughter had, uh, told Peggy that, uh, that this guy was a lot nicer to her than I was. So I, uh, I wanted
29 to find out if that was the, the case, so that's why I called. And, uh, and she hadn't heard her dad say
30 that. Uh, and the, uh, proper phrasing from the younger daughter was, um, that he takes care of her
31 better, uh, than I did. And that's, that's what we talked about.

1 MP: Um, you told me that you had also, uh, tried to broach the issue with her, you, of you goin' back to
2 Vegas with her? Is that correct?
3 JH: Um, back to Vegas to stay with Peggy?
4 MP: Yeah.
5 JH: Uh, that has been a, uh, I have asked to come back and have a, uh, have another chance. Uh, she
6 has been willing to go so far as to say she would do that. But no guarantees. It, it won't be welcomed
7 with open arms. But, uh, (inaudible) and I wanted to clarif-, clarify that, uh, one last time too, but our
8 phone conversation was, uh, brief, uh, and I, um, I didn't, I was gonna fish for some more reassurance,
9 you know.
10 MB: You alluded to the fact like she couldn't talk or whatever.
11 JH: Yeah. I think she's with her boyfriend right now.
12 MB: What's his name?
13 JH: Uh, all I know is Angelo.
14 MP: And I, I talked to you before about, give me some idea of why it is that the family would say that,
15 that Angelo treats her better than you did.
16 JH: Well, this gal's ten years old and this guy has, from what I understand, a hell of a lot more money to
17 lavish than I do. And you know, that, that was, in my next conversation that's what I'll be asking, you
18 know, from perceived by the eyes of a ten year old, is that because, you know, you guys go out and do
19 this and you buy th-, this, an-, and this or did? Cause I was never bad to her, other than not having the
20 balls to divorce my wife. And, um, and from the kids, always good, always good. They told me that
21 was my first kids experience and it was a, it went from bewildering to, uh, pretty cool.
22 MP: We talked before about, I mean, you told me that you're, you're in a pretty bad financial situation.
23 And you said that Peggy, uh, at least I, if your words, if I remember correctly, you said she's no worse
24 off than when I got there. But is, what's, what's Peggy's financial situation? Is she, is she in some
25 really hard times right now or?
26 JH: Well, um, I believe I recall her saying that she's rung up like fourteen thousand on her credit cards.
27 Um, me, I'm probably double that. Uh, if not even slightly higher. But I don't, I don't let it bother me.
28 Uh. You know, um, I've had money, and I've had no money, now I just spend somebody else's money,
29 and it all feels about the same. Um.
30 MP: Um, when you were in Vegas with her for that, those months, did you work?
31 JH: No.

1 MP: (inaudible). Is that where you racked up that credit card?
2 JH: Mm, some.
3 MP: Bills?
4 JH: Yeah.
5 MB: What does she do in Vegas?
6 JH: Drives a limo.
7 MB: She's paid pretty well if she's sportin' around in a Lexus.
8 JH: Uh, she h-, she, that's, it's a twelve year old Lexus. Uh, I don't know if you've been in one of those
9 things, but.
10 MB: Yeah.
11 JH: You'd never guess that it was that old. Uh, bought that a long time ago. And, uh, uh, she worked
12 for it.
13 MP: Now when you drove from here, uh, your house in Florida out to Vegas, what, what car did you
14 take?
15 JH: Took my, uh, Sebring.
16 MP: The Sebring?
17 JH: Mm-hm.
18 MP: Well, I already told ya that, uh, that we're here because of a, an implications of, of some people in
19 this crime.
20 JH: Mm-hm.
21 MP: And I think I, I had asked you this before, and you originally brought up Peggy as, you know, is
22 Peggy mad enough to implicate me in this crime? But I wanted to cover with you again, is there
23 anybody else that's angry at ya? Anybody else that, do ya owe somebody, and you said you were in
24 debt, do you owe somebody large amounts of money? Is there, a-, and I'm not accusing you of
25 anything.
26 JH: (inaudible)
27 MP: Are there drugs involved or?
28 JH: Oh no, no. No.
29 MP: Any?
30 JH: Just, uh, just not really givin' a shit. That's why I rung em up. An-, and they're all, you know, I
31 don't think Citibank's mad at me, and I don't think, uh, you know, current with the payments

1 MB: Well is giving that twenty-eight bucks a month or whatever, to keep up on your, your.
2 JH: Oh boy.
3 MB: Would you like a fifty thousand dollar limit?
4 JH: Yeah, my next step will be one of those, you know, combined, uh, uh, the, what do you call them,
5 uh?
6 MB: Debt consolidation thing or whatever.
7 JH: There ya go.
8 MB: Well, what do ya think brought us here, Jim? Any idea?
9 JH: No. That's why I'm, I'm bewildered and guessing.
10 MB: What do you think Peggy's reaction's gonna be at my guys out there?
11 JH: I'd be surprised if it's any different than mine.
12 MB: We're still, I'm still kickin' around why she would have told Detective Plumberg that she brought
13 a gift to Russ's house that night.
14 JH: I have no idea.
15 MB: I mean, she told you that.
16 MP: Yeah, Peggy's, Peggy's statement to me was that she called Russ, that she met Russ at his
17 apartment, and she even went so far as to describe for me the clothes that Russ was wearing when she
18 met him. Never mentioned you once, and you're telling me she was back at the hotel room.
19 JH: Yeah.
20 MP: I just don't, man I, I need to explain that one. That doesn't make sense to me.
21 JH: Well, I can't explain it, because I was the one who went.
22 MB: Well, you're gonna have two days before the guy's killed, and either one or both of you have gone
23 to see him, both of you are telling us you've been there.
24 JH: Yeah.
25 MB: But she says she went alone and you say you went alone. Doesn't make any sense.
26 JH: Well, I remember, I remember it very clearly.
27 MP: And are ya, are ya sure that Peggy worked at the salon during that time?
28 JH: Uh, e-, either dropped her off in the morning or she drove in. Uh, either picked her up or she drove
29 home. Had money in her, uh, and checks from her work, and, uh, if she was not there, uh, I would be
30 surprised.

1 MP: Wow, cause she told me she never even got together with ren-, or Brenna during the holidays.
2 And it seems like she would've said, I worked at her salon.
3 MB: I saw her four or five days in a row.
4 MP: I mean.
5 JH: Oh, I'm, I'm sure.
6 MP: And.
7 MB: But she didn't even mention that.
8 JH: I, I'm telling you what I remember.
9 MP: Would it surprise you to know that I, uh, the phone calls that I had at the house and that I had from
10 leaving this room, uh, were from detectives in Las Vegas serving a search warrant on her house?
11 JH: No.
12 MP: That wouldn't surprise ya?
13 JH: Nothin', nothin' would surprise me at this point.
14 MB: Who's Bill Hill?
15 JH: Uh, he's a friend of mine that lives here, bass player.
16 MB: Hm. Does that surprise you that I had brought up that name?
17 JH: E-, uh, yes.
18 MB: Why?
19 JH: Uh, because you're from W-, Whidbey Island?
20 MB: Would it surprise you that I've been talkin' to him almost daily for the last week an a half?
21 JH: Yeah, it would surprise me.
22 MB: What about lunch on Monday?
23 JH: Yeah.
24 MB: Would it surprise you that I was, I was there, that maybe I watched you guys have lunch?
25 JH: That, that would be fine.
26 MB: And what was the conversation you had with Bill after lunch?
27 JH: I told him I was leavin'.
28 MB: Why?
29 JH: Cause I needed to get back to Peggy.
30 MB: For what?
31 JH: Cause I love her.

- 1 MB: What else did you tell him.
- 2 JH: That was it.
- 3 MB: Bill's your friend.
- 4 JH: Yes he is.
- 5 MB: And he's physically sick by what you've told him, and by what he's been dealing with. Frankly,
- 6 I'm kinda tired of sittin' here listenin' to us go over the same stuff over and over again. I mean, we're
- 7 not telling you the whole truth, and you're not telling us the whole truth. So we're at the point, you
- 8 know, Bill called me, out of the blue, over a week ago. So we're at truth or dare time Jim.
- 9 JH: Yeah.
- 10 MB: You know what you've told Bill. He's your best friend in the whole world. The guy's fallin'
- 11 apart over this. Literally, falling apart over the guilt he's carrying around because you told him what
- 12 you did.
- 13 JH: I don't buy that for a minute.
- 14 MB: So your best friend in the whole world calls me, calls the Island County Sheriff's Office out of the
- 15 blue, why do you think I'm here?
- 16 JH: I don't know.
- 17 MB: What do you think I'm making it up?
- 18 JH: No. I think you had, are working on the information you have.
- 19 MB: Well the information I have that I'm working on is coming from your best friend. Why the hell
- 20 would I fly all the way out here to Florida?
- 21 JH: Well, he could be one of the guys pissed at me.
- 22 MB: Why?
- 23 JH: I've been trying to get him into the band that I was in. We had a good one awhile back.
- 24 MB: Mm. That was just in the practice stages. I hear a lot of the people in the band are pissed at ya,
- 25 but he's not one of em, cause he wasn't in the band.
- 26 JH: That's right. A-, and I think he knew that I would be leaving again.
- 27 MB: Hell, he knew that in February. He knew you weren't back here for good. Right?
- 28 JH: ~~Ne~~ ^{Well} If he did, he was one up on me, cause I wasn't sure of anything.
- 29 MB: From what I recall from our conversations you told everybody, you, you know, of course
- 30 everybody thought you had come back to Jean, but you told him, oh, I'm only gonna be here a little
- 31 while. You need to get some distance away from something. Do you recall that conversation? 

1 JH: Not at all.

2 MB: So why would your best friend in the whole world, the guy who was crying in our hotel room last
3 night at midnight, do this to you. Some guy who's been physically sick, who is a Christian, from what I
4 understand.

5 JH: Yes he is.

6 MB: Who you told as early as late January or early February, I believe. Probably when you came back
7 here that you killed this guy on Whidbey Island.

8 JH: It's not true.

9 MB: And he's carrying this around all these months. That's not true? Well, you know what, unless Bill
10 Hill pulled the trigger, he knew some serious details that only you would know.

11 JH: Well.

12 MB: Bill Hill, who's never been to Whidbey Island in his life, who doesn't have a connection one to
13 anybody in this case.

14 JH: Uh, he knows Peggy.

15 MB: I know he knows Peggy. Through you.

16 JH: Yeah.

17 MB: He's met her once?

18 JH: Mm.

19 MB: Twice?

20 JH: Y-, yeah, maybe twice, well, maybe more than that.

21 MB: That's it? That's the only connection he has to anybody up here. And you can sit there and keep
22 playing this Jim, but I'm not buying the fact that your best friend in the whole world calls me last
23 Monday out of the blue and says, Commander Beech, I'm just callin' because, he takes that long breath,
24 I, I just was wonderin' if, if you guys had an unsolved homicide on Whidbey Island? And I said, and I
25 didn't know his name, I said, well, yeah, we, we did. In fact, we've had two in Island County around
26 that period, around Christmas. And I said, which one are you referring to? And he says, the one where
27 a man was shot. And I said, well, yeah, we're working a case. Well, I think I have some information
28 but I'm afraid to tell you. So for the next four days straight we talk on a daily basis about everything
29 you've told him. Everything. And how do you think we know all these details of, of stuff? Where the
30 hell are we gonna find out that I knew you were leavin' in two days? How the hell am I gonna find out
31 all these, you know, minute details of you and Peggy's relationship? He's told me everything.

1 JH: (inaudible)

2 MB: The guy's dyin'. I mean, he's, I mean, he, I asked him, I said, why are you, you know, why are
3 calling me if Jim's your best friend. And he s-, and he can't take it. He can't take the guilt of carryin' it
4 around. He says he's having stomach problems. He can't sleep at night, and the reason he called in the
5 first place was simply, he needed to know if you really did this, or if you were bullshittin' him for some
6 reason.

7 JH: Well, I don't know what he's talkin' about.

8 MB: You have no idea what the hell he's talking about?

9 MP: Jim, um, I'll tell you this right now too, these phone calls I've been getting, Peggy's sittin' with
10 two detectives in Las Vegas right now, just like you are.

11 JH: Mm-hm.

12 MP: I, uh, the questions I'm giving are, are, are formed around things that she's telling the other
13 detectives. I, I, I'm just giving you the opportunity right now Jim, like I said, you know what, I think
14 the plot for this didn't come from you. I don't think the scheme for this came from you.

15 JH: Is this the point in time when you guys would suggest I ask for an attorney? You being
16 professionals.

17 MP: We, we twice read you your rights.

18 JH: Yeah. Yeah. I can, I can ask for one.

19 MP: That's up to you. I, I'm, I, I would like to, I, I'll be completely honest with ya, I, I was hoping I
20 could enlist your help, to enlist you on my side to go after the two people that I think are the most
21 responsible. That's what I'm after. I don't want to see you go down by yourself. I don't want to see
22 you hit rock bottom and be the only one down on the rocks.

23 JH: Uh.

24 MB: You got played Jim.

25 JH: That's fine. Um, it's attorney time.

26 MP: Mm-kay,

27 MB: OK.

28 MP: Well, you don't wanna, you don't wanna answer any more questions or talk to us about, any more
29 about the issue? OK. The time is eighteen oh four on August fourth, and we're gonna terminate the
30 interview with Mister Huden.

OFFICE RECEPTIONIST, CLERK

To: Patrick Mayovsky
Cc: ICPAO_webmaster@co.island.wa.us
Subject: RE: State v. James Huden, No. 90336-1 / Letter and Attachment

Received 6/11/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patrick Mayovsky [mailto:MayovskyP@nwattorney.net]
Sent: Wednesday, June 11, 2014 3:17 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: ICPAO_webmaster@co.island.wa.us
Subject: State v. James Huden, No. 90336-1 / Letter and Attachment

Attached for filing today is a letter and an attachment for the case referenced below.

State v. James Huden

No. 90336-1

Letter and attachment

Filed By:
Jennifer Sweigert
206.623.2373
WSBA No. 38068
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ATTACHMENT 'B'
COURT OF APPEALS OPINION
CASE # 69227-5-1
STATE OF WASHINGTON
v.
JAMES EDWARD HUDEN

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington
Seattle*

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February 3, 2014

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CASE #: 69227-5-1

State of Washington, Respondent v. James Edward Huden, Appellant
Island County, Cause No. 69227-5

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Vickie Churchill

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES EDWARD HUDEN,

Appellant.

No. 69227-5-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 3, 2014

APPELWICK, J. — Huden was convicted of first degree murder and given an exceptional sentence based on his victim's particular vulnerability. Huden appeals his sentence, arguing that there was insufficient evidence to support the aggravating factor. He also appeals his conviction, arguing that the trial court abused its discretion allowing the jury access to a video of his police interrogation during deliberations and that the prosecutor committed misconduct. We affirm.

FACTS

On December 27, 2003, Russel Douglas was found dead in a car on Whidbey Island. Douglas had a gunshot wound to the head, apparently a homicide. The police investigation ultimately led to James Huden, due in part to information from Huden's close friend, William Hill. The State charged Huden with first degree murder.

At trial, Hill testified that Huden said he and a woman named Peggy Thomas killed a man. Huden told Hill that they chose Douglas as a victim, because Huden thought Douglas was abusive to his family. Huden's stepfather abused him, and Huden wanted to kill someone that fit that modus operandi. Under the ruse of giving Douglas a gift for his wife, Thomas lured Douglas to a dead end road in a sparsely populated area

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2014 FEB 3 AM 8:50

of Whidbey Island. Huden was waiting there. When Douglas arrived, Huden approached the car and shot Douglas in the forehead.

The State argued that Douglas was particularly vulnerable to the crime of first degree murder, because he was still buckled into his car when Huden approached him and because he had an unsuspecting mindset. The jury found Huden guilty as charged, including the aggravating factor of particular vulnerability. Huden appeals.

DISCUSSION

Huden challenges his exceptional sentence, arguing that there was insufficient evidence to support the aggravating factor of particular vulnerability. He also argues that the statute establishing the aggravating factor is unconstitutionally vague. In addition, Huden appeals his conviction, alleging that the trial court abused its discretion in permitting the jury access to a video of his interrogation. He further asserts that the prosecutor committed multiple instances of misconduct.

I. Particularly Vulnerable Victim Aggravating Factor

Huden argues that the trial court improperly imposed an exceptional sentence, because there was insufficient evidence to establish particular vulnerability. We review the fact finder's reasons for imposing an exceptional sentence under a clearly erroneous standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Under this standard, we reverse the findings only if substantial evidence does not support them. State v. Bluehorse, 159 Wn. App. 410, 423, 248 P.3d 537 (2011). "Substantial evidence" is sufficient evidence to "persuade a fair-minded person of the truth of the declared premises." Id. at 423-24 (quoting State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997)).

The jury must find beyond a reasonable doubt that there is a factual basis for an aggravated sentence. RCW 9.94A.537(6); State v. Suleiman, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). RCW 9.94A.535(3)(b) permits a sentence above the standard range where the victim was particularly vulnerable or incapable of resistance and the defendant knew or should have known that fact. For a victim's vulnerability to justify an exceptional sentence, the State must also show that the vulnerability or inability to resist was a substantial factor in the commission of the crime. Suleiman, 158 Wn.2d at 291-92.

The evidence at trial demonstrated that Douglas was shot while seated in his car. The angle of the wound indicated that the shot came from the driver's side. The door was closed, but the window was down several inches. The range of fire was between several inches and a couple of feet. Douglas was in the driver's seat, slumped over with his hands on his thighs. The keys were still in the ignition, the car was in reverse, and the emergency brake was up to his right. His seatbelt was across his body with the buckle unhooked. Based on the blood spatter, however, Douglas was shot with his seatbelt still attached.

The evidence further showed that Huden and Thomas lured Douglas to the location under false pretenses. Thomas had told Douglas that she had a gift for his wife and asked him to meet her. When Douglas left that day, he told his wife that he was going to run errands. When Douglas arrived at the meeting spot, Huden shot him.

The evidence also demonstrated that Huden attacked Douglas in a relatively remote location. Wahl Road is a dead end road outside of Langley city limits and does not get much traffic. The area has multiple residents, but is sparsely populated overall.

Douglas's car was parked in an opening in the vegetation off Wahl Road that was visible to neighboring homes and passersby.

In closing, the prosecutor argued that Douglas was more vulnerable than a typical victim of first degree murder:

He is in two ways. Obvious way: He is seat belted in his car. He's got bucket seats. He's got a center console. Shift lever. Parking brake's up. His legs are under the steering wheel. . . .

. . . .

And [Douglas] was particularly vulnerable in another way. . . .

. . . [H]e's unsuspecting. And he has no reason to think twice when the man coming up to his car approaches the car. He has no reason to flinch, to duck, to start the motor, to take the brake off, to unbuckle the seatbelt because he's been duped into thinking that this is just the average thing that a husband might do on the day after Christmas. [He was b]oth vulnerable and incapable of resistance...

In addition to Douglas's seatbelt and unsuspecting mindset, the State's briefing argued that his remote location contributed to his particular vulnerability

Huden does not allege that the jury was not properly instructed on the law in this case. Rather, he contests the jury's factual finding by special verdict that particular vulnerability existed.¹ He argues that Douglas was not particularly vulnerable to a sudden gunshot to the head. This is so, he contends, because the suddenness of such an attack would prevent any victim from resisting. He relies on State v. Jackmon, 55 Wn. App. 562, 569, 778 P.2d 1079 (1989), and State v. Serrano, 95 Wn. App. 700, 712,

¹ At trial, the jury was instructed to consider whether "[Huden] knew or should have known that [Douglas] was particularly vulnerable or incapable of resistance." The instructions elaborated that a victim is particularly vulnerable if "he or she is more vulnerable to the commission of the crime than the typical victim of murder in the first degree. The victim's vulnerability must also be a substantial factor in the commission of the crime."

715, 977 P.2d 47 (1999), both of which reversed a finding of particular vulnerability in cases involving victims shot from behind with a firearm.

In Jackmon, the victim was shot in the back of the neck while seated at table in his office. 55 Wn. App. at 564-65, 567. The trial court made a finding of particular vulnerability based in part on the fact that the victim was disabled by a cast on his ankle. Id. at 565. The Court of Appeals reversed, noting that there was no indication the victim's disability rendered him more vulnerable to the assault that an able-bodied person would have been. Id. at 567. No evidence established that the defendant knew about the leg injury or that the cast was visible to the defendant prior to committing the crime. Id. Further, it was highly unlikely an able-bodied person would have been able to escape. Id.

In Serrano, the victim, an orchard worker, was above the ground in an orchard ape² when he was shot multiple times in the back. 95 Wn. App. at 710-11. The trial court found that the victim could not run or protect himself and that he was particularly vulnerable. Id. at 711. The court of appeals reversed. Id. at 712, 715. It reasoned that, though the victim may have been vulnerable because he was above the ground in an orchard ape, the record did not suggest this was a substantial factor in the shooting. Id.

Neither case stands for the proposition that an exceptional sentence based on victim vulnerability is necessarily unavailable when the victim is attacked with a firearm. Rather, in each case, one of the key components necessary to uphold the exceptional sentence was not supported in the record below.

² An orchard ape is a caged platform on a hydraulic lift powered by a tractor. Serrano, 95 Wn. App. at 711.

Here, the victim was an able-bodied man like the victim in Serrano. But, the finding of particular vulnerability or inability to resist is not limited to the physical characteristics of the victim. State v. Ross, 71 Wn. App. 556, 565, 861 P.2d 473, 883 P.2d 329 (1993). We recognized particular vulnerability when the defendant knew the victim was alone and stranded. State v. Altum, 47 Wn. App. 495, 503, 735 P.2d 1356 (1987), overruled on other grounds by State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997). Similarly, we recognized particular vulnerability where the defendant picked his victims based on the fact that they worked alone in offices open to the public. Ross, 71 Wn. App. at 565. And, we recognized that attacking women alone in their homes while they slept left them less able to resist and more vulnerable than a person awake. State v. Hicks, 61 Wn. App. 923, 931, 812 P.2d 893 (1991).

The record here supports a finding that Huden knew or should have known that Douglas was particularly vulnerable or unable to resist the attack. Like the victims in Altum, Ross, and Hicks, Douglas had been isolated by Huden. Douglas was asked to meet at a fairly remote location that required he come in a vehicle. He was alone when he was attacked. Like the victims in Hicks and Serrano, Douglas was unable to resist the attack. He had set the parking brake and turned off the vehicle. He was belted into his vehicle, with little ability to move between the door, wheel, and console. He was approached and shot before he could exit the vehicle.³

³ The State also relied on the argument that Douglas was unsuspecting. However, the victim was unsuspecting in virtually every published case that involved this exceptional sentencing option. See, e.g., Serrano, 95 Wn. App. at 711 (victim shot from behind); Ross, 71 Wn. App. at 564 (defendant gained entry using ruse); Hicks, 61 Wn. App. at 931 (victim asleep); Jackmon, 55 Wn. App. at 567 (victim shot in back of neck); Altum, 47 Wn. App. at 497 (victim grabbed from behind). If that factor alone was

And, like Hicks—but unlike Jackmon and Serrano—the record here supports a finding that Douglas's particular vulnerability or inability to resist were substantial factors in the commission of the crime, based on the way Huden set up the meeting and crime. Taken together, these circumstances provide sufficient evidence to support the jury's finding of particular vulnerability.⁴

We hold that the particularly vulnerable victim aggravator properly supports imposition of the exceptional sentence.

II. Vagueness of Aggravating Factor Statute

Huden also challenges the constitutionality of RCW 9.94A.535(3)(b), which establishes the "particularly vulnerable" aggravating factor. He argues that the statute is unconstitutionally vague.

However, in State v. Baldwin, the Washington Supreme Court held that sentencing guidelines are not subject to due process vagueness analysis. 150 Wn.2d 448, 461, 78 P.3d 1005 (2003). This is because sentencing guidelines do not define conduct or allow for arbitrary arrest and prosecution. Id. at 459.

Huden maintains that the U.S. Supreme Court's decision in Blakely v. Washington nullifies the Baldwin rationale. 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In Blakely, the Court ruled that a judge may not impose a sentencing enhancement without either findings by the jury or a stipulation by the defendant. See id.

enough, one would have expected it to have been discussed in Jackmon and Serrano, since it would have resulted in affirmance rather than reversal.

⁴ Because there is sufficient evidence to support a finding of particular vulnerability, the trial court had substantial and compelling reasons to support Huden's exceptional sentence. See RCW 9.94A.535.

Huden argues that this established a due process right that encompasses vagueness challenges to sentencing enhancements. He focuses on the Blakely Court's treatment of aggravating factors as equivalent to elements of a crime. But, Blakely did not destroy any distinction between aggravating factors and elements. In State v. Powell, a post-Blakely decision, a majority of the Washington Supreme Court concluded that aggravated sentencing factors are the functional equivalent of essential elements that must be charged in an information. 167 Wn.2d 672, 690, 223 P.3d 493 (2009), (Stephens, J. concurring), overruled by State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). But, the court subsequently overruled that decision:

[W]e are of the view that the decision a majority of this court reached in Powell on the issue of whether aggravating factors must be charged in the information is incorrect. . . . We, therefore, overrule this court's decision on that issue and adopt the position advanced by the lead opinion in Powell to the effect that, so long as a defendant receives constitutionally adequate notice of the essential elements of a charge, "the absence of an allegation of aggravating circumstances in the information [does] not violate [the defendant's] rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, or due process."

Siers, 174 Wn.2d at 276 (alterations in original) (quoting Powell, 167 Wn.2d at 687).

Blakely focused on the right to a jury trial. See 542 U.S. at 301-02. This is distinct from the vagueness doctrine, which exists to provide notice to the public and protect it from arbitrary state intrusion. Baldwin, 150 Wn.2d at 458. The rule in Baldwin still stands.

Huden may not bring a vagueness challenge to the aggravating factor statute.

III. Jury Access to Interrogation Video During Deliberations

Huden argues that the trial court improperly permitted the jury unlimited access to a video of his interrogation. At trial, the prosecution introduced the video as an exhibit and played it for the jury during trial. The court provided the jury with a video player to watch it again during deliberations.

The trial court has discretion to allow the jury to take video tape recorded exhibits to the jury room. State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997). In Castellanos, the trial court provided the jury a playback machine during deliberations so it could review video tape recordings of drug transactions. Id. at 96-97. The appellate court affirmed this exercise of discretion, finding that the jury's unlimited access to the recordings alone did not prove that the jury gave the exhibit undue prominence. Id. at 102. The court also distinguished between testimonial and nontestimonial exhibits, suggesting that the former raised problems of undue emphasis, while the latter should be treated as any other exhibit. See id. at 101-02.

Huden focuses on this distinction, arguing that the video of his police interview was testimonial. He cites to State v. Elmore, a case in which the trial court permitted the jury to review video tapes of the defendant's confession and police interview. See 139 Wn.2d 250, 296, 985 P.2d 289 (1999). Huden relies on the dissent in that case to assert that the video of his own interview was testimonial. But, the Elmore majority expressly found the taped confession and interview to be nontestimonial. Id.

The record here does not contain the video tape or a transcript of Huden's interrogation. But, under Elmore, the trial court did not abuse its discretion in providing

the jury unlimited access to a video tape of the defendant's police interrogation and confession. Huden offers no evidence to distinguish the present case.

Based on the evidence presented, we do not find that the trial court abused its discretion.

IV. Prosecutorial Misconduct

Huden alleges multiple instances of prosecutorial misconduct. Prosecutorial misconduct is grounds for reversal where the conduct is both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). This court determines the effect of a prosecutor's improper conduct in the context of the full trial, including the evidence presented or addressed in argument, the issues in the case, and the jury instructions. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Generally, a prosecutor's comments are prejudicial only where there is a substantial likelihood that they affected the jury's verdict. Monday, 171 Wn.2d at 675.

A. Comments On Huden's Demeanor

Huden first argues that the prosecutor improperly inferred that he was guilty by commenting on Huden's demeanor. Prosecutors have wide latitude in closing argument to draw reasonable inferences from the evidence and express those inferences to the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). But, counsel must refrain from expressing a personal opinion. State v. Rivers, 96 Wn. App. 672, 674-75, 981 P.2d 16 (1999).

Huden challenges the prosecutor's comments about his interaction with the police. In closing, the prosecutor described Huden's reaction to the police showing up at his Florida home, noting that Huden did not seem surprised, despite the fact that the

detectives came all the way from Washington. The prosecutor also commented on Huden's behavior during his interrogation, pointing out his "[v]ery flat affect." The prosecutor further noted that Huden never expressly denied having killed Douglas. None of these statements contained opinions—they were descriptions of the evidence established at trial. At most, they were implications of inferences that counsel wished for the jury to draw. This was not improper.

B. Comments On Huden's Credibility

Huden also argues that the prosecutor improperly commented on his credibility. Specifically, he contests the prosecutor's statement about "some actual information that [Huden] gave that was reliable here." He contends that this improperly insinuated that he had lied to the police.

Prosecutors may not express their personal opinions of the defendant's credibility. State v. Calvin, 176 Wn. App. 1, *18-*19, 302 P.3d 509, ___ P.2d ___ (2013). But, there is no prejudicial error unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Id. at *19 (quoting State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). In Calvin, the prosecutor said the defendant was "just trying to pull the wool over your eyes." Id. The court found that this was an explanation of the evidence, rather than a personal opinion. Id.

Taken out of context, the prosecutor's statement here may seem like an insinuation that Huden was an unreliable witness. But, the prosecutor's comment directly preceded a list of evidence that corroborated Huden's statements during his interrogation. The prosecutor did not assert that Huden had otherwise lied, thus

juxtaposing the following reliable statements. See id. This was not a clear and unmistakable opinion of the defendant's credibility.

C. Comments On Huden's Silence

Huden further asserts that the prosecutor improperly commented on his silence during his police interview. In closing, the prosecutor reviewed statements that Huden made during his interrogation, and then pointed out some details that Huden had not mentioned. The prosecutor noted that the absence of these details was "[p]retty significant."

The Fifth Amendment forbids comment by the prosecution on a defendant's refusal to testify. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 12 L. Ed. 2d 106 (1965). But, this was not a comment on Huden's silence. In fact, the prosecutor explicitly stated that Huden spoke to the police. The prosecutor was merely drawing inferences from the contents of Huden's statement. This was not improper.

D. Vouching For State's Witnesses

Huden also challenges the prosecutor's comments about the State's witnesses. It is improper for a prosecutor to vouch for the veracity of a witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). But, counsel may comment on a witness's veracity so long as it does not express a personal opinion and does not argue facts beyond the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). In State v. Warren, the court found that a prosecutor's actions were proper when he argued that certain details had a "ring of truth" to them. 165 Wn.2d 17, 30, 195 P.3d 940 (2008). The court found that the statement was an inference based on specific details from trial, rather than the prosecutor's personal opinion. Id.

Here, the prosecutor made multiple statements about the strength of the State's witnesses' testimony. He said that their testimony combined was "so strong, so overwhelming, in and of themselves they prove beyond a reasonable doubt." He also called Hill's testimony "uncontroverted," "unassailable," and "unimpeachable," stating that it had "[every] indicia of reliability." The prosecutor emphasized that Hill was Huden's best friend, and that it was very difficult for Hill to come forward. As in Warren, these comments were mere inferences from the evidence at trial. The prosecutor did not state his own belief about witness credibility, but remarked on the strength of the evidence presented at trial and the lack of reason to doubt it.

Huden also challenges the prosecutor's comments that two State witnesses were "heroes" for testifying against Huden. During closing, the prosecutor said:

But this case is also about heros [sic].

I submit to you that Bill Hill is a hero. Bill was put in a position he did not ask to be put in, he did not want to be put in, and it was very difficult for him. He had to choose between loyalty to his best and closest friend and doing the right thing and doing what his conscience told him to do.

.....

Now Keith Ogden, I submit, is also a hero in a similar situation. He didn't have the closeness with Jim Huden that Bill Hill had; but nevertheless, Keith found himself in possession of a gun that he had good reason to believe . . . was used to kill a man. And Keith, too, had to struggle with that a little bit. But he knew what he had to do because his conscience told him what to do.

(Emphasis added.) The use of the word "hero" crossed into the realm of personal opinion.

However, Huden did not object to these comments at trial. Where a defendant fails to object to improper conduct, the error is considered waived unless the conduct

was so flagrant and ill-intentioned that it creates an enduring prejudice that could not have been neutralized by a curative instruction. State v. Brown, 132 Wn.2d 529, 568, 940 P.2d 546 (1997). In Brown, the prosecutor stated that the defendant's crime was "evil" and "screams out for the death sentence." Id. The court held that, though the words were dramatic, the prosecutor's general statements were supported by the evidence and his conduct did not warrant reversal. Id. at 568-69.

Conversely, in State v. Belgarde, the prosecutor told the jury that the defendant was "strong in" the American Indian Movement, whom he described as "a deadly group of madmen" and "butchers, that killed indiscriminately Whites and their own." 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (emphasis omitted). The prosecutor also called the group "militant" and analogized them to notorious political leaders. Id. at 507. The court found that those statements were so prejudicial that a curative instruction would have been ineffective. Id. 507-08.

Like the descriptions in both Brown and Belgarde, the word "hero" does have emotional appeal. But, it does not rise to the inflammatory level of the statements in Belgarde. And, as in Brown, the prosecutor used the word in context of a statement supported by the evidence: here, the witnesses' difficult position of testifying as Huden's friends. In the face of the strong evidence against Huden, it is unlikely that this brief complimentary description of the State's witnesses prejudiced the outcome of his trial. This error does not warrant reversal.

E. Personal Opinion Of Huden's Guilt

Finally, Huden protests that the prosecutor improperly expressed his opinion of Huden's guilt. It is improper for a prosecutor to state a personal belief about the guilt or innocence of the accused. State v. Emery, 161 Wn. App. 172, 192, 253 P.3d 413 (2011), aff'd, 174 Wn.2d 741, 278 P.3d 653 (2012). But, the court will not find prejudicial error unless it is clear that counsel is expressing a personal opinion rather than an inference from the evidence. Id. at 192-93. In Emery, the court declined to find prejudicial error where the prosecutor said that "the truth of the matter" was that the defendant was guilty. Id. at 192. The court noted that this statement came after discussing the State's evidence, and was only an inference therefrom. Id. at 193.

Here, while discussing the special verdict forms, the prosecutor told the jury that it would consider aggravating circumstances "if you find Mr. Huden guilty -- And I strongly argue that that is the case and the standard of evidence and proof has been met." This statement, as in Emery, came after the prosecutor laid out the State's evidence, and was merely an inference that he wished for the jury to draw. This did not constitute error.

We affirm.

WE CONCUR:

Spencer, A.C.J.

Schubert, J.

ATTACHMENT "C"
MINUTES OF TRIAL

FILED

JUL 23 2012

DEBRA VAN PELT
ISLAND COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs

JAMES HUDEN,
Defendant.

Cause No 05-1-00109-8
Judge Vickie I Churchill
Reporter Karen Shipley
Clerk Keri Wade
Date 07-10-2012

189
KW

SCANNED

APPEARANCE

- Defendant In-Custody
- Did not appear Excused Atty for State Banks
- Atty for Def Montoya

HEARING TYPE

- Arraignment Omnibus Readiness
- Plea Disposition Show Cause
- Motion for Bench Warrant Jury trial

HEARING

- Court advises Def of Rights Def waives counsel Request counsel
- Referred to Public Defense Dept Def waives speedy trial Def admits violations
- Guilty Plea Not Guilty
- Defense objection to timeliness of arraignment trial

State's exhibit #1-82 were marked prior to trial.

9:10 am Court reviews jury questionnaire. Court inquired of Clerk re Jury Panel Oath. Court took recess @ 9:20 am.

9:35am Clerk swore in the jury panel on vior dire oath. Court introduces parties & gave general instructions. 9:45 am Jury excused to complete jury questionnaire. Court took recess & reconvened @ 10:45am, outside the presence of the jury re jury questionnaire. Mr. Montoya motions for juror to be excused for cause. Response by Mr. Banks. Court excused jurors # 3, 4, 17, 21, 42, 54, 66, 67 & 69 for cause.

COURT

- Finds _____ voluntary Enters Sentence/Disposition
- Bench Warrant \$ _____ Bench Warrant Quashed
- Entered Scheduling Order/Release Order Entered Order

OTHER

- Continued by _____ to _____
- Stricken by _____
- Trial date Stricken Set _____ for _____ days

Minute Code TRIAL JDG 02 CTR 02
APT 55:33

Jurors # 6, 9, 27, 36, 50, 56, 63, & 74 were brought in & questioned outside the presence of the panel. Jurors excused. Jurors # 56, 63, 74, 50, 27, are excused for cause. Juror # 26 questioned, outside the presence of the panel. 11:48 am -Jury panel brought back in. 11:57am- Court took lunch recess & reconvened @ 1:18 pm outside the presence of the jury panel. Court releases juror # 46 for cause. 1:25 pm- Jury panel brought in. Court gave general instructions & conducted general questioning. 2:09 pm- General questioning by Mr. Banks. 2:30 pm Jury panel excused. Court inquired of counsel. Jurors # 20, 47, 61, 62, & 72 excused for cause. 2:45 pm- Court took afternoon recess & reconvened @ 3:00 pm outside the presence of the jury panel re Jury # 15, 29, & 51. 3:10 pm- Jury panel brought in with general questioning by Mr. Montoya. 3:30 pm- Additional questioning by Mr. Banks. 3:50 pm- Additional questioning by Mr. Montoya. 4:10 pm- Court gave general instructions. 4:13 pm- Court took evening recess. (3:58)

Day 2 (07/11/2012)

State's exhibit # 83-85 marked prior to court.

9:17am -Court convened outside the presence of the jury panel. Court heard motion in limine. Mr. Banks motions to use a video of Def's interview.

9:37 am- Jury Panel brought in.

9:38 am- Additional questioning by Mr. Banks.

10:10 am- Additional questioning by Mr. Montoya.

10:18 am- Additional questioning by Mr. Banks.

10:23 am - Jury panel excused. Court inquired of counsel regarding juror # 39, juror # 39 excused for cause. Juror # 11 brought in for additional questioning.

10:35 am- Court took morning recess & reconvened at 10:51am. Court heard peremptory challenges.

11:01 am- Jury panel brought in and a panel of 14 was seated as follows.

1) Karie Lynn Deaton	2) Leslie R Vandervoet	3) Carole R Homes
4) Robert G Meade	5) Christopher I Hansen	6) Karen R Wilson
7) Elizabeth Lampers	8) Mark M Gmerek	9) Derek Michael Britain
10) Bert Gallant	11) Douglas L Bishop	12) Debbie Lynn Roos
Alt) Rodney G Dempsey	Alt) David B Hagen	

11:10 am- Clerk swore the jury on 2nd oath & Court gave general instructions.
11:27 am- Jury excused. Outside the presence of the jury court reviews pretrial motions.
11:30 am- Court took lunch recess & reconvened @ 1:15 pm.
1:16 pm- Opening statement by Mr. Banks.
2:03 pm- Opening statement by Mr. Montoya.
2:04 pm- * **Brenna Douglas** called by Mr. Banks, sworn & testified. Exhibit # 1, 3, 12, identified, offered, no objection, admitted.
2:43 pm- Court took afternoon recess @ reconvened @ 3:04 pm with Ms. Douglas remaining on the stand. 3:06 pm- X-exam by Mr. Montoya.
3:13 pm- witness excused.
3:16 pm * **Diane Bailey** called by Mr. Banks, sworn & testified. Exhibit # 87 marked, identified, illustrative purpose only. Exhibit # 6, 7, 8, 9, identified, offered, no objection, admitted.
3:35 pm- X-exam by Mr. Montoya. 3:37 pm- witness excused.
3:37 pm- * **Nicole Luce** called by Mr. Banks, sworn & testified.
3:50- pm X-exam by Mr. Montoya. 3:52 pm- Re-direct by Mr. Banks.
3:53 pm- witness excused.
3:55 pm- Jury excused for the evening & is reminded of general instructions.
3:56 pm- Mr. Banks presents a stipulation re chain of custody.
3:58 pm- Court took evening recess. (8:10)

DAY 3 (07/12/2012)

9:02 am- Court convened without the presence of the Jury. Mr. Montoya motions to redact a statement made by Mr. Banks during opening statement, & motions to call State's witness Mr. Young. Court denies motion to redact. Court grants motion for witness.
9:06 am- Jury brought in.
9:06 am- * **Joseph Doucette** called by Mr. Banks, sworn & testified.
9:18 am- X-exam by Mr. Montoya. 9:18 am- Witness excused.
9:19 am- * **Sgt Rick Norrie** called by Mr. Banks, sworn & testified.
9:34 am- X-exam by Mr. Montoya. 9:39 am- Re-direct by Mr. Banks.
9:39 am- Witness excused.
9:40 am- * **Detective Laura Price** called by Mr. Banks, sworn & testified.
9:54 am- X-exam by Mr. Montoya. 9:58 am- Re-direct by Mr. Banks.
Exhibit # 35, identified, offered, no objection, admitted.
10:02 am- Re-cross by Mr. Montoya. 10:03 am- witness excused.

10:03 am- * **Deputy Leif Haugen** called by Mr. Banks, sworn & testified. Exhibit # 36, 37, identified, offered, no objection, admitted. 10:30 am- Jury excused & Court heard Mr. Montoya's rejection. Response by Mr. Banks. Court overruled rejection. 10:32 am- Court took morning recess & reconvened @ 10:47 am w/ Deputy Haugen remaining on the stand. 10:49 am- X-exam by Mr. Montoya. 10:53 am Re-direct by Mr. Banks. 10:54 am- witness excused.

10:54 am * **Dr. Robert Bishop** called by Mr. Banks, sworn & testified. Exhibit # 13-18,20-35, identified, offered, no objection, admitted. 12:00 pm- Court took lunch recess & reconvened @ 1:15 pm with Dr. Bishop remaining on the stand & reminded he's still under oath. Exhibit # 38-43, 45-46, 56-57 identified, offered, no objection, admitted. 2:04 pm- X-exam by Mr. Montoya. 2:11 pm- Re-direct by Mr. Banks. 2:12 pm- Witness excused.

2:13 pm - * **Dr. Daniel Selove** called by Mr. Banks, sworn & testified. Exhibit # 47, 50-51, identified, offered, no objection, admitted. 1:30 pm- Court took afternoon recess & reconvened @ 2:47 pm with Dr. Selove remaining on the stand & reminded he's still under oath. Exhibit # 55, identified, offered, no objection, admitted. 3:25 pm- X-exam by Mr. Montoya. 3:31 pm- Witness excused.

3:31 pm * **Lt. Harry Uncapher** called by Mr. Banks, sworn & testified. Exhibit # 88-89, marked, identified, offered, no objection, admitted. 3:37 pm- X-exam by Mr. Montoya. 3:38 pm- Witness excused.

3:38 pm- * **Sgt. Mike Beech** called by Mr. Banks, sworn & testified. 3:53 pm- Jury excused while Mr. Banks gave proof of Authority to Mr. Montoya's objection. Response by Mr. Montoya. Rebuttal by Mr. Banks. Further response by Mr. Montoya. Court sustained objection. 4:02 pm- Jury brought back in with Mr. Beech remaining on the stand. 4:14 pm- X-exam by Mr. Montoya. 4:16 pm- witness excused. 4:16 pm- Jury excused while court puts sidebar on the record. 4:18 pm- Court took evening recess. (13:43)

Day 4 (July 13, 2012)

9:01 am. Court convened outside the presence of the Jury; Mr. Banks addressed the court regarding witness Bill Hill's medical condition. Court addressed the issue with counsel. Court addressed State's motion in limine regarding witness Bill Hill. Mr. Montoya request for interview with Witness Bill Hill after Mr. Banks direct. Response by Mr. Banks. Rebuttal by Mr. Montoya. Court advised counsel to interview before States' direct.

9:09 am. Court takes brief recess & reconvened @ 9:30 am.
9:30 am- Jury Brought in.
9:31 am - * **Det. Mark Plumber** called by Mr. Banks, sworn & testified.
State's exhibit # 90-91 marked, identified, offered, no objection, admitted.
9:11 am- X-exam by Mr. Montoya. 10:17am- Re-Direct by Mr. Banks.
10:17am witness excused.
10:19 am- * **Mr. William Hill** called by Mr. Banks, sworn & testified.
10:44 am- Court takes morning recess & reconvened @ 11:03 with Mr. Hill remaining on the stand.
11:37 am- X-exam by Mr. Montoya.
11:46 am- Jury excused. Court can put sidebar on the record.
11:50 am- Court took lunch recess & reconvened @ 1:16 pm with Mr. Hill remaining on the stand & is reminded he's still under oath.
Pla's Exhibit # 92, marked. 1:20 pm- Witness excused.
1:20 pm * **Deputy Shawn Warwick** called by Mr. Banks, sworn & testified. Exhibit # 58, 92, identified, offered, no objection, admitted.
1:30 pm- X-exam by Mr. Montoya. 1:32 pm- Re-direct by Mr. Banks.
1:32 pm witness excused.
1:33 pm Court takes evening recess and reminds jury panel of general instructions. (16:09)

Day 5 (July 16, 2012)

Pla's exhibits # 93-94 marked prior to court. 9:02 am Court convened.
9:02 am- * **Ms. Cynthia Francisco** called by Mr. Banks, sworn & testified.
9:13 am- X-exam by Mr. Montoya. 9:13am- Witness excused.
9:13 am- * **Mr. Richard Deposit** called by Mr. Banks, sworn & testified.
9:25 am- X-exam by Mr. Montoya. 9:32 am- Re-direct by Mr. Banks.
9:33 am- Witness excused.
9:33 am- * **Mr. William Marlow** called by Mr. Banks, sworn & testified.
9:41 am- X-exam by Mr. Montoya. 9:42 am- Witness excused.
9:42 am- * **Mr. Richard Earley** called by Mr. Banks, sworn & testified.
Exhibits # 93, identified, offered, no objection, admitted.
9:52 am- X-exam by Mr. Montoya. 9:54 am- Witness excused.
9:54 am- * **Martin Snytsheugel** called by Mr. Banks, sworn & testified.
Exhibit #78 offered, no objection, admitted.
10:01 am- X-exam by Mr. Montoya. 10:03 am- Re-direct by Mr. Banks.
10:03 am- Re-cross by Mr. Montoya. 10:04 am- Witness excused.
10:04 am- * **Keith Ogden** called by Mr. Banks, sworn & testified.

Exhibit # 59-60, identified, offered, no objection, admitted. Exhibit # 95-97, marked, identified. 10:25 am- Jury excused, outside the presence of the jury Mr. Banks puts side bar objection on the record. Response by Mr. Montoya. Rebuttal by Mr. Banks. Objection is sustained.

10:30 am- Court takes morning break & reconvened @ 10:45 am with Mr. Ogden remaining on the stand, is reminded he's still under oath.

Exhibit # 79 & 95 offered, no objection, admitted. 10:54 am- X-exam by Mr. Montoya. 10:59 am- Witness excused. 10:59 am- Sgt. Mike Beech recalled by Mr. Banks, is reminded he's still under oath. Exhibit # 61-74, identified, offered, no objection, admitted. 11:12 am- Witness excused.

11:15 am Jury excused for lunch while court inquired of scheduling issues. Mr. Banks addressed the court regarding video tape interview of Mr. Huden & to allow the Jury to follow along w/ a transcript. Mr. Montoya will review the video during the lunch break. 11:21 am- Court took lunch recess. Pla's exhibit # 98-101 marked during lunch break. Court reconvened @ 1:30 pm outside the presence of the jury re: juror # 10 speaking with Mr. Ogden during the lunch break. 1:33 pm- Juror #10 brought in and questioned by the court. Juror # 10 has been excused. Court inquired of Mr. Montoya regarding transcript being provided to the jury during the video tape interview. 1:43 pm- Jury brought in.

1:45- * **Detective Phil Farr** called by Mr. Banks, sworn & testified.

1:47 pm- Witness excused. 1:48 pm- Dr Bishop recalled by Mr. Banks, is reminded he's still under oath. 1:53 pm- X-exam by Mr. Montoya. 1:54 pm- Witness excused. 1:55 pm- * **Mr. Mark Plumberg** recalled by Mr. Banks, is reminded of previous oath. Exhibit # 83, identified, offered, no objection, admitted. Exhibit # 77, offered, no objection, admitted. Exhibit # 99, 101, identified, offered, no objection, admitted. 2:04 pm-

X-exam by Mr. Montoya. 2:04 pm- Re-direct by Mr. Banks. 2:06 pm- Witness excused. 2:07 pm- * Ms. Kathy Geil called by Mr. Banks, sworn & testified. 2:09 pm- Court takes brief recess & reconvened @ 2:14 pm. With Ms. Geil remaining on the stand. Pla's Exhibit # 102-109, marked. Exhibit # 102-109, identified, offered, no objection, admitted. 2:52 pm- X-exam by Mr. Montoya. 2:53 pm- Witness excused. 2:56 pm Jury takes evening recess & reminds Juror's of general instruction.

2:57 pm- Mr. Banks puts sidebar on the record. 2:58 pm Court takes evening recess. (19:00)

Day 6 (July 17, 2012)

States exhibit # 110-111 marked prior to court.

9:34 am- Court reconvened.
9:34 am- * **Correction Deputy Jeanne Herron**, called by Mr. Banks, sworn & testified. Exhibit # 100, identified, offered, no objection, admitted.
9:39 am- Witness excused. 9:39 am- * **Margaret Barber** called by Mr. Banks, sworn & testified. Exhibit # 111, offered, no objection, admitted.
9:49 am- X-exam by Mr. Montoya. 9:50 am- Re-Direct by Mr. Banks.
9:52 am- Witness excused. 9:52 am- * **Lisa Collins** called by Mr. Banks, sworn & testified. 10:21 am- X-exam by Mr. Montoya. 10:22 am- Witness excused. 10:23 am- Jury excused for morning recess. Outside the presence of the Jury Mr. Banks put side bar on the record. 10:25 am- Court takes mornings recess @ 10:45 outside the presence of the jury, Mr. Banks addressed the court regarding Mr. Montoyas motion to redact statement during Mr. Banks opening statement. Response by Mr. Montoya. Rebuttal by Mr. Banks. Deputy US Marshal Raymond Fleck sworn & testified, outside the presence of the Jury. Court addressed counsel re email received this morning. Response by Mr. Banks. 11:00 am- Jury brought in. 11:01 am- * **Ms. Jill Arwine** called by Mr. Banks, sworn & testified. Exhibit # 110, identified, offered, no objection, admitted. 11:31 am- Witness excused.
11:32 am- * **Deputy US Marshal Raymond Fleck** called by Mr. Banks, sworn & testified. Exhibit # 75-76, 80, identified, offered, no objection, admitted. 11:43 am- X-exam by Mr. Montoya. Re-direct by Mr. Banks.
11:44 am- Witness excused. 11:45 am- * **Mr. Det Mark Plumber** re-called by Mr. Banks, is reminded of previous oath. 11:59 am Court took lunch recess. State's exhibit # 112, marked during lunch recess. 1:52 pm- Court reconvened outside the presence of the Jury. Mr. Banks addressed the court regarding an email from Court Admin regarding the statement from Mr. Gallant. Response by Mr. Montoya. Court will advise the Jury at a later time. 2:01 pm- Jury brought in with Mr. Plumber remaining on the stand, is reminded he's still under oath. Exhibit # 112, identified, offered, no objection, admitted. Court watches CD. 3:03 pm- Court took afternoon recess & reconvened at 3:23 pm with Mr. Plumber remaining on the stand.
3:24 pm X-exam by Mr. Montoya. 3:25 Witness excused. States Rest. Court advised the Jury the court will be doing individual questioning.
3:27 pm- Court questioned Juror # 1. Juror # 1 excused. 3:31 pm- Juror # 2 questioned, Juror # 2 excused. 3:33 pm- Juror # 3 questioned, Juror # 3 excused. 3:35 pm- Juror # 4 questioned, Juror # 4 excused. 3:38 pm- Juror # 5 questioned, Juror # 5 excused. 3:40 pm- Juror # 6 questioned, Juror # 6 excused. 3:43 pm- Juror # 7 questioned, Juror # 7 excused. 3:45 pm- Juror # 8 questioned, Juror # 8 excused. 3:47 pm- Juror # 9 questioned, Juror # 9 excused. 3:50 pm- Juror # 11 questioned, Juror # 11 excused.

3:52 pm- Juror # 12 questioned, Juror # 12 excused. 3:54 pm- Juror # 13 questioned, Juror # 13 excused. 3:57 pm- Juror # 14 questioned, Juror # 14 excused. 4:01 pm- Jury brought back in and is reminded of general instructions. 4:03 pm- Jury excused. 4:04 pm- Outside the presence of the Jury, Court reviews Jury instruction. Court inquired of counsel regarding time needed for closing arguments. Response by Mr. Banks. Response by Mr. Montoya. Mr. Banks addressed the court regarding rebuttal witnesses. No objection by Mr. Montoya. 4:09 pm- Court takes evening recess. (23:22)

Day 7 (July 19, 2012)

9:33 am- Court convened. * **Dr. Jon Nordby** called by Mr. Montoya, sworn & testified. 10:31 am- Jury excused for morning recess. Outside the presence of the Jury Court put on record jury question. 10:32 pm- Court took morning recess. Pla's exhibit # 113 & 114 marked during break. 10:52 am- Court reconvened with Dr. Nordby remaining on the stand, is reminded he's still under oath. 11:17 am- X-exam by Mr. Banks. 12:01 pm- Court takes afternoon lunch recess. Pla's # 115-143 marked during lunch break. 1:17 pm- Court reconvened with Dr. Nordby remaining on the stand. Exhibit # 49, 113, 114, 143, identified, offered, no objection, admitted. Exhibit # 144, marked, identified, objection. 2:11 pm- Jury excused while Court puts objection on the record. Exhibit # 144, admitted. 2:15pm- Court took afternoon recess. Pla's Exhibit # 145 marked during break. 2:30 pm- Court reconvened with Dr. Nordby remaining on the stand, is reminded he's still under oath. Pla's exhibit # 146, marked, identified, Exhibit # 145, identified, offered, no objection, admitted. Pla's exhibit # 147, marked, identified, no objection, admitted. Re-direct by Mr. Montoya. 3:08 pm- Re-cross by Mr. Banks. 3:15 pm- Witness excused. 3:15 pm * **Mr. Ronald Young** called by Mr. Montoya, sworn & testified. 3:18 pm- Witness excused. Defense rest. 3:19 pm- Court takes brief recess & reconvened at 3:32 pm. 3:32 pm- * **Dr. Bishop** recalled by Mr. Banks, is reminded he's still under oath. Exhibit # 120, 123-126, identified, offered, objection. 3:43 pm- Jury excused for the evening recess, outside the presence of the jury, court put objection on the record. Court will take objection under advisement including extra exhibits that Mr. Banks would be offering. Court inquired of counsel regarding Juror question. Response by Mr. Banks. Response by

Mr. Montoya. Court denies jury question. Court inquired of counsel regarding jury instruction. Response by Mr. Banks. Response by Mr. Montoya. 3:58 pm- Court takes evening recess. (26:65:87)

Day 8 (July 20, 2012)

9:04 am- Court reconvened without the presence of the jury. Court made oral pronouncement regarding objection to exhibits. Court denies objection.

9:08 am- Jury brought in with Dr. Bishop remaining on the stand and is reminded he's still under oath. Exhibit # 115, 117-120, 123-126, 138-141, identified, offered, objection, admitted. 9:37 am- X-exam by Mr. Montoya.

9:38 am- Jury excused for brief recess. Outside the presence of the Jury, Court discusses jury instruction. Mr. Montoya addressed court regarding time schedule. 9:45 am- Court takes morning recess & reconvened @ 9:59 am- with Court reading jury instructions.

10:21 am- Closing argument made by Mr. Banks.

11:23 am- Jury takes afternoon recess. Outside the presence of the jury, Mr. Banks sights three Supreme Court cases. 11:25 am- Court takes lunch recess & reconvened @ 12:18 pm.

12:18 pm- Closing arguments by Mr. Montoya.

12:44 pm- Rebutal arugment from Mr. Banks.

12:55 pm- Court gave alternate juror instructions & released him. Counsel reviewed exhibits. Clerk swore the bailiff.

1:00 pm- Jury excused for deliberation. Clerk provided the exhibits to the bailiff for delivery to the jury.

1:23 Court reconvened outside the presence of the jury for a jury question. Ron Yount of central services accompanied by the Bailiff, provided computer for view of exhibit # 112. 4:19 pm- Court reconvened. Court inquired of jury to where they stand on the deliberation.

4:26 pm- Court takes evening recess. (33:13:88)

Day 9 (July 23, 2012)

11:05 am Court convened, presiding juror presented the verdict forms to the Court. Court read the verdict form & jury finding the Def Guilty and all special verdicts. Clerk Polls the jury. Verdict stands as read. Court releases the jury with the thanks of the Court.

11:13 am- Mr. Banks motions for bail to be revoked & for. Response by Mr. Montoya and request for sentence hearing to be set for the end of August. Court grants motion to revoke bail. Court orders def held without bail pending sentencing. Court sets sentencing hearing for August 24, 2012. (55 hrs 33 minutes)

ATTACHMENT "D"
BRIEF OF APPELLANT

NO. 69227-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES HUDEN,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

APR 11 2013

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence based on the deceased's particular vulnerability because the evidence was insufficient to prove the aggravating factor beyond a reasonable doubt.

2. RCW 9.94A.535(b)(3), describing the aggravating factor that the victim was particularly vulnerable, is unconstitutionally vague in violation of due process.

Issues Pertaining to Assignments of Error

1. The aggravating factor in this case applies only if the victim is more vulnerable than a typical victim of the offense and if that vulnerability is a substantial factor in the commission of the offense. Here, the victim was shot in the head at point blank range without warning. Did the State fail to prove a person is more vulnerable to this type of attack merely because he is seated in a car and wearing a seatbelt?

2. A penal statute that fails to set forth objective guidelines to guard against arbitrary application is unconstitutionally vague in violation of Fourteenth Amendment due process. The "particularly vulnerable" aggravator in RCW 9.94A.535(3)(b) requires the jury to determine whether the victim was more vulnerable than a typical victim of the offense. Because a jury has no way to know what a typical victim looks like, is this aggravator unconstitutionally vague?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County prosecutor charged appellant James Huden with first degree murder, alleged the victim was particularly vulnerable, and alleged Huden was armed with a firearm at the time of the offense. CP 63-64. The jury found him guilty as charged and the court imposed an exceptional sentence of 960 months. CP 3-6, 14-16. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

After failing to return from an errand the day after Christmas, Russell Douglas was found dead in his car on Whidbey Island on December 27, 2003. 4RP¹ 314, 318. His wife Brenna Douglas, from whom he was separated at the time of his death, testified Douglas was abusive to her and their children, to the extent that at one point, she sought a restraining order against him. 4RP 321-22. The separation arose because Douglas had had yet another affair and was seeing someone else. 4RP 308, 320. Nevertheless, Brenna Douglas testified the separation was amicable, and, over the holidays, she and Douglas were attempting to reconcile. 4RP 315,

¹ There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 18, 2012; 2RP – July 6, 2012; 3RP – July 10, 2012; 4RP – July 11, 2012; 5RP – July 12, 2012; 6RP – July 13, 2012; 7RP – July 16, 2012; 8RP – July 17, 2012; 9RP – July 19, 2012; 10RP – July 20, 2012; 11RP – July 23, 2012; 12RP – Aug. 21, 2012.

327. Their business relationship in running the beauty salon the couple owned together continued to be good, she testified. 4RP 300, 330.

Initially, there were no leads. 5RP 564. Douglas' death was investigated as a homicide in part because there was an obvious gunshot wound to the head but no gun was found at the scene. 5RP 385-89. The coroner and medical examiner testified the gunshot wound caused death within minutes at most, and voluntary movement would have been impossible almost instantly. 5RP 522-23, 530, 546, 553. The coroner also opined Douglas was shot where he was found, seated in the driver's seat of his car. 5RP 505. Although the seat belt was not fastened when Douglas was found, the coroner opined it must have been unfastened after the shooting because an area of the belt located above the wound was saturated with blood, while a lower area was free from blood as if it had been covered with the seatbelt at the time of the wound. 5RP 492-93, 495, 506.

In the summer of 2004, Island County detectives visited Huden and his wife in their Florida home after receiving several phone calls from Huden's friend William Hill. 5RP 583-85. Hill described Huden as his "best friend." 5RP 684-85. The friends met in 2001 and played together in a band for two years. 5RP 636-37. They also spent time together socially and became very close. 5RP 638-39. Hill walked Huden's bride down the aisle

at his wedding. 5RP 639. One thing the friends had in common was a childhood with abusive parents. 5RP 642.

Hill described how his friend Huden had returned to Whidbey Island (where he grew up) to attend a funeral and, while there, had fallen for a woman named Peggy Thomas. 5RP 644-45. In 2003, Hill testified, Huden told him he was leaving his wife and moving to Las Vegas to be with Thomas. 5RP 647. Then, in February 2004, Huden was back in Florida. 5RP 650. About two weeks after Huden's return, he and Hill attended a jam session together. 5RP 651. During the drive there, Hill claimed Huden said he had found a man who was an abuser, like his much-hated stepfather, and had murdered him. 5RP 653.

Hill testified Huden told him the only people that knew were Peggy Thomas and the female friend she worked with at the hair salon. 6RP 654. Hill testified Huden described how he and Thomas lured the man to a secluded spot claiming to have a birthday present from Thomas for the man's wife, and then shot him in the head. 6RP 655-56.

When detectives confronted Huden with his friend's accusation, Huden replied he did not know why anyone would say such a thing. 8RP 923. He admitted he and Peggy Thomas had visited Whidbey Island at Christmas in 2003. 8RP 924. He told detectives he met Russell Douglas briefly when he delivered a gift from Peggy for Douglas' wife. 8RP 927,

937. He told detectives he had never owned a firearm. 8RP 924. Detectives did not arrest Huden; they drove him back to his home after interviewing him at the local police station. 8RP 944-45.

Roughly two weeks after interviewing Huden, the Island County Sheriff's Office got a call from law enforcement in New Mexico regarding a firearm that had been turned in. 7RP 776; 8RP 945. Keith Ogden, another friend of Huden's, testified that in October 2003, he taught Huden to fire a gun Huden had recently bought. 7RP 755, 761. After some practice in Ogden's back yard in Las Vegas, Ogden testified, he simply left the shell casings and bullets where they fell. 7RP 758-59. After Christmas, Ogden said, Huden invited him to lunch and asked him to keep the gun because Peggy Thomas' young daughters would be living with them. 7RP 758. When a cousin called him after learning about Douglas' death on the Internet, Ogden turned the gun over to his local sheriff's office. 7RP 768. After learning about the weapon, the detectives returned to Florida to find Huden, but were unable to do so. 8RP 945.

A toolmark examiner from the Washington State Patrol Crime Laboratory testified the bullet taken from Douglas' head and the ones found in Ogden's back yard were all fired from the Bersa .380 that Ogden said was Huden's. 7RP 829-36. A partial DNA profile was obtained from the weapon, and Huden was a possible match, along with one in every 100

people. 8RP 877. The latent print examiner testified Huden's fingerprints were found on several pages of the manual for the Bersa .380. 8RP 907-08.

The State also presented a criminal complaint for unlawful flight to avoid prosecution against Huden and an accompanying arrest warrant showing Huden was arrested in Mexico in June 2011. Exs. 75, 76; 8RP 912-13. A federal marshal testified the fact that Mexico's immigration service was involved in the arrest, and the absence of any record of legal entry into Mexico, meant Huden must have been in Mexico illegally. 8RP 915-16.

Huden presented alibi testimony from a friend he had lunch with in Tukwila on December 26, 2003 and expert testimony refuting the claim that Douglas was shot in his car wearing a seatbelt. 9RP 1044, 1150-51. The defense argued Hill and Ogden were not credible and their stories did not make sense. 10RP 1253-55. The State argued Douglas was a particularly vulnerable victim because, at the time he was shot, he was seat belted into his car with no opportunity to run. 10RP 1246.

C. ARGUMENT

1. THE EXCEPTIONAL SENTENCE WAS UNWARRANTED BECAUSE A PERSON WEARING A SEATBELT IS NOT PARTICULARLY VULNERABLE TO A SUDDEN GUNSHOT TO THE HEAD.

A trial court must impose a sentence within the standard range for the offense unless it finds substantial and compelling reasons to support an

exceptional sentence. RCW 9.94A.535. Facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. State v. Suleiman, 158 Wn.2d 280, 288-289, 143 P.3d 795 (2006). A sentencing court may rely on a jury finding of an aggravating factor if it finds substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.537.

Exceptional sentences are reversed on appeal when the evidence in the record does not support the reason given or when the reasons given do not justify an exceptional sentence. RCW 9.94A.585. The jury's finding of particular vulnerability is reviewed for substantial evidence, *i.e.* whether, viewing the evidence in the light most favorable to the State, any rational person could have found the asserted fact beyond a reasonable doubt. State v. Hyder, 159 Wn. App. 234, 259, 244 P.3d 454 (2011); State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010).

The 80-year exceptional sentence imposed in this case rests on the aggravating factor that the defendant knew or should have known the victim was particularly vulnerable. CP 5-6, 13, 14; RCW 9.94A.535(3)(b). The evidence was insufficient to establish this aggravating factor because Douglas was no more vulnerable than other victims of similar attacks and the seatbelt was not a substantial factor in the offense.

An exceptional sentence may be imposed if “The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” RCW 9.94A.535(3)(b). This aggravating factor requires both (1) that the victim be more vulnerable to the particular offense than other victims would be and (2) that the particular vulnerability was a substantial factor in the commission of the crime. State v. Jackmon, 55 Wn. App. 562, 566-67, 778 P.2d 1079 (1989).

Jackmon illustrates these two requirements. In that case, the victim was shot in the neck from behind while sitting at a desk. Id. The trial court imposed an exceptional sentence based in part on the aggravator that the victim was particularly vulnerable because of his pre-existing broken ankle.² Id. at 565.

The court determined the question on appeal was whether the broken ankle “rendered the victim more vulnerable to the particular offense than a non-disabled victim would have been.” Id. at 567. The court concluded the victim’s broken ankle did not render him any more vulnerable to this type of attack than any other person: “The victim was shot from behind, apparently without warning, while sitting down. It is highly unlikely that an able bodied person would have been able to escape Jackmon’s attack.” Id. Therefore,

² At the time, former RCW 9.94A.390(2)(b) permitted an exceptional sentence if the trial court found “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.”

the court held the evidence was insufficient to justify an exceptional sentence based on the victim's particular vulnerability. Id.; see also State v. Serrano, 95 Wn. App. 700, 710-12, 977 P.2d 4 (1999) (victim shot five times in the back while working in a cage on a hydraulic lift; court held vulnerability of being in lift cage was not a substantial factor).

The facts of this case directly parallel Jackmon and Serrano. Douglas was shot in the head at point blank range. 5RP 530, 537. The attack was almost certainly a surprise because he was apparently expecting a gift for his wife. 6RP 655. As in Jackmon, it is "highly unlikely" that even a person not wearing a seatbelt, or even not in a car, would be able to escape from such an attack. 55 Wn. App. at 567. The seatbelt was not a substantial factor in accomplishing the crime, and Douglas was no more vulnerable than any other victim of a surprise attack with a firearm.

The manner in which the offense was committed did not make Douglas particularly vulnerable. The State therefore failed to prove the aggravating factor beyond a reasonable doubt and there was thus no substantial or compelling reason to support the exceptional sentence. RCW 9.94A.537(6). Huden respectfully requests this Court reverse the exceptional sentence and remand for imposition of a sentence within the standard range.

2. THE “PARTICULARLY VULNERABLE”
AGGRAVATING FACTOR IS UNCONSTITUTIONALLY
VAGUE.

- a. Since *Blakely*,³ a Statute Violates Due Process When It Permits Increased Punishment Based on a Jury Finding but Is Too Vague to Prevent the Jury from Making an Arbitrary Decision.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution requires that statutes give citizens fair warning of prohibited conduct and protect them from “arbitrary, ad hoc, or discriminatory law enforcement.” State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). When a challenged provision does not involve First Amendment rights, it is evaluated as applied. Douglass, 115 Wn.2d at 182.

Prior to the landmark decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Washington’s Supreme Court held that the void-for-vagueness doctrine did not apply to aggravating

³ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

factors used to increase criminal sentences beyond the standard range.⁴ State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The Baldwin court reasoned that the aggravating factors detailed in the Sentencing Reform Act to limit judicial sentencing discretion did not implicate due process vagueness concerns because there is no constitutional right to sentencing guidelines and because the guidelines do not set penalties. Id. at 459-61.

But since Blakely, the Baldwin rationale no longer stands. Aggravating factors are now the equivalent of elements of a more serious offense and, therefore, must be found by a jury beyond reasonable doubt. Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (quoting Apprendi v. New Jersey, 530 U. S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); State v. Benn, 161 Wn.2d 256, 263, 165 P.3d 1232 (2007). Blakely, Apprendi, and their progeny rest on the Sixth Amendment right to a jury trial, applied to the states via the right to due process of law under the Fourteenth Amendment. Apprendi, 530 U.S. at 476. Fourteenth Amendment due process also requires striking down statutes that are so vague as to permit arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. This line of cases makes clear that Fourteenth Amendment due process applies, not merely to elements of the offense, but

⁴ The issue of whether aggravating factors may be challenged for vagueness post-Blakely is currently pending at the Washington Supreme Court in State v. Duncalf, no. 86853-1. Oral argument was held September 13, 2012.

to additional facts that increase the punishment that can be imposed. As the court explained regarding the sentencing enhancement at issue in Apprendi:

New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently

Apprendi, 530 U.S. at 476.

Under due process vagueness principles, the elements of a crime must be sufficiently clear as to prevent arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. Since Blakely and Apprendi, the same due process concerns that apply to elements of an offense, also apply to aggravating factors. As the Court has noted, the requirements of due process may not be avoided simply by labeling the statute differently:

Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague

Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 520, 15 L. Ed. 2d 447 (1966) (discussing a Pennsylvania statute permitting juries to require acquitted defendants to pay court costs on pain of imprisonment). The aggravating factor under RCW 9.94A.535(3)(b) provides the State with a procedure for depriving a defendant of liberty. Therefore, it must meet the challenge that it is unconstitutionally vague. Giaccio, 382 U.S. at 402.

b. The “Particularly Vulnerable” Aggravator Is Unconstitutionally Vague Because the Jury Has No Frame of Reference for a Typical Victim of an Offense.

A criminal statute that “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” violates due process. Giaccio, 382 U.S. at 402-03. A statute fails to guard against arbitrary enforcement when it fails to provide ascertainable standards or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974). To survive a vagueness challenge, a sentencing factor must have a “common-sense core of meaning . . . that criminal juries should be capable of understanding.” Tuilaepa v. California, 512 U.S. 967, 973, 114 S. Ct. 2630, 2635-36, 129 L. Ed. 2d 750 (1994) (citing Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 2959, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)).

For a jury, the “particularly vulnerable” aggravator in RCW 9.94A.535(3)(b) lacks ascertainable standards and, therefore, invites unfettered latitude in its application. As discussed above, this aggravator requires the jury to decide whether the victim in a given case was more vulnerable to the particular offense than the typical victim of that offense. Jackmon, 55 Wn. App. at 566-67. But a jury is not instructed as to how vulnerable the typical victim of a given offense is. In the days before Blakely, when a judge found the aggravating factors supporting an exceptional sentence, judges could perhaps be supposed to have a bank of knowledge upon which to determine whether a given victim was more vulnerable than was typical for that offense. But a juror cannot be presumed to have such a bank of knowledge.

For a jury, there is no “common-sense core of meaning” regarding the typical victim of a given offense. Tuilaepa, 512 U.S. at 973. The only way for the jury to make this determination is on an arbitrary, ad hoc, or entirely subjective basis.⁵ Jurors are often encouraged to apply their common sense and their every day experience when evaluating evidence. But unless the juror has been extremely unlucky or happens to have a career in the criminal justice field, the juror has no common sense or daily experience of what a typical murder victim looks like or how vulnerable that

⁵ Or perhaps on the basis of the episodes of television series such as “Law and Order” or “CSI” the juror has seen.

person might be. The lack of any way to ascertain a “typical” murder victim renders this factor unconstitutionally vague as applied to Huden. Goguen, 415 U.S. at 578.

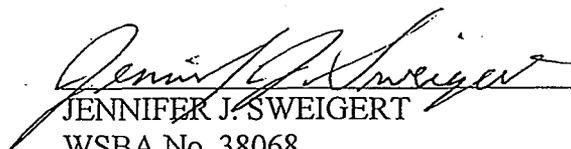
D. CONCLUSION

The evidence was insufficient to show Douglas was more vulnerable than a typical victim of the type of offense committed here, and RCW 9.94A.535(3)(b) is unconstitutionally vague in violation of due process because the jury had no framework in which to determine whether he was. Huden therefore requests this Court vacate his exceptional sentence and remand for resentencing within the standard range.

DATED this 11th day of April, 2013.

Respectfully submitted,

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