No. 46066-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONNELL W. PRICE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

OPENING BRIEF OF APPELLANT

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2. The resentencing court violated Price's rights to allocution and the appearance of fairness doctrine in imposing the sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In Blakely, the Court held that due process and the right to jury trial require that any factor which "aggravates" an offense and increases the punishment imposed must be presented to and found by a jury, not a judge, to a standard of proof of beyond a reasonable doubt.

   In imposing the exceptional sentence on resentencing, the lower court here relied on the aggravating factor that the

   crime involved domestic violence and the acts of the defendant manifested intimidation. The jury never made any finding, however, that the crime involved domestic violence. Did the resentencing court err and were Price's rights under Blakely violated by the imposition of the exceptional sentence based on facts not found by the jury?

2. The resentencing court imposed an exceptional sentence before asking appellant if he wished to speak. When counsel noted the error, the court then apologized and heard from Price, after which the court stated it had heard nothing to make it "reconsider" the exceptional sentence.

   Did the resentencing court violate Mr. Price's right to allocution and was the court's willingness to "reconsider" its decision insufficient to render the error harmless?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Donnell W. Price was charged by information in Pierce

County Superior Court with first-degree murder and second-degree unlawful possession of a firearm, with further allegations that the murder was committed while armed with a firearm and that the crime was aggravated by being a crime of "domestic violence" and the conduct of the defendant was either deliberate cruelty or manifested intimidation of the victim. CP 1-2; RCW 9.41.010; RCW 9.41.040(2)(a)(i); RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.535(3)(h); RCW 9A.32.030(1)(a); RCW 10.99.020.

Price was convicted after a jury trial and, on October 19, 2007, ordered to serve an exceptional sentence of 434 months for the murder based on adding 60 months for "manifest intimidation," also having the standard ranges run consecutive, for a total term of 494 months. CP 11-22. Findings of fact and conclusions of law were entered in support of that exceptional sentence, on December 7, 2007. CP 32-34.

Mr. Price appealed and, on October 12, 2009, this Court affirmed in an unpublished decision. CP 35-47. On October 10, 2012, this Court granted a personal restraint petition in part, remanding for resentencing. CP 81-88.

Proceedings on remand for resentencing were held before the Honorable Ronald E. Culpepper on January 31, February 27 and March 7, 2014, after which the judge imposed an exceptional sentence. RP 78-80; CP 92-103. Mr. Price appealed and this pleading follows. See CP 104-116.

2. Facts relating to issues on appeal

In the original sentencing, the trial court found that Price's 1991

and 1993 felony convictions did not "wash" and thus were to be counted in the offender score. CP 83. That determination, however, was made based upon the representations of the prosecutor that it had the relevant documents to prove the felonies did not "wash," without the prosecution actually presenting them. CP 83. This Court, in granting the personal restraint petition in part, remanded for resentencing, giving the prosecution the chance to "provide all relevant documentation to prove Price's criminal history and resulting offender score" under RCW 9.94A.530(2). CP 85. The Court also ordered correction of the "seriousness levels pertinent to each current offense, which should be XV and III instead of XIV and IV." CP 85.

At the first hearing on remand for resentencing, on January 31, 2014, the parties noted that the judge who had tried the case was retired and the new judge who had taken his position had worked as a prosecutor on Mr. Price's trial in 2006, so that a new judge was now involved. RP 3. That judge, Judge Culpepper, granted private counsel's motion to withdraw, based on that counsel's statement he did not want to be appointed and had done a lot of work without getting a lot of money for representing Price at trial, years before. RP 5-6.

On February 27, 2014, the parties appeared again, now with new counsel appointed for Mr. Price. RP 12-13. The prosecutor told the court that the purpose of the hearing was to allow him to provide the documents needed to support the offender score by proving that the prior felony convictions did not "wash." RP 15-16. Ironically, the prosecutor still did not have all the documents he needed to make that argument and said he

would not be able to get a missing judgment and sentence that day. RP 18-20. He admitted that the document would prove "[d]ispositive" on the issue of whether there was a "wash." RP 21.

The prosecutor then told the court that there were people present in the courtroom who had "come here, obviously, anticipating that this was going to be a sentencing hearing," but that resentencing could not occur without those documents. RP 20. He suggested that the court have those people address the court to "make whatever requests they want to make" about the sentence they felt was appropriate, after which the prosecutor could present the evidence he did have with him that day. RP 20-21. The parties would have to return, however, so that the prosecutor could present the missing documentation and they could then argue the issues at that time. RP 20-21.

The court gave the prosecutor additional time to get his evidence together, setting over the resentencing. RP 22. At the next hearing, on March 7, 2014, the prosecutor presented several exhibits establishing the prior felony convictions and several documents regarding modification of sentences which the prosecution argued supported their position that the prior felonies did not "wash." RP 39-40, 42. The parties disputed whether several of the intervening misdemeanors were valid, because they were based upon violations of terms of community supervision which had occurred years after Price's 12 months of community supervision, ordered in 1993, should have ended. RP 39-61. There was lengthy discussion on that issue but ultimately the trial court ruled that the offenses did not "wash." RP 61.

After making that ruling regarding the offender score, the court heard from relatives of the victim regarding the sentence, and then the prosecutor, who was planning to play the 9-1-1 tapes from trial but could not because he was having technical issues. RP 61-70. The prosecutor detailed facts he said were proven at trial at length, until counsel finally objected that she had not been trial counsel and thus could not rebut any of the prosecutor's claims. RP 66-68. The court agreed that counsel was making a"certain point" but said it assumed the prosecutor would recite "the facts and not his interpretation of them." RP 69. The prosecutor concurred, handed up some gruesome photos of the victim and argued about the nature of the crime. RP 68-69. Ultimately, the prosecutor asked the court to sentence Mr. Price to an exceptional sentence like the one previously imposed. RP 70-71.

At that point, the court asked if other potential aggravating factors were submitted to the jury, and the prosecutor conceded that there was a special verdict on whether the crime manifested "deliberate cruelty." RP 72. That special verdict was answered, "[n]o." RP 32, 73; CP 9-10.

Counsel also objected to the court imposing an exceptional sentence based on the "domestic violence" aggravator purportedly found by the jury. RP 73. She noted that the aggravating factor required proof that the crime involved "domestic violence" and that the conduct manifested intimidation of the victim, but the jury had made no finding regarding "domestic violence," as evidenced by the special verdict forms they had filled out. RP 73-74. Counsel argued that the court could not impose an exceptional sentence based on that aggravating factor as a result

without violating Mr. Price's rights under Blakely. RP 74. When the prosecutor declared that the issue was outside the "scope" of the resentencing hearing, counsel noted that the remand was for resentencing, which meant that there had to be a lawful sentence. RP 74-75.

The court then ruled:

> Well, with respect to the issue of the exceptional sentence, the jury did find by special verdict that there was an aggravating circumstance, so I think Judge Fleming did have the ability, if he wished, to impose an exceptional sentence.

RP 76. After that, Judge Culpepper said it was very difficult to know "the perfect sentence in any case," especially when he had not heard the trial. RP 77. He noted that Judge Fleming "heard the testimony and probably felt the emotion," and said that it was "hard to think of something more malicious" than the crime Price had committed by shooting and killing the victim when police were there to arrest him. RP 77. The judge then went on:

> But, again, I wasn't there. I can't say I don't know what I would have done, but I certainly don't see any reason to vary from Judge Fleming, who heard the trial and heard all the details, did, so I'm going to sentence Mr. Price to 374 months in prison, the high end, plus the additional 60 months for the deadly weapon enhancement, and I'm also going to sentence him to an additional 60 months exceptional sentence upward. I'm simply adopting what Judge Fleming, who heard the trial and knows it a lot better than I did and was there, did.

RP 77-78. The court mentioned the terms of community custody, the imposition of legal financial obligations and other penalties. RP 78.

The judge then said, "[t]here's nothing I've heard or seen that indicates there was anything wrong with Judge Fleming's sentence, so I am, in effect, adopting it." RP 78. At that point, counsel said, "[a]nd I

understand that, Your Honor. I know Mr. Price wanted to address the Court and provide some information, but you've made your ruling without his ability to allocute." RP 78. The court apologized, said, "[y]ou're right; I should have done that," then said:

> Mr. Price, anything you would like to say? The sentence isn't final yet. Is there anything you would like to say, Mr. Price?

RP 78-79.

Price then talked about his case and his concerns about violations of the right to public trial. RP 80. He said he was a minister who had been ordained, a former senior ward in the Mason Lodge and other things, asking also for some legal materials at public expense. RP 80. He said he had tried to show his remorse "for the accident that happened," noting that the tragedy hurt his family, too, and that his 27th wedding anniversary was that day. RP 79-81.

Judge Culpepper said:

> I apologize for not hearing from you earlier, Mr. Price. I should have, of course, granted that and listened. I did listen. **I really didn't hear anything that makes me change my mind. I've reconsidered.** I'm going to impose what I said earlier.

RP 81 (emphasis added). The judge said that the declaration that it was an accident was "a lie by the evidence," because the positioning of the gun according to the prosecutor had indicated the crime "wasn't an accident" but rather the defendant "executing" the victim "with the police breaking down the door." RP 81. Mr. Price then noted those were the facts the prosecution had brought up but there was also evidence of a struggle and the shooting happened during that struggle. RP 82. Judge Culpepper responded that he did not think someone would accidentally shoot

someone in the face during a struggle, stating his opinion that the shooting was deliberate, apparently based on what the prosecutor had said and presented. RP 82.

Judge Culpepper then said:

> So, again, 374 months on Count I, level 15, Murder in the First Degree, 60 months for the deadly weapon finding the jury made, so 434, and I find that Judge Fleming made a good decision in the additional 60 weeks for the exceptional sentence.

RP 82. The prosecutor corrected, "[m]onths," and the court agreed. RP 83.

After the judge reimposed the same sentence and the parties talked about the appellate process, the judge told Price he had a right to appeal, talked about the timing of the appeal and discussed whether he was indigent. RP 83-84. Once they were through with most of the discussion, the prosecutor said, "I think the record should reflect the Court's judgment was not final at the point in time when the Court allowed Mr. Price to allocute." RP 85. The judge then declared, "[i]t's still not final because I haven't signed it yet." RP 85. The prosecutor agreed, and the judge said, "[a]fter hearing him, I reconsidered it and reimposed it, and I apologize for not hearing from him before I gave my initial inclination." RP 84-85.

D. ARGUMENT

1. THE RESENTENCING COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON AN AGGRAVATING FACTOR NOT PROPERLY FOUND BY A JURY, IN VIOLATION OF PRICE'S STATE AND FEDERAL RIGHTS UNDER BLAKELY AND ITS PROGENY

Both the state and federal constitutions guarantee the right to due process and trial by jury, which "requires that a sentence be authorized by

the jury's verdict." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); Sixth Amend.; 14th Amend.; Art. I, § 21; Art. I, §22. It is by now established that, 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." See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Further, it is also now settled that the statutory maximum in question is "the maximum a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Blakely, 542 U.S. at 303 (emphasis in original).

Our state constitution provides even greater protection for jury trials than does its federal counterpart. See Williams-Walker, 167 Wn.2d at 896. Under both state and federal constitutions, however, a sentencing court violates a defendants rights to trial by jury if imposes greater punishment than would have otherwise been authorized based on the facts actually found by a jury. See State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (Recuenco III). Thus, under both constitutions, aggravating factors which are used to support an exceptional sentence above the standard range must be proven to and found by a jury, beyond a reasonable doubt, by special verdict. See, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); see also, State v. Ortega, 131 Wn. App. 591, 594-95, 128 P.3d 146 (2006), review denied, 160 Wn.2d 1002 (2007).

Our state's statutes also mandate such a requirement. Under RCW

9.94A.537, in order for a sentence to be imposed above the standard range in compliance with the requirements of Blakely, the prosecution must give notice of the aggravating circumstances upon which it will rely and, further:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. **The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory**.

RCW 9.94A.537(3) (emphasis added).

In this case, the lower court erred in imposing an exceptional sentence on remand based on an aggravating factor which was not properly found by the jury by special interrogatory as required under Blakely and RCW 9.94A.537(3). In rejecting this argument below, the trial court relied on its belief that the "jury did find by special verdict that there was an aggravating circumstance" so that an exceptional sentence could be imposed. See RP 76.

But in fact, the jury did not so find. Price was accused of having committed the crime with the aggravating factor of the crime having involved domestic violence as defined in RCW 10.99.020, with one or more of the following present:

> (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim[.]

CP 1-2. The special verdicts submitted to the jury on the aggravating factors were based solely upon the third alternative. CP 9, 10. That

aggravating factor is contained in RCW 9.94A.535(3), as one of the aggravating factors that must be considered and found by a jury, that "[t]he current offense involved domestic violence, as defined in RCW 10.99.020" and that "[t]he offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim[.]" RCW 9.94A.535(3)(h).

A crime involves "domestic violence" under RCW 10.99.020(5) if it is "committed by one family or household member against another." RCW 10.99.020(5). "Family or household member" is further defined under RCW 10.99.020 as:

> spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Thus, in order to meet its burden of proving the aggravating factor in this case, the prosecution had to prove that the crime was committed by one family or household member against another, as defined above, and, as submitted to the jury in theory here, that "[t]he offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim[.]" RCW 9.94A.535(3)(h). Under Blakely and our sentencing statutes, the jury had to find those facts, beyond a reasonable doubt, by special verdict, before an exceptional sentence could be imposed based on that aggravating factor. But such findings were not made.

Instead, the special verdict form for the aggravating factor provided only:

> We, the jury, having found the defendant guilty of Murder in the First Degree or Murder in the Second Degree, return a special verdict by answering the following question from the court:
>
> *QUESTION:* During the commission of this offense, did the defendant's conduct manifest intimidation of the victim?
>
> *ANSWER:* Yes *(Yes or No).*

CP 10.[1]

Thus, the jury made no factual finding that the offense involved "domestic violence" as required to establish the aggravating factor upon which an exceptional sentence could rest. But such a finding by a jury is essential to provide the sentencing court with the authority to even consider imposing an exceptional sentence. See, e.g., Hughes, 154 Wn.2d at 134. A trial court no longer may make its own findings of fact in support of an exceptional sentence, even when, unlike here, the court actually heard the trial. See RCW 9.94A.537(6). Only if the jury "finds, unanimously and beyond a reasonable doubt," the facts supporting an aggravating factor may the court sentence the offender to an exceptional sentence, and it still must make the additional finding that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6).

Further, it is of no moment that other jury instructions properly indicated that the prosecution had the burden of proving that the offense

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[1]Copies of the special verdict forms for the aggravating factors are being filed herewith for the Court's convenience as Appendix A.

"involved domestic violence," because the question of whether that burden had been met was never put to the jury. Indeed, there is a further problem with the jury instructions regarding this point. Instructions 23 and 25 told the jury that, for the purposes of the special verdict, the prosecution had "alleged in this case. . .that the offense involved domestic violence, and the defendant's conduct during the commission of the offense manifested intimidation of the victim," but neither of those instructions asked the jury if that burden had been met. Supp. CP ___ (court's instructions to jury, at 27, 29).[2] Instead, Instruction 25 effectively told the jury that the "domestic violence" element had been already been met, because it first told the jury a crime involves "domestic violence" when "it is committed by one family or household member against another," but then specifically said "[f]amily or household members" includes adults who have or have had a dating relationship." Supp. CP ___ (instructions, at 29).[3]

Our state constitution prohibits comments on the evidence, which occur when a jury is instructed that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Art. IV, § 16. An instruction is a comment on the evidence if it resolves a disputed issue of fact that was up to the jury to decide. Becker, 132 Wn.2d at 64-65; see State v. Levy, 156 Wn.2d 709, 721-23, 132 P.3d

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[2]A supplemental designation of clerk's papers designating the court's instructions is being filed herewith. For the Court's convenience, a copy of the instructions is filed herewith as Exhibit B.

[3]The same defect exists in the instruction on the special verdict for domestic violence/deliberate cruelty, but as the jury answered "no" when asked if that factor had been met, that special verdict was not the basis for the exceptional sentence and thus is not at issue in this appeal. See Supp. CP ___ (instructions at 28).

1076 (2006). Improper instructions which amount to a comment on the evidence are presumed prejudicial, because they are constitutional error effectively relieving the prosecution of part of its burden of proof. See Becker, 132 Wn.2d at 65.

Here, Instruction 25 effectively told the jury that the prosecution had met its burden of proving "domestic violence" by showing that the adults involved "have or have had a dating relationship," one of the ways in which someone can be deemed "[f]amily or household members" for the purposes of that aggravating factor. Even if Instruction 25's declaration that the aggravating factor was alleged and the prosecution had the burden of proving it, that flawed instruction cannot somehow be seen as curing the Blakely error here.

Because the aggravating factor the exceptional sentence relied on requires a finding that the offense involved "domestic violence" and the jury made no such finding here, Judge Culpepper erred in imposing the sentence. This Court should so hold and should reverse.

In response, the prosecution may raise an argument it brought below - that the issues before the court on resentencing were limited to solely taking the documents it submitted and changing the seriousness level of a few offenses. As it did below, any such claim should fail. The trial court's discretion on remand for resentencing is limited by the scope of the appellate court's mandate ordering such resentencing. See State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Where, as here, the court remands a case for resentencing rather than some "ministerial correction" of a judgment and sentence, the resentencing court is tasking with again

determining the appropriate sentence to impose and thus has broad discretion to do so. See State v. White, 123 Wn. App. 106, 109, 97 P.3d 34 (2004).

Thus, in White, when a defendant had received a drug offender sentencing alternative (DOSA) sentence and successfully challenged his offender score calculation on appeal, on remand the resentencing court had the authority to decline to impose a DOSA even though neither party had challenged the imposition of the DOSA on appeal. 123 Wn. App. at 110. The entire sentence was before the trial court for resentencing, the Court held. 123 Wn. App. at 110-12. "[E]ven though the offender score problem was the sole issue considered in the prior appeal," the Court found, the remand for resentencing "applied to the entire outcome[.]" 123 Wn. App. at 112. The reversal of the sentence and remand for resentencing "wiped that slate clean," allowing the court on remand for resentencing to fashion an appropriate sentence how it saw fit. See id.

Put another way, as this Court has noted, where the lower court conducts a resentencing hearing, allowing argument and exercising its discretion, all of the issues relating to the imposition of the sentence are properly before that court, as opposed to when the court on remand simply acts to make ministerial corrections. See State v. Toney, 149 Wn. App. 787, 791-93, 205 P.3d 944 (2009), review denied, 168 Wn.2d 1027 (2010). Here, if the only act of the lower court on remand had been to simply change the seriousness level of the offenses, for example, that would likely have been merely "ministerial." But the court held multiple hearings, heard from family members of the victim, looked at and took evidence, heard

lengthy argument and made rulings, conducting a full resentencing. As such, the issue of whether the exceptional sentence should be imposed was fully before the lower court. Because that court erred in imposing an exceptional sentence based on an aggravating factor not found beyond a reasonable doubt by the jury, reversal is required.

2. PRICE WAS DEPRIVED OF HIS STATUTORY RIGHT TO ALLOCUTION AND THE COURT'S LATER RECONSIDERATION OF THE SENTENCE ALREADY DECIDED WAS NOT SUFFICIENT TO REMEDY THE ERROR

Reversal and remand for a new sentencing hearing before a different judge is also required, because Price was deprived of his statutory right to allocution and the error was not "harmless." The statutory right to allocution allows the defendant the right to speak prior to having the sentencing court rule. See In re Echevarria, 141 Wn.2d 323, 6 P.3d 573 (2000). Allocution is the right of the defendant in the criminal case "to make a personal argument or statement to the court before the pronouncement of sentence." State v. Canfield, 154 Wn.2d 698, 701, 116 P.3d 391 (2005).

Put simply, the right of allocution is "the defendant's opportunity to plead for mercy and present any information in mitigation of sentence." 154 Wn.2d at 701. This right has its origins in common law and, in this state, has been guaranteed since our state began. Echevarria, 141 Wn.2d at 333-34. Currently, the right is encompassed in RCW 9.94A.500(1), which provides, in relevant part, that the "court shall. . . allow arguments from . . . the offender . . . as to the sentence to be imposed."

In Echeverria, the Supreme Court held that trial courts should

"scrupulously follow" this statute by "directly addressing defendants" during sentencing hearings, to ask them if they wanted to say anything to the court in mitigation of sentence. 141 Wn.2d at 336-37. The right of allocution is "a significant aspect of the sentencing process," the Echeverria Court held, and trial courts should thus work to honor it. 141 Wn.2d at 704-705. Indeed, the Court found that the "right of the accused to make a personal statement is vital" at a sentencing hearing, as opposed to perhaps other types of proceedings. 141 Wn.2d at 705.

Here, in imposing the sentence, the court utterly failed to ask Mr. Price if he wished to speak. The judge engaged in lengthy musings about what he should impose, talked about how difficult it was to know the "perfect sentence" in a case where he did not hear the trial, talked about the "emotion" he thought Judge Fleming probably felt during the trial and opined that it was "hard to think of something more malicious" than the crime. RP 77. And the judge then imposed the exceptional sentence without allowing Mr. Price to allocute. RP 77-78. It was only after the judge had established the sentence that the court realized, on counsel's objection, that it had not heard from Mr. Price, noting, "you've made your ruling without his ability to allocute." RP 78.

Further, the fact that the court was willing to reconsider after Price had spoken does not render the failure to allow him to speak prior to entry of the sentence "harmless." While the court apologized, told Price the sentence was not "final yet" and then let him speak, that was not enough. As the judge's own words make it clear, the judge had already made up his mind *before* hearing from Price and treated Price's allocution as if it were

akin to a motion to "reconsider" the sentence already imposed. The judge said he "really didn't hear anything that makes me ***change my mind***" and that he had "reconsidered." RP 81 (emphasis added). The court then reimposed the exact sentence it had already imposed. RP 82. While the prosecutor later declared his opinion that the record "should reflect the Court's judgment was not final at the point in time when the Court allowed Mr. Price to allocute," the judge's response again shows that the allocution was treated more as a motion to reconsider than anything else. RP 85. The judge appeared to believe that it was sufficient to allow allocution even after the sentence had been declared, provided the judgment and sentence paperwork was not yet signed. RP 85. But the court itself again declared that it had "reconsidered" its decision before reimposing the same sentence. RP 85.

This type of "reconsideration" after the fact is not enough. See State v. Crider, 78 Wn. App. 849, 861, 899 P.2d 24 (1995). Having the opportunity to speak "extended for the first time after" the court has orally declared the sentence is, at best, an empty gesture. See Crider, 78 Wn. App. at 861. Indeed, "[e]ven when the court stands ready and willing to alter the sentence when presented with new information, . . . from the defendant's perspective the opportunity comes too late. The decision has been announced and the defendant is arguing from a disadvantaged position." Id.

Thus, in State v. Aguilar-Rivera, 83 Wn. App. 199, 202, 920 P.2d 623 (1996), the trial court imposed an exceptional sentence which was requested by the prosecution, rejecting the standard-range sentence

requested by the defense. 83 Wn. App. at 200. The court announced its sentence and the defendant was being fingerprinted when defense counsel brought it to the court's notice that the court had not asked the defendant if he wanted to speak, prior to imposing the sentence. The court then heard from the defendant, who asked to receive a sentence which would have allowed him to participate in a work-release type of program. 83 Wn. App. at 201. The court checked the relevant statutes to see if the defendant would be eligible for that program but ultimately imposed the same exceptional sentence it had originally declared. 83 Wn. App. at 201.

On review, the appellate court reversed. A new sentencing hearing was required in order to ensure the appearance of fairness, the Court held. 83 Wn. App. at 203. Put simply, the "judge's oversight" in denying the right to allocution "effectively left Aguilar-Rivera in the difficult position of asking the judge to reconsider an already-imposed sentence." Aguilar-Rivera, 83 Wn. App. at 203. Further, because Price specifically objected below, the error was preserved. See, e.g., State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007).

There is a split of opinion as to whether the failure to allow allocution may be deemed "harmless" under limited facts. In State v. Gonzales, 90 Wn. App. 852, 853, 954 P.2d 360, review denied, 136 Wn.2d 1024 (1998), for example, Division One found the failure of the sentencing court to allow the defendant his right to allocution prior to imposing sentence was harmless, because the defendant had received the lowest possible sentence and had gotten the sentence for which he asked. 90 Wn. App. at 855. Remand for resentencing to allow the defendant to exercise

his right to allocution could not result in a sentence more favorable to him, Division Two noted. 90 Wn. App. at 855. In Crider, however, Division Three refused to apply a "harmless error" standard. See Crider, 78 Wn. App. at 861. This Court appears to have adopted the former position in its decision in Hatchie, and the Supreme Court declined to address the issue, finding Hatchie had not preserved the issue by failing to object below. See Hatchie, 161 Wn.2d at 405-406 n. 1.

Here, even if a "harmless error" standard was applied, reversal would still be required because it is clear the error could not be deemed "harmless." Price received an exceptional sentence, over his objection and request for a sentence within the standard range. Further, the prosecution engaged in lengthy discussion of the facts at trial and what it said the evidence showed about Price, the nature and heinousness of the crime, and other facts. Not only that, the court heard testimony or argument from family members advocating the longest possible sentence, at two different hearings, prior to deciding to impose the exceptional sentence on remand. This is not a case like Gonzales, where the defendant got everything he wanted and remand would serve no purpose. As this Court has noted, in situations where the right to allocution is violated, remand for resentencing in front of a *different* judge is required, not only based on the violation of the right to allocution but also in order to ensure that the proceedings are vested with the appearance of fairness. See, e.g., State v. Baer, 93 Wn. App. 539, 545-46, 969 P.2d 506 (1999).

Reversal and remand for resentencing in front of a new judge is required. Mr. Price was deprived of his right to allocution and the court's

later "reconsideration" and reimposition of the same sentence after hearing from Price was not enough. This Court should so hold.

E. CONCLUSION

The trial court erred in imposing an exceptional sentence on remand, based on an aggravating factor not properly, fully found by a jury, beyond a reasonable doubt, by special verdict. Remand for resentencing within the standard range is required. Further, because the judge deprived Mr. Price of his right to allocution prior to deciding the sentence, reversal and remand for resentencing in front of a new judge would be required, even if the exceptional sentence had been validly supported by an aggravating factor.

DATED this 3rd day of November, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
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Counsel for Appellant
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Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at pcpatcecf@co.pierce.wa.us, and to Donnell Price, DOC 710977, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 3rd day of November, 2014.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
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Post Office Box 31017
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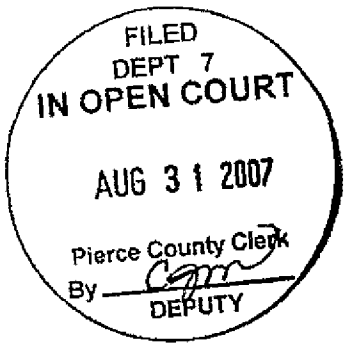
COA # 46066-1-II



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DONNELL WAYNE PRICE Defendant.	CAUSE NO. 06-1-04159-5 SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of Murder in the First Degree or Murder in the Second Degree, return a special verdict by answering the following question from the court:

QUESTION: During the commission of this offense, did the defendant's conduct manifest deliberate cruelty?

ANSWER: No *(Yes or No).*

PRESIDING JUROR

APPENDIX A

5635 9/5/2007 88134

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

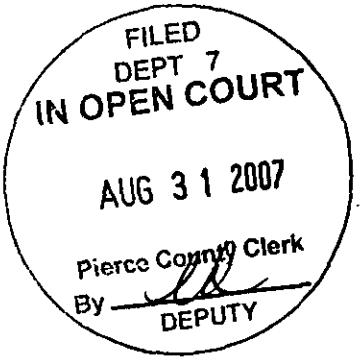
STATE OF WASHINGTON, Plaintiff, vs. DONNELL WAYNE PRICE Defendant.	CAUSE NO. 06-1-04159-5 SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of Murder in the First Degree or Murder in the Second Degree, return a special verdict by answering the following question from the court:

QUESTION: During the commission of this offense, did the defendant's conduct manifest intimidation of the victim?

ANSWER: Yes *(Yes or No).*

PRESIDING JUROR



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DONNELL WAYNE PRICE Defendant.	CAUSE NO. 06-1-04159-5

COURT'S INSTRUCTIONS TO THE JURY

DATED this 31st day of August, 2007.

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 7

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

INSTRUCTION NO. 8

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 10

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 3rd day of September, 2006, the defendant shot Olga Carter;

(2) That the defendant acted with intent to cause the death of Olga Carter.

(3) That the intent to cause the death was premeditated;

(4) That Olga Carter died as a result of defendant's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Murder in the First Degree , the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Murder in the First Degree necessarily includes the lesser crime(s) of Murder in the Second Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 12

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person.

INSTRUCTION NO. 13

To convict the defendant of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about 3rd day of September, 2006 , the defendant shot Olga Carter;

(2) That the defendant acted with intent to cause the death of Olga Carter;

(3) That Olga Carter died as a result of the defendant's acts; and

(4) That the acts occurred in State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly owns a firearm or has a firearm in his or her possession or control and he or she has, before the occasion of possession, been convicted of a crime that makes him or her ineligible to possess a firearm.

INSTRUCTION NO. 15

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 16

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

INSTRUCTION NO. 17

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 18

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 3rd day of September, 2006 the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of a crime that made him ineligible to possess a firearm on or about September 3, 2006; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighting all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 20

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and B. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Murder in the First Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the

decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You will next consider the crime of Unlawful Possession of a Firearm in the Second Degree, as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A for Count II the words "not guilty" or the word "guilty," according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the Judicial Assistant. The Judicial Assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 21

You will also be furnished with a special verdict form for Count I. If you find the defendant not guilty on Count I, do not use the special verdict form. If you find the defendant guilty on Count I, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

INSTRUCTION NO. 22

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime charged in Count I. The State must also prove beyond a reasonable doubt that there is a connection between the firearm and defendant and between the firearm and the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes.

INSTRUCTION NO. 23

You will also be furnished with additional special verdict forms relating to aggravating factors that have been alleged by the State on Count I. If you find the defendant not guilty on Count I, do not use these special verdict forms. If you find the defendant guilty on Count I of the crime of Murder in the First Degree or Murder in the Second Degree, you will then use these additional special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

The State has alleged that the following aggravating factors exist in this case: (1) That the current offense involved domestic violence and the defendant's conduct manifested deliberate cruelty toward the victim; and (2) That the current offense involved domestic violence and the defendant's conduct manifested intimidation of the victim. You are not to consider the allegations that these aggravating factors exist as proof that they exist.

You should deliberate on each question presented on the special verdict forms. In order to answer any question, you must unanimously agree on the answer. You should consider each question separately. Your answer to one special verdict should not control your answer to the other verdict.

INSTRUCTION NO. 24

For purposes of a special verdict, the State must prove beyond a reasonable doubt the presence of an aggravating factor. An aggravating factor alleged in this case is that the offense involved domestic violence, and the defendant's conduct during the commission of the offense manifested deliberate cruelty.

A crime involves "domestic violence" when it is committed by one family or household member against another. "Family or household members" includes adults who have or have had a dating relationship.

"Deliberate cruelty" means gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.

INSTRUCTION NO. 25

For purposes of a special verdict, the State must prove beyond a reasonable doubt the existence of an aggravating factor. An aggravating factor alleged in this case is that the offense involved domestic violence, and the defendant's conduct during the commission of the offense manifested intimidation of the victim.

A crime involves "domestic violence" when it is committed by one family or household member against another. "Family or household members" includes adults who have or have had a dating relationship.

"Intimidation" means unlawful coercion; extortion; duress; putting in fear.

RUSSELL SELK LAW OFFICES

November 03, 2014 - 9:54 AM

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Case Name: State v. Price
Court of Appeals Case Number: 46066-1

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

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