

State of Washington v. Richard Trevor Duncalf, No. 62237-4-I

Cox, J. (concurring) — I agree with the majority that Richard Duncalf cannot challenge for the first time in this appeal the trial court’s decision not to instruct the jury on the definition of “substantially exceeds.” The supreme court recently defined this term in State v. Stubbs.¹ I write separately to state my belief that such an instruction is required in future cases.

RCW 9.94A.535(3)(y) permits a judge to impose an exceptional aggravated sentence, provided a jury finds that the victim’s injuries “substantially exceed” the level of bodily harm **necessary** to satisfy the **elements** of the offense.² Here, the level of bodily harm required for second degree assault is “substantial bodily harm.”³ To “substantially exceed” that level of harm, this jury should have been required to find that the victim’s injuries met the definition of “great bodily harm.”

At this trial, the judge noted the absence of any proposed jury instruction to define “substantially exceed,” and suggested that such an instruction would be necessary. Nevertheless, neither Duncalf nor the State proposed such an instruction. Moreover, Duncalf chose not to except to the court’s instructions to the jury, which did not include such a definition.

During deliberations, the jury submitted the following question to the

¹ 170 Wn.2d 117, 129, 240 P.3d 143 (2010).

² State v. Stubbs, 170 Wn.2d 117, 129, 240 P.3d 143 (2010).

³ RCW 9A.36.021(1)(a).

court:

[W]hat constitutes “substantially exceeded” the level of bodily injury necessary to constitute substantial bodily harm?^[4]

The court responded:

There is no specific, legal definition of that term. Apply the commonly held meaning to the words.^[5]

The jury acquitted Duncalf of first degree assault. But it convicted him of second degree assault. The jury also returned a special verdict that Ketchum’s injuries “substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree.”⁶ Based on this special verdict, the court imposed an exceptional sentence of 100 months of confinement.

During this appeal of Duncalf’s sentence, the supreme court decided Stubbs. The court stated that RCW 9.94A.535(3)(y), the post-Blakely amendment to the SRA that permits a court to impose an exceptional sentence, requires the jury to answer a different question than what was required under prior law.⁷ The specific question now is whether the “victim’s injuries substantially exceed the level of bodily harm **necessary** to satisfy the **elements** of the offense.”⁸

⁴ Clerk’s Papers at 392.

⁵ Clerk’s Papers at 393.

⁶ Clerk’s Papers at 398.

⁷ Stubbs, 170 Wn.2d at 128-29.

In Stubbs, the crime of conviction was first degree assault. The supreme court stated that no injury short of death could exceed the definition of “great bodily harm,” the level of harm necessary to prove first degree assault.⁹ The court stated that the question is “whether injuries that fall *within* that definition are, nevertheless, so much worse than what is *necessary* to satisfy that element that they can be said not only to exceed, but to *substantially* exceed, that minimum.”¹⁰

The State argued in that case that injuries that fall within the definition of “great bodily harm” may still be so much worse than what is necessary to satisfy the element that they can be said to “not only exceed, but substantially exceed injuries at the low end of the range” of great bodily harm.¹¹ The supreme court rejected this argument:

Though injuries at the far end of the spectrum of “great bodily harm” exceed the minimum, the legislature evidently views them as differing in degree, not kind. . . . While there are different degrees of “great bodily harm,” the legislature has classified injuries such as [the victim’s] that create a probability of death the same as injuries . . . [that result in] a significant permanent loss or impairment of the function of a bodily part or organ. *One case of “great bodily harm,” then, is not qualitatively different than another case. **Such a leap is best understood as the jump from “bodily harm” to “substantial bodily harm,” or from “substantial bodily harm” to “great bodily harm.” That is what is meant by “substantially exceeds.”***^{12]}

⁸ Id. at 129 (citing RCW 9.94A.535(3)(y)) (emphasis added).

⁹ Id.

¹⁰ Id.

¹¹ Id.

Here, the majority correctly concludes that in order to “substantially exceed” the bodily harm element of second degree assault—“substantial bodily harm”—the victim’s injuries must meet the definition of “great bodily harm.”¹³

The State argues, and the majority agrees, that “the severe injuries sustained by Ketchum are sufficient to constitute ‘great bodily harm,’” as RCW 9A.04.110(4)(c) requires. Perhaps they are. But we will never know because the jury in this case was never instructed to decide whether Mr. Ketchum’s injuries met the definition of “great bodily harm” for purposes of the aggravating circumstance. Rather, the court instructed the jury to determine whether the injuries “substantially exceeded” those of substantial bodily harm without further definition or clarification. Presumably, the jury followed the trial court’s instruction that “There is no specific, legal definition of that term. Apply the commonly held meaning to the words.” But, as Stubbs held after the trial in this case, this guidance is no longer legally correct.

In any event, Duncalf does not challenge the sufficiency of the evidence

¹² Id. at 130 (emphasis added).

¹³ The three levels of bodily harm, in ascending order, are: (a) “bodily harm,” defined as “physical pain or injury, illness, or an impairment of physical condition”; (b) “[s]ubstantial bodily harm,” defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part”; and (c) “[g]reat bodily harm,” defined as “**bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.**” RCW 9A.04.110(4) (emphasis added).

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to support a finding of “great bodily harm” Moreover, he does not challenge the sufficiency of the evidence to support the jury finding in this case: that the victim’s injuries “substantially exceeded” those necessary for substantial bodily harm. Thus, we are not required to examine whether the evidence in this case is sufficient to meet the proper standard.

The importance of a correct finding to support an aggravated sentence is more than a matter of semantics. In Blakely v. Washington,¹⁴ the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁵ Under our state statutes, a jury should have the proper definition of “substantially exceed” before it when it makes the determination that an aggravating circumstance exists.¹⁶

With these principles in mind, I conclude that affirming the sentence in this case is proper. Duncalf’s challenge comes too late for this court to provide any relief.

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

¹⁵ Id. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

¹⁶ State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997) (a term is technical when it has a meaning that differs from common usage (citing State v. Scott, 110 Wn.2d 682, 694, 757 P.2d 492 (1988) (Utter, J., dissenting))).

Cox, J.