No. 81650-6

J.M. JOHNSON, J. (dissenting)—In reversing Troy Dean Stubbs's exceptional sentence, the majority overturns a jury's express finding and mistakenly concludes that the severe injury aggravator codified by the legislature in RCW 9.94A.535(3)(y) does not apply to first degree assault. *See* majority at 14-15. I cannot join the majority in doing so. I would hold that extreme injuries such as those suffered by Ryan Goodwin *can* be found to substantially exceed the level of harm necessary to satisfy the elements of first degree assault. I would also hold that the injuries inflicted by Stubbs in this case were properly and expressly found by the jury to justify an exceptional sentence. I therefore dissent.

As the majority notes, the State charged Stubbs with first degree assault by alternate means pursuant to RCW 9A.36.011(1)(a) and/or (c). The

first of these means applies if a person "[a]ssaults another with . . . any deadly weapon . . . likely to produce *great bodily harm* or death." RCW 9A.36.011(1)(a) (emphasis added). No injury is even necessary under this means; only use of a weapon likely to cause great harm. The second means applies if a person "[a]ssaults another and inflicts *great bodily harm*," RCW 9A.36.011(1)(c) (emphasis added). Some actual bodily harm is required under this means.

I would hold that severe injuries can substantially exceed the level of harm necessary to satisfy the "great bodily harm" element of RCW 9A.36.011(1)(a) and/or (c), and that Goodwin's injuries do substantially exceed that level of harm. Stubbs viciously stabbed Goodwin in the neck when Goodwin's back was turned. This was first degree assault under both of the means described above. As a result, Goodwin has lost half of the strength in his left arm and two-thirds of the strength in his right hand. His rib cage muscles, bladder, intestines, and legs are completely and permanently paralyzed. Goodwin requires a catheter, must induce his bowel movements by hand, and is impotent. Goodwin's life expectancy has been reduced by 17 years because of these injuries, and he faces a higher risk of pneumonia,

stroke, and seizure for the rest of his now-shortened life. The trial court described his suffering as a "fate worse than death." Report of Proceedings (Sept. 7, 2005) at 55.

As the jury expressly found, these injuries substantially exceed the level of harm necessary to satisfy the "great bodily harm" element of first degree assault.[1] "Great bodily harm" includes bodily injuries that create either (i) a probability of death, (ii) significant serious permanent disfigurement, or (iii) significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c). Goodwin's injuries, as described above, went beyond this level of harm: they reduced Goodwin's life expectancy by nearly two decades, permanently limited the function of his arms and lungs, and permanently paralyzed his legs, bladder, and intestines. In other words, Stubbs's assault did not merely create a *probability* of death; it created a *certainty* of a hastened death, shortening Goodwin's life by decades. Stubbs did not merely inhibit the function of bodily parts or organs; he destroyed *several* of Goodwin's bodily parts or organs. Thus, in a

[1] That the legislature has not defined a level of harm greater than "'great bodily harm'" does not mean that such harm does not exist. Majority at 11. It does, and Goodwin suffered it.

meaningful, quantitative way, the harm that Stubbs caused substantially exceeds that which is necessary to satisfy the "great bodily harm" element of first degree assault.[2]

As the Court of Appeals described it, Goodwin now "live[s] in a suspended, tortured state between life and death." *State v. Stubbs*, 144 Wn. App. 644, 650, 184 P.3d 660 (2008). An expert at trial testified that he continuously faces death as a result of Stubbs's assault: His injuries could kill him at any moment by causing a fatal stroke, and the paralysis of his rib cage muscles could cause him to contract a deadly lung infection. This is hardly equivalent to the injuries of most first degree assault victims, many of whom fully recover. Goodwin's suffering thus substantially exceeds that which is necessary to satisfy the "great bodily harm" element of first degree assault from a qualitative, as well as a quantitative, perspective.

Having explained how Goodwin's injuries substantially exceed the

[2] As the Washington Association of Prosecuting Attorneys (WAPA) observes, this element would be satisfied even if Goodwin had fully recovered from the stab wound or if Goodwin had only lost a finger or a toe as a result of the assault. Br. of Amicus WAPA at 7-8. Although we do not compare a victim's injuries to the minimum level of harm that could have led to the same conviction in applying the serious injury aggravator, *State v. Bourgeois*, 72 Wn. App. 650, 662, 866 P.2d 43 (1994), Goodwin's injuries obviously surpass this level of harm.

level of harm necessary to satisfy the elements of first degree assault, I turn now to the question of whether such severe injuries, as supported by an express jury finding of severity, justify Stubbs's exceptional sentence.

I agree with the majority that only injuries "'greater than that contemplated by the Legislature in setting the standard range'" may justify an exceptional sentence. Majority at 7 (quoting *State v. Cardenas*, 129 Wn.2d 1, 6, 914 P.2d 57 (1996)). However, the majority is clearly wrong in holding that the legislature intended the standard range sentence for first degree assault to encompass extreme injuries such as those suffered by Goodwin. *Id.* at 14.

The legislature intended chapter RCW 9.94A RCW to "codify existing common law aggravating factors." Laws of 2005, ch. 68, § 1, *codified at* RCW 9.94A.537. The majority argues that common law existing at the time of codification prohibited the severity of a victim's injuries from supporting a sentence above the standard range and that the legislature codified this prohibition in RCW 9.94A535(3)(y). Majority at 7-12, 14 (citing *Cardenas*, 129 Wn.2d at 1; *State v. Armstrong*, 106 Wn.2d 547, 723 P.2d 1111 (1986); *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986); *State v. Bourgeois*,

72 Wn. App. 650, 866 P.2d 43 (1994); *State v. George*, 67 Wn. App. 217, 834 P.2d 664 (1992), *overruled on other grounds by State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995)).

I disagree with the majority's characterization of these cases. Three cases involve crimes different from first degree assault and therefore do not control today's decision of whether the severity of a victim's injuries can support an exceptional sentence here. *See Cardenas*, 129 Wn.2d at 6-7 (vehicular assault); *Armstrong*, 106 Wn.2d at 550-51 (second degree assault); *Nordby*, 106 Wn.2d at 519 (vehicular assault). Moreover, the remaining two cases do not hold, as the majority infers, that no injury can exceed the level of harm covered by the "great bodily harm" element of first degree assault, nor do they hold that RCW 9.94A.535(3)(y) does not apply to that crime. Majority at 12.

In the first of these cases, *George*, the Court of Appeals acknowledged that "[t]he seriousness of a victim's injuries cannot be used to enhance a defendant's sentence if that factor was considered *in defining the crime itself*." 67 Wn. App. at 222 (emphasis added) (citing *State v. Tunell*, 51 Wn. App. 274, 279, 753 P.2d 543 (1988), *overruled on other grounds by State v.*

Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991)). The court was correct up to this point. However, it then added that the gravity of a victim's injuries "'may be used to justify an exceptional sentence if they are significantly more serious than in the usual case.'" *Id.* at 222-23 (quoting *Tunell*, 51 Wn. App. at 279). We have since disapproved of this language "to the extent that [it] suggests that an exceptional sentence can be imposed merely because of the severity of the injury, where this is [already] an element of the crime." *Cardenas*, 129 Wn.2d at 7.[3]

A clearer statement of the law is found in *Bourgeois*. There, the Court of Appeals explained that the extent of a victim's injuries cannot support an exceptional sentence if that factor was considered by the legislature "in defining, *and setting the standard range for*, the crime of conviction." *Bourgeois*, 72 Wn. App. at 662 (emphasis added). The severity of a victim's injuries thus *can* justify an exceptional sentence if that aggravating factor was not considered by the legislature in either (i) defining the crime or (ii) setting its standard range sentence. In *Bourgeois*, the court found that the victims'

[3] This disapproval was expressed in dicta, however, and did not overrule *George* because the discussion was not necessary to the resolution of the vehicular assault issue in *Cardenas*.

injuries—gunshot wounds destroyed one victim's spleen and half of his pancreas, and necessitated a colostomy—"unambiguously" exemplified "what the Legislature defined as an intentional assault inflicting great bodily injury." *Id.* at 662. In other words, the legislature had considered injuries like the victim's in defining and setting the standard range for first degree assault. This being the case, the court invalidated the aggravating factor. *Id.* at 664.

Although the reasoning underlying *George* has been called into question, *see Cardenas*, 129 Wn.2d at 7, it cannot be said that the aforementioned cases stand for the proposition that, categorically, no injury can possibly exceed the level of harm encompassed by "great bodily harm" in the context of first degree assault, and that RCW 9.94A.535(3)(y) may never apply. *Bourgeois* merely found that the injuries *in that case* did not exceed the statutory definition of great bodily harm; *George* and the cases discussing second degree and vehicular assault were likewise fact-specific.[4]

[4] *See Cardenas*, 129 Wn.2d at 6-7 ("Michel's injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range [for vehicular assault]. Consequently, the severity of injuries suffered cannot justify an exceptional sentence."); *Armstrong*, 106 Wn.2d at 550-51 ("The fact that Armstrong inflicted serious first and second degree burns upon the baby merely brings Armstrong's crime within the definition of second degree assault. . . . Hence, the nature of the injuries inflicted were already accounted for in determining the presumptive sentence range for second degree

The majority's assertion that "the aggravating factor of serious injury did not apply to first degree assault" under the common law prior to the codification of RCW 9.94A.535(3)(y) is mistaken. Majority at 14. The seriousness of a victim's injuries *did* apply as an aggravating factor to first degree assault prior to codification: it could support an enhanced sentence so long as the legislature did not consider the seriousness of the injuries inflicted *in a particular case* when it (i) defined first degree assault or (ii) established the standard range sentence for that crime. No case has squarely held otherwise—and I note that it is the province of the legislature, not the courts, to define crimes and sentences.

Under the correct standard, I would recognize that the legislature did not consider injuries as severe as Goodwin's in defining or setting the standard range sentence for first degree assault. Rather, Goodwin's injuries substantially exceed the level of harm—"great bodily harm," RCW

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assault; they cannot be counted a second time to justify an exceptional sentence."); *Nordby*, 106 Wn.2d at 519 ("While the victim's injuries here were severe, this factor was already considered in setting the presumptive sentence range for vehicular assault. It cannot, therefore, be a basis for a sentence outside the presumptive range."); *see also State v. Cowen*, 87 Wn. App. 45, 56, 939 P.2d 1249 (1997) (affirming the imposition of an exceptional sentence for first degree attempted homicide where the victim's multiple gunshot wounds caused him to "remain forever paralyzed, in extreme pain, and unable to perform basic bodily functions" because "[n]o authority indicates that the Legislature necessarily contemplated such injuries in determining the standard range").

9A.36.011(a) and (c)—that the legislature contemplated would be encompassed by that crime. The severity of Goodwin's injuries therefore justifies the exceptional sentence that Stubbs received under RCW 9.94A.535(3)(y), and on this basis I would affirm the Court of Appeals.

In so ruling, I would also affirm the Court of Appeals' rejection of Stubbs's vagueness challenge to RCW 9.94A.535(3)(y). The phrase "substantially exceeds" is not so imprecise that it carries no commonsense meaning. Suppl. Br. of Pet'r at 16. The term "substantial" indicates that the level of harm suffered by the victim must be significantly greater than that defined as "great bodily harm" in the statute. *Cf. State v. Worrell*, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) ("'interferes *substantially* with his liberty'" in kidnapping statute not unconstitutionally vague (emphasis added) (quoting RCW 9A.40.010(1))); *State v. Saunders*, 132 Wn. App. 592, 599, 132 P.3d 743 (2006) ("*substantial* pain" in third degree assault statute not unconstitutionally vague (emphasis added)). The statutory definition of "great bodily harm," *see* RCW 9A.04.110(4)(c) offers a sufficiently objective baseline for jurors to compare to a particular victim's injuries and apply the "substantially exceeds" standard of the aggravating factor. Such a jury

finding is proper, and ought not be disturbed by an appellate court. RCW 9.94A.535(3)(y) also apprises defendants that inflicting a significantly more serious bodily injury may result in an exceptional sentence; the statute is not unconstitutionally vague, and I would affirm the Court of Appeals on this issue as well. Because the majority fails to address this matter and erroneously holds that RCW 9.94A.535(3)(y) does not apply to first degree assault as a matter of law, thereby overturning a proper jury finding authorized by legislative enactment, I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: