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Supreme Court No.: 94254-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

SHANE DEWEBER,

Respondent/Cross-Petitioner.

ANSWER TO PETITION FOR REVIEW/CROSS PETITION

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WASHINGTON APPELLATE PROJECT
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A. INTRODUCTION

The State alleged Shane Deweber committed two counts of assault and further alleged the aggravating factor that the victims were members of law enforcement. Despite the fact that the jury returned a special verdict that found only two of the three required factual findings for the aggravating factor, the trial court imposed an exceptional sentence. The Court of Appeals reversed Mr. Deweber's exceptional sentence after properly determining it was not authorized by the jury's findings.

The State seeks review even though the Court of Appeals' decision follows this Court's precedent. The State's criticism of the Court of Appeals' decision is misguided and review should be denied. If the Court accepts review, it should also accept review of the issue raised in Mr. Deweber's cross-petition.

B. ISSUES PRESENTED

1. Under this Court's holding in *State v. Williams-Walker*,[1] a defendant's constitutional right to a jury trial requires that the sentence imposed be authorized by the jury's verdict. At Mr. Deweber's trial, the jury returned a special verdict that found only two of the three required findings for the aggravating factor but the trial court imposed an

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[1] 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

exceptional sentence against Mr. Deweber. The Court of Appeals reversed the exceptional sentence. Has the State failed to show that the Court of Appeals' decision is in conflict with our courts' prior decisions, precluding review under RAP 13.4(b)(1) or (2)?

2. If this Court grants review, should it also review the issue of substantial public interest as to whether the trial court erred when it refused to instruct the jury on the lesser degree offense of third degree assault, where a rational jury could have found that Mr. Deweber's vehicle, in the manner it was used, did not meet the statutory definition of a deadly weapon? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Shane Deweber became severely depressed after he and his wife separated. 1/29/15 RP 426. As the owner of his own flooring company, he worked long hours in addition to acting as the primary caregiver for his two daughters. 1/29/15 RP 425. He began to feel as though he was walking in "quicksand," and that just getting through the day required too much effort. 1/29/15 RP 426. He stopped taking the insulin necessary to manage his diabetes, ate and slept little, and lost weight. 1/27/15 RP 261; 1/29/15 RP 426.

Mr. Deweber began having suicidal thoughts and saw a psychiatric nurse practitioner. 1/29/15 RP 424; 1/28/15 RP 357. She observed Mr.

Deweber appeared depressed and anxious and prescribed medications to address his mental health symptoms as well as Adderall for his attention deficit hyperactivity disorder. 1/28/15 RP 358, 360-61.

Two nights in a row, Mr. Deweber went to the recreational vehicle (RV) where his wife was living, banged on the door, and tried to talk to her. 1/28/15 RP 394. She warned him if he returned again, she would call the police. 1/28/15 RP 395. On the following day, Mr. Deweber learned she was seeing someone else. 1/29/15 RP 427. He talked with his wife on the phone but the conversation did not go well. 1/29/15 RP 429. Mr. Deweber decided to take his own life, downing 250 Adderall pills with ten beers. 1/27/15 RP 267. In text messages, he explained to his mother that he had made up his mind and warned her against calling for help, telling her that if the police arrived he would attempt to incite them to shoot him. 1/27/15 RP 267.

Mr. Deweber's sister spoke with him over the phone for several hours that night. 1/28/15 RP 336. When they ended the conversation, she felt his spirits had improved and he had decided to go to bed. 1/28/15 RP 335. The last thing Mr. Deweber remembered was speaking with his sister. 1/29/15 RP 430. However, at trial the evidence showed Mr. Deweber went to his wife's RV and woke her up by banging on the door. 1/28/15 RP 393. His wife testified she had known him for 20 years and

that when he showed up that night, he was not acting like himself. 1/28/15 RP 394. Unlike the prior two evenings, where he had remained calm, that night his words were incomprehensible, he was licking the windows, and he was "twitching and jerking." 1/28/15 RP 393, 396.

When sheriff's deputies arrived at the scene, they also noticed Mr. Deweber was walking strangely and "moving kind of in a jerking motion." 1/26/15 RP 114-15, 135. When they asked him to show his hands, he pulled a samurai sword out of his truck and approached them. 1/26/15 RP 114-16. He yelled at the officers to shoot him. 1/26/15 RP 135. They attempted to tase him instead, but Mr. Deweber climbed into his truck and drove away. 1/26/15 RP 120-21. The deputies pursued him, but terminated the pursuit after determining it was unsafe. 1/26/15 RP 124.

Recognizing that Mr. Deweber was likely headed back to his wife's residence, a sergeant with the Benton County sheriff's office and a Kennewick police officer pulled their cars off the roadway and prepared to lay spike strips in order to stop Mr. Deweber's car. 1/27/15 RP 182-83. However, they soon heard a car approaching them from behind at a high speed, at which point they ran. 1/27/15 RP 185; 213. Mr. Deweber's truck collided with the sergeant's vehicle, which ended up on top of the Kennewick officer's car. 1/27/15 RP 190, 215. After the impact, Mr. Deweber climbed out of the passenger window of his truck covered in

blood. 1/27/15 RP 193. He ran at the officers, screaming at them to kill him. 1/27/15 RP 193. One officer was eventually able to immobilize Mr. Deweber through use of a taser, allowing the officers to place him under arrest. 1/27/15 RP 220.

Mr. Deweber was charged with two counts of first degree assault and one count of eluding a police officer. CP 23-25. The level of amphetamines in Mr. Deweber's body that evening tested at almost seven times the level of toxicity, which the State's forensic scientist testified could have been fatal. 1/27/15 RP 239, 246.

At trial, Mr. Deweber requested the court instruct the jury on the lesser degree offense of assault in the third degree. 1/29/15 RP 403. The trial court denied this request, incorrectly finding that a vehicle is defined as a deadly weapon by statute and therefore the jury was obligated to find Mr. Deweber used a deadly weapon if they found him guilty of assault. 1/29/15 RP 444. Instead, the trial court granted the State's proposal to instruct on second degree assault. 1/29/15 RP 445. The jury acquitted Mr. Deweber of both counts of first degree assault but found him guilty of second degree assault. CP 145-48.

The State also alleged the aggravating factor that Mr. Deweber committed the assaults against members of law enforcement. CP 24. However, the special verdict returned by the jury only indicated that two

of the three necessary factual findings for the aggravating factor were made by the jury. CP 150-51. Mr. Deweber objected to the trial court's imposition of an exceptional sentence, explaining the court lacked the authority to do so because the jury did not make all of the required findings. 2/27/15 RP 9. The trial court disagreed and imposed an exceptional sentence on Mr. Deweber of 86 months. CP 186.

In an unpublished decision, the Court of Appeals reversed Mr. Deweber's exceptional sentence, finding the sentence was not authorized by the jury's verdict and therefore violated Mr. Deweber's constitutional right to a fair trial. Slip Op. at 7. It affirmed Mr. Deweber's convictions, finding the trial court's refusal to instruct the jury on third degree assault was not error. Slip Op. at 12.

D. ARGUMENT

1. The State has failed to establish a basis for review under RAP 13.4(b)(1) or (2).

The Court of Appeals correctly applied the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and this Court's decision in *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010), to conclude that where the jury's special verdict found only two of the three factual findings required for an aggravator, it did not authorize the trial court to impose an

exceptional sentence. Slip Op. at 7-8. The State asserts the Court of Appeals' decision is in conflict with prior decisions of this Court and the Court of Appeals, but its claims are unavailing. The petition for review should be denied.

a. The Court of Appeals properly relied on this Court's decision in *State v. Williams-Walker* to find that the trial court exceeded its authority when it imposed an exceptional sentence not allowed by the jury's special verdict.

The State charged Mr. Deweber with two counts of assault and alleged an aggravating factor that in each case the victim was a member of law enforcement. CP 24. At trial, the court instructed the jury on the aggravating factor, correctly stating what facts must be found.[2] CP 118. However, the language of the special verdict form, which was proposed by the State, only asked the jury to answer the following question:

> QUESTION: Was the crime of Assault in the First Degree as charged in Count I or the lesser crime of Assault in the Second Degree, regarding [alleged victim], committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

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[2] Pursuant to RCW 9.94A.535(3)(v), the elements of the aggravating factor are: "[t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, *the offender knew that the victim was a law enforcement officer*, and the victim's status as a law enforcement officer is not an element of the offense." (Emphasis added).

CP 150-51. This question omitted the allegation that Mr. Deweber knew the victims were law enforcement officers, as required by RCW 9.94A.535(3)(v).

In both special verdict forms, the jury responded "yes." CP 150-51. Despite the omission of a necessary element in these special verdict forms, and over Mr. Deweber's objection, the trial court imposed an exceptional sentence of 86 months. 2/27/15 RP 7; CP 186.

The Court of Appeals correctly determined the jury's special verdict did not authorize the trial court to impose an exceptional sentence because "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*, 542 U.S. at 304 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)) (emphasis original); Slip Op. at 7. In reaching this conclusion, it also relied on this Court's decision in *Williams-Walker*, 167 Wn.2d at 900.

In *Williams-Walker*, the State asked the jury, in three separate cases consolidated on appeal, to return a special verdict finding the defendant was armed with a deadly weapon, and the juries did. 167 Wn.2d at 892. In each case, evidence was presented at trial that the "deadly weapon" at issue was a firearm, and the trial court imposed a five-

year firearm enhancement rather the less severe deadly weapon enhancement found by the jury. *Id.* at 893-94. This Court reversed, finding "[f]or purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict." *Id.* at 900.

This Court held that to find otherwise, and allow a trial court to impose an exceptional sentence based on its assessment of the evidence presented rather than the jury's special verdict, would violate a defendant's right to a jury trial. *Id.* at 899. A trial court is not authorized to impose an exceptional sentence simply because an enhancement is alleged. *Id.* at 900. It "must be authorized by the jury in the form of a special verdict." *Id.*

Despite this Court's unambiguous holding in *Williams-Walker*, the State insists the Court of Appeals was wrong not to rely on prior civil cases to determine whether the jury instructions, when read as a whole, were accurate. Petition at 9. The State relies on *Capers v. Bon Marche*, 91 Wn. App. 138, 955 P.2d 822 (1998) and *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995). These cases do not consider whether a criminal defendant's right to a jury trial was violated under the Sixth Amendment and article I, sections 21 and 22.

When relying on the civil cases, the State mischaracterizes the Court of Appeals' decision. It argues the court held that a "special verdict form must contain all elements of an aggravating factor, even if the jury was correctly instructed on the aggravating factor." Petition at 8. The Court of Appeals was very clear that this was not its holding. Slip Op. at 8, n. 5. The court referred to this as a "straw man" argument and explained that a special verdict form need not include the findings that support an aggravator. Slip Op. at 8. However, where "the court *chooses* to frame the question in a special verdict form by asking about elements, it must ask about all of the elements." Slip Op. at 8, n. 5 (emphasis added). The court found it cannot be presumed that a jury, rather than answer question posed, will assume the question intended to refer to additional elements. Slip. Op. at 8-9.

The court's holding is correct under this Court's decision in *Williams-Walker*, 167 Wn.2d at 896 and United States Supreme Court precedent. *See Blakely*, 542 U.S. at 304; *Apprendi*, 530 U.S. at 490. Aside from a defendant's prior convictions, "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*, 530 U.S. at 490. Because the jury was not asked to find all of the elements of the aggravating factor, the trial court did not have the

authority to impose an exceptional sentence. Review is not warranted under RAP 13.4(b)(1) or (2).

b. The Court of Appeals properly found the error was not subject to a harmless error analysis.

Where the error lies not in the jury's finding but in the court's imposition of an exceptional sentence based upon the incomplete finding, the error is not harmless. *Williams-Walker*, 167 Wn.2d at 902; *State v. Recuenco*, 163 Wn.2d 428, 436, 180 P.3d 1276 (2008); *see also In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 432, 237 P.3d 274 (2010) ("Our conclusion in both *Recuenco* and *Williams-Walker* was that, where a jury trial is had, a sentencing judge may impose only the sentence enhancement authorized by a jury's verdict and that imposition of a greater sentence enhancement may never be harmless."). Based on this Court's prior decisions, the Court of Appeals correctly determined the trial court's imposition of an exceptional sentence, unsupported by a sufficient jury finding, was not subject to a harmless error analysis. Slip Op. at 9.

The State argues that the Court of Appeals' decision in *State v. Fehr*, 185 Wn. App. 505, 341 P.3d 363 (2015), compels the opposite result. Petition at 11. In *Fehr*, the defendant was charged with three counts of delivery of methamphetamine, each with a sentencing enhancement for occurring 1,000 feet of a school bus route stop. *Id.* at

507. The Court of Appeals found automatic reversal was required because the special verdict form asked the jury only whether the delivery occurred within 1,000 feet of a school bus *route*, relieving the State of its burden to prove the only element of the sentencing enhancement. *Id.* at 515-16.

The State asserts that, despite the outcome in *Fehr*, the court's reasoning indicates that special verdict forms are subject to a harmless error analysis where they permit the parties to argue their case, are not misleading, and inform the jury of the law. Petition at 11. However, as the Court of Appeals properly determined, the error in this case was not in the jury's verdicts but the court's imposition of the exceptional sentence based on the jury's insufficient findings. Slip Op. at 9.

The Court of Appeals' decision is consistent with the Court's holding in *Williams-Walker*, in which this Court stated:

> Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings. Where the jury makes such a finding, the sentencing judge is bound by that finding. Where the judge exceeds that authority, error occurs that can never be harmless.

167 Wn.2d at 901-02; Slip Op. at 9

Based on the jury's special findings, the jury had not found the aggravating factor. Because the error was made in the in the trial court's imposition of the sentence, it cannot be harmless under *Williams-Walker*,

167 Wn.2d at 900. The State's claim that the court's decision conflicts with our courts' prior decisions is without merit. This Court should not grant review pursuant to RAP 13.4(b)(1) or (2).

2. The trial court erred when it denied Mr. Deweber's request for a third degree rape instruction.

"It is an 'ancient doctrine' that a criminal defendant may be held to answer for only those offenses contained in the indictment or information." *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) (citing *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)). Under article I, section 22, a defendant has the "right to be informed of the charges against him and to be tried only for offenses charged." *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 382 (1997).

However, a defendant is entitled to an instruction on a lesser offense when certain conditions are met. *State v. Henderson*, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, Mr. Deweber requested the jury be instructed on third degree assault in addition to first and second degree assault. 1/29/15 RP 403.

Third degree assault is a lesser degree offense, rather than a lesser included, of first degree assault. *State v. Walther*, 114 Wn. App. 189, 192,

56 P.3d 1001 (2002). A court must grant a defendant's request for an instruction on a lesser degree offense when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

Peterson, 133 Wn.2d at 891 (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). As the Court of Appeals acknowledged, only the third prong of this test was disputed in the trial court. Slip Op. at 10.

This third prong requires a factual showing that the evidence raises an inference that only the lesser degree offense was committed to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455. In other words, the court should permit the instruction where "the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Id.* at 456.

The trial court denied Mr. Deweber's request for the third degree assault instruction after finding a vehicle is a deadly weapon as a matter of law and therefore if the jury found Mr. Deweber assaulted the officers, it must necessarily find he assaulted them with a deadly weapon. 1/29/15 RP 444. The trial court's reasoning was erroneous, as a vehicle is not a deadly weapon as a matter of law pursuant to RCW 9A.04.110(6).

The Court of Appeals did not address the court's flawed reasoning, instead finding there was no evidence suggesting Mr. Deweber's truck was employed in such a way that it was not readily capable of causing death or substantial bodily harm. Slip Op. at 12. However, at the time Mr. Deweber collided with the police vehicles, the vehicles were empty. 1/27/15 RP 185; 213. Thus, a rational jury could have found Mr. Deweber committed assault, but that when he drove into the unoccupied vehicles, his truck was not "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6).

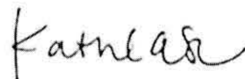
If this Court grants review, it should also review, pursuant to RAP 13.4(b)(4), whether the trial court erred when it denied Mr. Deweber's request for an instruction on assault in the third degree.

F. CONCLUSION

The State has failed to satisfy the criteria of RAP 13.4(b) and its petition for review should be denied. If this Court grants review, it should also review whether the trial court erred when it denied Mr. Deweber's request for an instruction on assault in the third degree.

DATED this 12th day of April, 2017.

Respectfully submitted,



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