No. 33247-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SHANE DEWEBER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Shane Deweber, severely depressed after separating from his wife, made the decision to take his own life. He consumed alcohol and a potentially fatal dose of Adderall, and ended up facing law enforcement officers with a samurai sword, telling them to shoot him. When this was unsuccessful, he drove away, but then crashed his truck into an unoccupied police vehicle, causing officers near the car to run to get out of the way. The State charged him with assault in the first degree and the trial court denied Mr. Deweber's request for an instruction on the lesser third degree assault after erroneously finding a vehicle was a *per se* deadly weapon. At sentencing, the trial court imposed an exceptional sentence of 86 months despite the fact this sentence was not authorized by the factual findings entered in the jury's special verdict.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Deweber's constitutional right to a fair trial when it imposed an exceptional sentence in the absence of the necessary factual findings by the jury.

2. The trial court erred when it entered finding of fact 1 in the Findings of Fact and Conclusions of Law on Exceptional Sentence. CP 191.

3. The trial court erred when it entered finding of fact 3 in the Findings of Fact and Conclusions of Law on Exceptional Sentence. CP 191.

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

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and article I, sections 21 and 22 prohibit the imposition of a sentence not authorized by the jury's verdict. When the State alleges the aggravating factor that the victim was a member of law enforcement, the statute requires the jury to make three factual findings. Where the jury returned a special verdict addressing only two of these three findings, but the trial court found the jury made all three findings and imposed an exceptional sentence anyway, did the court violate Mr. Deweber's constitutional rights, requiring reversal of the sentence and remand for a new sentencing hearing?

2. A defendant is entitled to an instruction on a lesser degree offense when the evidence would allow a rational jury to find the defendant committed only the lesser crime. The State charged Mr. Deweber with first degree assault and the trial court denied his request for an instruction on third degree assault. The trial court erroneously found a vehicle was a *per se* deadly weapon under the statute and therefore required the jury to find Mr. Deweber used a deadly weapon if it found he committed an assault. However, where the statute requires the jury to make a determination about how the vehicle was used, and a rational jury could have found his vehicle, in the manner it was used, did not meet the statutory definition of a deadly weapon, is reversal required because the trial court erroneously denied Mr. Deweber the requested instruction?

D. 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.

E. ARGUMENT

1. **The trial court violated Mr. Deweber's constitutional right to a jury trial when it imposed an exceptional sentence in the absence of a necessary factual finding by the jury.**

a. A court may impose punishment only to the extent allowed by the jury's verdict.

Article I, section 21 demands that the right to a jury trial "remain inviolate." "The term 'inviolate' connotes deserving of the highest protection." *Davis v. Cox*, 183 Wn.2d 269, 288, 351 P.3d 862 (2015) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). It "indicates that the right must remain the essential component of our legal system it has always been." *Id.* "At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." *Davis*, 183 Wn.2d at 289.

Under the Sixth Amendment and article I, sections 21 and 22, the right to a jury trial requires that the sentence imposed upon a defendant be authorized by the jury's verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). 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.

For purposes of *Apprendi*, the statutory maximum "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in original); *see also State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972). "When a judge inflicts punishment that the jury's verdict alone does not allow... the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304.

b. The jury's verdict did not authorize the imposition of an exceptional sentence.

i. *The special verdict, as drafted by the State and entered by the jury, made only two of the three required factual findings.*

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.[1] CP 24. The information properly set out the elements of the aggravating factor, which are:

> The 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.

RCW 9.94A.535(3)(v). At trial, the court instructed the jury on the aggravating factor, correctly stating what facts must be found. 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

[1] The information also alleged a deadly weapon enhancement, but the State later conceded this was improper. CP 23-25; 1/28/15 RP 339.

performing his or her official duties at the time of the offense?

CP 150-51; Supp. CP at __ (sub. no. 56) (State's proposed instruction using this language in the special verdict forms).[2] As to both victims, the jury responded "yes." CP 150-51.

The language of the special verdict form omitted the allegation that Mr. Deweber knew the victims were law enforcement officers. At sentencing, Mr. Deweber objected to the court using the jury's findings to impose an exceptional sentence against him. 2/27/15 RP 7. Citing *Blakely*, defense counsel explained the trial court did not have the authority to impose an exceptional sentence when the jury returned a verdict that made only two of the three necessary factual findings. 2/27/15 RP 9.

The trial court continued sentencing to allow for additional briefing, in which the State argued, without any citation to authority, that the trial court was authorized to impose an exceptional sentence against Mr. Deweber because the jury is required to consider all of the instructions as a whole. and that a "verdict form does not normally

[2] The instructions provided by the defense also included the State's special verdict forms. CP 81, 85. However, the difference in font shows which instructions were drafted by the defense. *See* 1/29/15 RP 403 (trial court noting the difference in the two sets of instructions was the defense's proposal for an instruction on assault in the third degree); CP 68, 86 (showing a different font used for the third degree assault instructions and verdict form).

contain all elements of the offense." 2/27/15 RP 25; CP 181. Although the State's arguments failed to address the issue raised by Mr. Deweber, the trial court held it was "not persuaded that the absence of that element in the special verdict form precludes the Court from imposing an exceptional sentence." 3/4/15 RP 2.

The standard range for Mr. Deweber's convictions was 33 to 43 months. CP 183. The trial court imposed an exceptional sentence of 86 months. CP 186. Before imposing sentence, the trial court made the following finding of fact:

> The jury by special verdict has found that Counts I and II, both Assault in the Second Degree, were committed against a law enforcement officer who was performing his or her official duties at the time of the offenses and that the defendant knew the victims were law enforcement officers.

CP 191. The court's finding was made in error. It is directly contrary to the special verdict forms returned in this case, which provide no factual determination by the jury as to whether Mr. Deweber knew the victims were law enforcement officers.

ii. *Absent the necessary third factual finding, the trial court lacked the authority to impose an exceptional sentence on Mr. Deweber.*

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. Our supreme 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.

The court held that to find otherwise, and allow a trial court to impose an exceptional sentence based on 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.*

In Mr. Deweber's case, the State properly alleged the enhancement in the information, but the jury did not return a special verdict finding the essential elements of the aggravating factor. At the State's request, the trial court asked the jury a

very specific question, as to whether two of the three elements of the enhancement were found. CP 150-51. Because the trial court is bound by these special verdict findings, it was not authorized to impose an exceptional sentence against Mr. Deweber, and it cannot gain such authorization by inferring this finding from the jury's verdict. *See* CP 191 (judge finding "the jury by special verdict has found" Mr. Deweber knew the victim was a law enforcement officer despite the absence of this finding in the verdict form and that, as a result, a standard range sentence was clearly too lenient). The court's imposition of sentence confining Mr. Deweber for 86 months was an error.

c. <u>The court's error is not subject to a harmless error analysis and reversal and remand for a new sentencing hearing is required.</u>

A harmless error analysis is not appropriate where "no error occurred in the jury's determination of guilt." *State v. Recuenco*, 163 Wn.2d 428, 441, 180 P.3d 1276 (2008). Here, the jury answered the special verdict question as it was presented to them. The error in this case lies not in the jury's finding but in the court's imposition of an exceptional sentence *based* on that incomplete finding. In such a case, the error can

never be harmless. *Williams-Walker*, 167 Wn.2d at 902; *Recuenco*, 163 Wn.2d at 436; *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.").

Here the jury did not authorize a sentencing enhancement. When the trial court found the jury had made the necessary findings and imposed an exceptional sentence against Mr. Deweber, it committed structural error. This Court should reverse and remand Mr. Deweber's case for a new sentencing hearing.

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

a. A defendant is entitled to a lesser degree instruction when the evidence would allow a rational jury to find the defendant only committed the lesser crime.

"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). Allowing an instruction on a lesser offense "helps protect the integrity of our criminal justice system by ensuring that juries considering defendants who are 'plainly guilty of *some* offense' do not set aside reasonable doubts in order to convict them and avoid letting them go free." *Henderson*, 182 Wn.2d at 742 (quoting *Keeble v. United States*, 412 U.S. 205, 212, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (emphasis added in *Henderson*)).

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)).

The 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 decision whether to instruct the jury on an inferior-degree offense, which involves application of law to facts, is reviewed de novo." *State v. Hampton*, 182 Wn. App. 805, 829, 332 P.3d 1020 (2014), overruled on other grounds by *State v. Hampton*, __ Wn.2d __, 361 P.3d 734 (2015). The Court must view the evidence in the light most favorable to the moving party. *Henderson*, 182 Wn.2d at 745.

b. Reversal is required because a rational jury could find Mr. Deweber did not commit the assault with a deadly weapon.

Mr. Deweber requested the court instruct the jury on third degree assault in addition to first and second degree assault. 1/29/15 RP 403. The State objected, arguing that if the jurors believed Mr. Deweber intended to assault the officers, the evidence required them to find he used a deadly weapon. 1/29/15 RP 407. The trial court agreed, 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.

When it made this finding, the trial court erred. A deadly weapon is defined as:

> [A]ny explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). The statute's language is unambiguous. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 366, 256 P.3d 277 (2011). According to its plain meaning, "mere possession is insufficient to render 'deadly' a dangerous weapon other than a firearm or explosive." *Id.* When a weapon does not fit in the

limited *per se* category, "its status rests on the manner in which it is used, attempted to be used or threatened to be used." *Id.*; RCW 9A.04.110(6).

Thus, contrary to the trial court's finding, in order to find Mr. Deweber guilty of first degree assault, the jury was required to examine the manner in which the car was used and determine if it met the definition of a "deadly weapon." CP 105 (instruction to the jury defining deadly weapon). 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 the jury reached this conclusion, it could have properly returned a verdict finding Mr. Deweber guilty of third degree assault, but not first or second degree assault. RCW 9A.36.031(1)(g)[3]. When the trial court found the jury did not need to make such a determination, because a vehicle was a deadly weapon as a matter of law, it erred. The remedy is

[3] Under RCW 9A.36.031(1)(g), an individual is guilty of assault in the third degree if "under circumstances not amounting to assault in the first or second degree... [he] assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault."

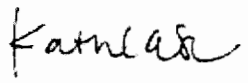
reversal and remand for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462.

F. CONCLUSION

This Court should reverse Mr. Deweber's convictions and remand for a new trial because the trial court erred when it denied his request for an instruction on assault in the third degree. In the alternative, Mr. Deweber is entitled to a new sentencing hearing because the trial court lacked the authority to impose an exceptional sentence without the required factual findings by the jury.

DATED this 12th day of January, 2016.

Respectfully submitted,



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SHANE DEWEBER,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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