

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARTEN LUIS CAPUTO,

Appellant.

No. 38780-8-II

UNPUBLISHED OPINION

Bridgewater, P. J. — Marten Luis Caputo appeals the exceptional sentence imposed after pleading guilty to second degree assault with a deadly weapon. The State concedes that the court erred when it imposed an exceptional sentence. Accepting the State's concession, we vacate Caputo's sentence and remand for resentencing.<sup>1</sup>

On September 5, 2007, Caputo assaulted his girlfriend Cecily Hawkins with a knife. Hawkins has a prosthetic leg and had given birth two weeks before the attack. Caputo pleaded guilty, by way of an *Alford*<sup>2</sup> plea, to second degree assault with a deadly weapon. In his plea agreement, the State sought to recommend 12 months confinement for the assault, 12 months confinement for the deadly weapon sentencing enhancement, credit for time served, and a no-contact order with Hawkins.

Caputo stipulated to certain facts surrounding the incident: (1) that Hawkins had given birth on August 22, 2007; (2) that Hawkins had a prosthetic leg; (3) that he was aware of these

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<sup>1</sup> Because this court is remanding the case for resentencing, it is unnecessary to address Caputo's claim of ineffective assistance of counsel as well as issues raised in his statement of additional grounds.

<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

facts; and (4) that the offense was committed on September 5, 2007. After acknowledging that an exceptional sentence was not part of the plea agreement, the State moved for 120-month exceptional sentence because Hawkins was particularly vulnerable. The trial court found that Hawkins was particularly vulnerable and imposed an exceptional sentence of 48 months confinement plus an additional 12 months for the deadly weapon sentencing enhancement, totaling 60 months' confinement.

#### ANALYSIS

Caputo contends that the trial court violated his *Blakely* and Sixth Amendment rights by finding the presence of an aggravating factor without submitting the issue to a jury. Whether an exceptional sentence violates the Sixth Amendment is a question of law reviewed de novo on appeal. *State v. Saltz*, 137 Wn. App. 576, 580, 154 P.3d 282 (2007).

“Other 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.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This holding is based on the Sixth Amendment right to trial by jury. U.S. Const. amend.. IV. The holding in *Apprendi*, was later clarified in *Blakely*. The *Blakely* court held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

To prove a victim's vulnerability as an aggravating factor justifying an exceptional sentence, “the State must show (1) that the defendant knew or should have known (2) of the

victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

Here, the trial court erred when it imposed an exceptional sentence without first submitting the issue of an aggravating factor to a jury or having Caputo's admission of the aggravating factor. While Caputo pleaded guilty and stipulated to certain facts, he did not stipulate that Hawkins was vulnerable because of her prosthetic leg and recent child birth. *Suleiman* requires that the defendant stipulate to the facts supporting particular vulnerability and that the defendant stipulate that the record supports a determination that the victim was particularly vulnerable. *Suleiman*, 158 Wn.2d at 292. The trial court imposed an exceptional sentence of 60 months based on its finding that Hawkins was particularly vulnerable, a sentence outside the standard range of 6 to 12 months for assault plus 12 months for the deadly weapon sentencing enhancement. RCW 9.94A.510. Caputo's exceptional sentence violates *Blakely* because it is predicated on an unstipulated fact, that Caputo knew Hawkins was particularly vulnerable, nor was it found by a jury beyond a reasonable doubt. We vacate the exceptional sentence and remand for sentencing consistent with *Blakely*.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.404, it is so ordered.

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Bridgewater, J.

We concur:

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Armstrong, J.

No. 38780-8-II

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Quinn-Brintnall, J.