

FILED
Apr 14, 2016
Court of Appeals
Division III
State of Washington

No. 33247-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

SHANE KYLE DEWEBER,

Appellant

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

NO. 13-1-01132-1

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. ISSUES RELATING TO DEFENDANT’S FIRST ARGUMENT:
1. Was the trial court “clearly erroneous” in entering a finding that the jury found that the defendant knew that Sgt. Clarke and Officer Grant were law enforcement officers when he assaulted them, given the jury was correctly instructed and the jury’s verdict necessarily rejected a contrary argument?
 - a. Is the issue whether the special verdict form included a finding that the defendant knew the victims of the Assault in the Second Degree were law enforcement officer; or whether the trial court’s Findings of Fact, Conclusions of Law on Exceptional Sentence included a finding that the jury verdict included this fact?
 - b. What is the standard on review concerning a trial court’s Finding of Fact?
 - c. Was the trial court “clearly erroneous” in a Finding of Fact that the jury’s special verdict included a factual decision that the defendant knew the victims were law enforcement officers, given that the jury was correctly instructed on the special verdict and the jury’s guilty verdict on two counts of Assault in the Second Degree necessarily rejected the defendant’s arguments?
 - d. Are the defendant’s citations to other cases on point?
- B. ISSUES RELATING TO DEFENDANT’S SECOND ARGUMENT:
1. Was the trial court correct not to instruct the jury that it could find the defendant guilty of Assault in the Third Degree?

II. STATEMENT OF FACTS

A. Facts relating to the crime:

1. **Prior to collision:** The defendant tells his mother that he will assault police officers if they try to intervene.

The defendant claimed he was suicidal on the night and morning of October 7 and October 8, 2013, respectively. RP at 432. His text messages to his mother threatened suicide and were focused on himself. RP at 263-65, 267. However, he also texted his mother at 11:35 p.m. on October 7, 2013: "Please don't call the law because I'll go after them with an ax and they'll have to shoot me." RP at 266-67.

The defendant testified that he did not remember leaving his residence on this evening. RP at 431. But he did go to the residence of Shannon Deweber, his estranged wife, as he had the last several nights. RP at 394. She called the police. RP at 396.

2. **Confrontation with police prior to collision:** The defendant consciously chooses to endanger the police and the public.

The police arrived at Shannon Deweber's residence around 4:18 a.m. RP at 134. The defendant then engaged in the following acts:

- Threatened Deputies Jech and Ramos with a sword. RP at 115-16.

- Told them they were “not going to shoot me with that pussy Taser.” RP at 117.
 - Successfully negotiated his truck around two patrol cars, to the surprise of the police officers. RP at 121, 138.
 - Engaged in a high speed attempt to out-run the police, including turning off his headlights and swerving from fog line to fog line. RP at 126, 296.
3. **The collision:** The defendant intentionally rammed two patrol cars.

Thinking that the defendant may make a loop and drive back to Shannon Deweber’s residence, Sgt. Mathew Clarke and Kennewick Police Department Officer Elizabeth Grant parked their patrol cars in a cutout on a roadway near her residence. RP at 182-83, 212. Clerk’s Paper Number 35 shows this cutout. See App. 1. Officer Grant was parked directly behind Sgt. Clarke. RP at 182. They were not at an angle (contrary to the position of the truck pictured in these photos). RP at 198.

Both patrol cars had their emergency overhead lights on. RP at 183, 214. Sgt. Clarke also had his headlights on. RP at 183. The area was well lit by the patrol car overhead lights. RP at 171.

Both police officers heard the defendant accelerate. RP at 185, 213. Sgt. Clarke saw the defendant swerve straight at the patrol cars. RP at

188. Officer Grant saw the defendant swerving directly toward them. RP at 213. The defendant's truck was coming directly where both of them were parked and where they had been standing. RP at 213. The officers ran, missing the collision by 10-15 feet. RP at 214-15. They both felt debris from the collision hit them as they were running. RP at 203, 215. Both are experienced patrol officers—Sgt. Clarke has been with the Benton County Sheriff's Office since 2003, and Officer Grant had been a patrol officer with the Kennewick Police Department for about 5 and 1/2 years. RP 173, 209. They were familiar with an intoxicated driver who may drift into oncoming traffic. RP at 226. The defendant's action was a deliberate swerve, not a drift caused by intoxication. RP at 226.

A witness, Brian Stockman, was up at this hour and wrote that the defendant's truck deliberately swerved into the patrol cars. RP 161, 165. He noted that there was no curve in the road and that there was no reason to swerve into the police cars, barring some equipment failure. RP 165, 167.

As a result of the collision, Sgt. Clarke's patrol car ended up on top of Officer Grant's patrol car. RP at 190. Officer Grant believed that there was no chance Sgt. Clarke would have survived the collision if he had been hit. RP at 221. Sgt. Clarke concurred, saying there was no way

anyone inside his patrol car would have survived the collision. RP at 196.

The collision was worse than that seen in fatality collisions. RP at 215.

4. After the collision: The defendant makes suicidal statements, but still threatens the police.

The defendant screamed at the police, “Kill me,” after the collision. RP at 193. However, he still would not listen to commands and ran at Sgt. Clarke. RP at 193. The defendant collapsed after Dep. Gerry hit him with a Taser. RP at 302.

5. The verdicts:

The defendant was found guilty of Assault in the Second Degree against Sgt. Clarke in Count I, Assault in the Second Degree against Officer Grant in Count II, and Attempting to Elude a Pursuing Police Vehicle in Count III. CP 146, 148-49. The jury also found that the “law enforcement victim” aggravating factor applied in Counts I and II. App. 2 – Special Verdict Forms, CP 150-51.

B. Procedural facts relating to Jury Verdict allowing an exceptional sentence:

Pursuant to RCW 9.94A.535(3)(v), the jury was instructed that if there were guilty verdicts of Assault in the First or Second Degree, they must “determine if the following aggravating circumstance exists:

Whether the crime was committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and the

defendant knew the victim was a law enforcement officer.” App. 3 – Jury instruction 22, CP 118; CP 137.

The jury answer “yes” to the following special verdict form:

The Special Verdicts both stated:

QUESTION: Was the crime of Assault in the First Degree as charged in Count I [or Count II in CP 151] or the lesser crime of Assault in the Second Degree, regarding Mathew D. Clarke [or Elizabeth K. Grant in CP 151], committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: Yes.

App. 2 – Special Verdict Forms, CP 150-51.

The trial court entered Findings of Fact and Conclusions of Law on Exceptional Sentence, finding:

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.

App. 4 – Findings of Fact, CP 191. The Court imposed an exceptional sentence of 86 months. App. 4, CP 191.

III. ARGUMENT

- A. **State’s Response to Defendant’s Argument Number 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.” Br. Appellant at 8.

- 1. The trial court's determination that the jury's verdict included a finding that the defendant knew Sgt. Clarke and Officer Grant were law enforcement officers is the issue.**

Of course, the special verdict forms should have included the provision about the defendant knowing the victims were law enforcement officers. But based on all facts, including the special verdict forms, the guilty verdicts, and the jury instructions, the trial court entered a Finding of Fact that the verdict included this fact. The trial court's Finding of Fact and whether that Finding was supported is the issue on appeal.

- 2. The standard on review concerning a trial court's imposition of an exceptional sentence is "clearly erroneous."**

An exceptional sentence may be reversed on appeal if: (1) under a clearly erroneous standard, the trial court's reasons for imposing the sentence are not supported by the record; (2) those reasons do not justify the exceptional sentence as a matter of law; (3) under an abuse of discretion standard, the exceptional sentence is clearly too excessive or clearly too lenient. *State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006). So, the issue is whether the trial court's Finding of Fact that the jury's verdict included all the necessary requirements is supported by the record.

3. **The trial court's Finding that the special verdict included the requirement that the defendant knew the victims were law enforcement officers, since the jury was correctly instructed and the guilty verdicts on the Assault in the Second Degree counts, necessarily rejected the defendant's arguments.**

The jury was instructed that it had to determine whether the crime was committed against a law enforcement officer who was performing his or her duties and whether the defendant knew the victim was a law enforcement officer. App. 3, CP 118. The jurors would not have answered the Special Verdicts "yes" unless they were satisfied beyond a reasonable doubt that it was the correct answer. App. 2, CP 150-51; App. 3, CP 117.

The jury's verdict of guilty on charges of Assault in the Second Degree also supports the trial court's Findings of Fact. CP 148. The jury rejected beyond a reasonable doubt that the collision was "purely accidental." *See* defense attorney's argument at RP 488. It also rejected the testimony of his expert that he could not form the intent to assault police officers. By necessity, the jury found that the defendant saw two patrol cars and intentionally slammed into them with the intent to cause injury to the law enforcement officers.

The trial court's Finding of Fact about the jury's verdict is supported by substantial evidence.

4. The defendant's citations to various cases are not on point.

The cases cited by the defendant do not directly address this situation. For example, in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010), which included discussion of a companion case, *State v. Graham*, 132 Wn. App. 1053 (2009), *rev'd by State v. Williams-Walker*, 137 Wn.2d 889, 225 P.3d 913 (2010), the jury was instructed that the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon. The jury returned a special verdict form, indicating it found that defendant Graham was armed with a deadly weapon during the commission of first degree assault. However, the trial court sentenced the defendant pursuant to a firearm enhancement rather than a deadly weapon enhancement.

The defendant is correct that "harmless error" would not apply. *See State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). The issue is not whether the jury could have found that the defendant knew that Sgt. Clarke and Officer Grant were law enforcement officers, making the jury's failure to do so harmless. The issue is whether the trial court is correct that the jury made this finding.

Because the jury was instructed that it could only answer "yes" to the special verdict form if the State proved beyond a reasonable doubt that

the crimes were “committed against law enforcement officers who were performing their official duties at the time of the crime, and the defendant knew the victims were law enforcement officers,” it is clear that given these instructions and the jury’s verdict finding the defendant guilty of two counts of Assault in the Second Degree that the jury followed its instructions. App. 3, CP 118; CP 137.

B. State’s Response to Defendant’s Argument Number 2:
“The trial court erred when it denied Mr. Deweber’s request for a third degree assault instruction.” Br. Appellant at 15.

The defendant correctly states the requirements for a trial court giving an instruction on a crime of a lesser degree than that charged:

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.

State v. Peterson, 133 Wn.2d 885, 948 P.2d 382 (1997).

The first two elements are satisfied; the third is not. The evidence is that the defendant told his mother earlier in the evening that he would harm police officers if they were called; he accelerated his vehicle to speeds up to 100 MPH; and he slammed his vehicle into the patrol cars which were well-illuminated. RP at 171, 183, 185, 188, 213-15, 266-67. The force of the impact was tremendous, resulting in one patrol car ending

up on top of the other. RP at 190. The experienced patrol officers at the scene stated this was one of the worst collisions they had ever seen and would have resulted in a death if Sgt. Clarke was still in his patrol car. RP at 196, 215.

The jury could have accepted the defense attorney's argument that the collision may have been purely accidental. RP at 488. The jury could have accepted testimony from the defendant's expert that the defendant was not able to form the intent to harm Officer Grant and Sgt. Clarke. RP at 386. If the jury had accepted either argument, the defendant would have been found not guilty. But either the defendant intended to assault the police officers by ramming them with his truck or he did not. The jury could not have found that the defendant deliberately rammed the patrol cars, while accelerating up to 100 MPH, but was not using his vehicle as a deadly weapon.

IV. CONCLUSION

By finding the defendant guilty of Assault in the Second Degree, the jury rejected the defendant's argument that he did not intend to injure police officers or that the collision was an accident. The evidence supported that verdict: the defendant accelerated up to 100 MPH and deliberately slammed his truck into the patrol cars, producing one of the worst collisions seen by experienced patrol officers. There is no way that

the jury could not have concluded that the defendant intentionally assaulted police officers with his vehicle, but that the vehicle was not a deadly weapon.

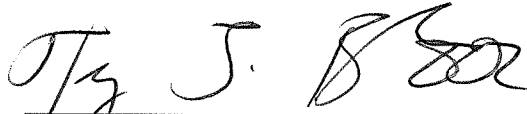
The jury was correctly instructed on the “law enforcement aggravator” and was told to only answer the corresponding special verdict “yes” if the State proved each element beyond a reasonable doubt. The trial court correctly found that the jury’s verdict found that the defendant knew he was assaulting law enforcement officers.

The verdicts and the exceptional sentence should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of April, 2016.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", is written over a horizontal line.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Kathleen Shea
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101-3647

E-mail service by agreement
was made to the following
parties:
wapofficemail@washapp.org

Signed at Kennewick, Washington on April 14, 2016.

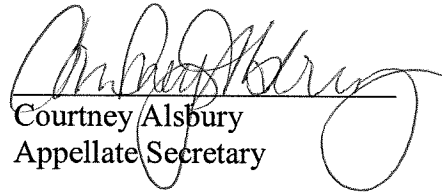
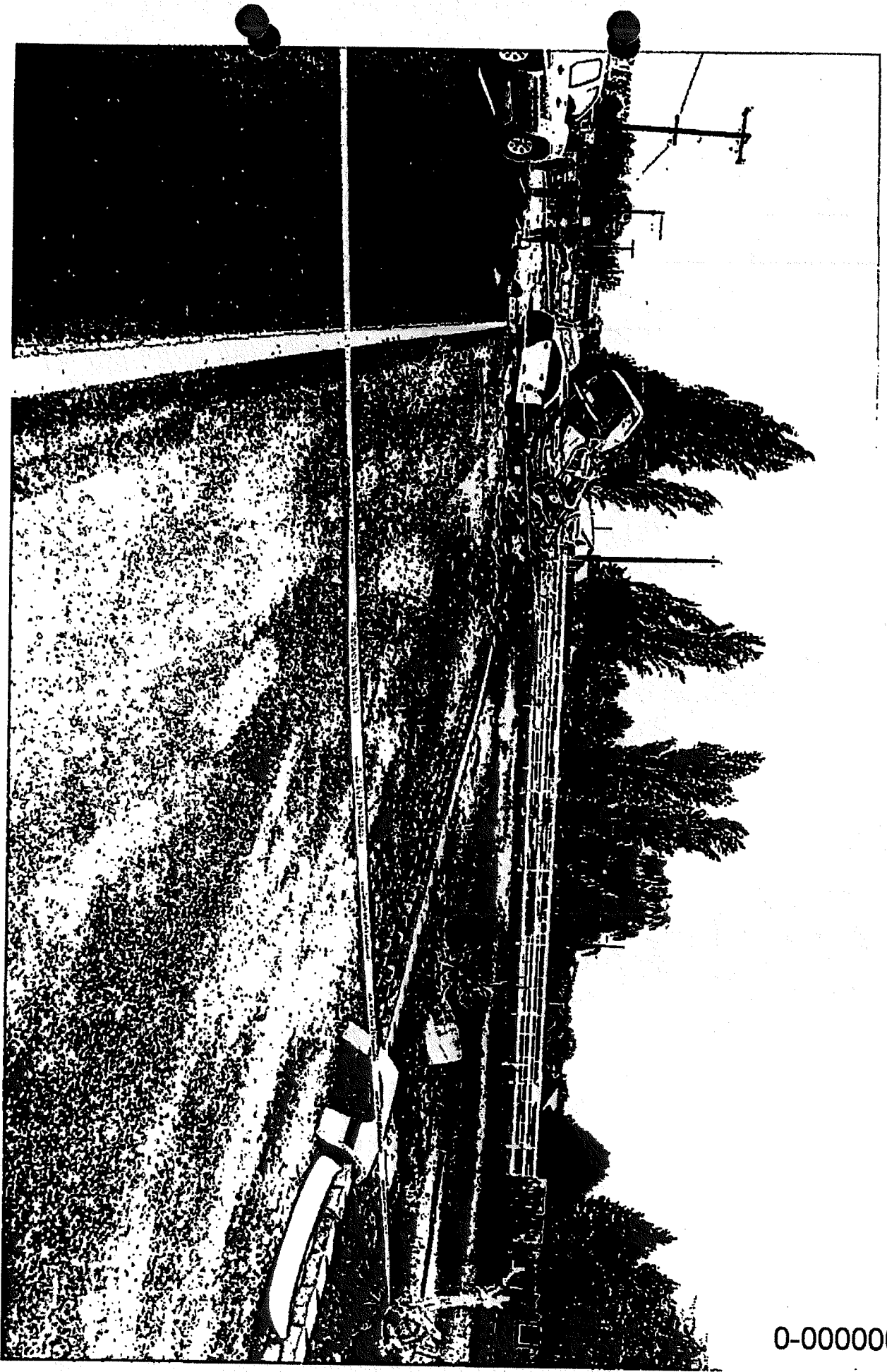

Courtney Alsbury
Appellate Secretary

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APPENDIX 1

Clerk's Paper 35 – Photo showing
cutout in roadway where patrol cars
were parked before the collision



0-00000035

APPENDIX 2

Clerk's Papers 150-51 – Special Verdict Forms 1 and 2

JOSIE DELVIN
BENTON COUNTY CLERK

JAN 30 2015

FILED

KXS

IN THE SUPERIOR COURT OF
STATE OF WASHINGTON FOR BENTON COUNTY

JUDGMENT DOCKET
NO 15-9-00272.7

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
SHANE KYLE DEWEBER)
Defendant.)

No. 13-1-01132-1

SPECIAL VERDICT FORM 1

We, the jury, return a special verdict by answering as follows:

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 Mathew D. Clarke, committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: YES (Write "yes" or "no")

DATED this 30th day of January 2015.

[Signature]
Presiding Juror

JOSIE DELVIN
BENTON COUNTY CLERK

JAN 30 2015

FILED *K/S*

IN THE SUPERIOR COURT OF
STATE OF WASHINGTON FOR BENTON COUNTY

JUDGMENT DOCKET
NO 15-9-00272-7

STATE OF WASHINGTON,)	
	Plaintiff,)	No. 13-1-01132-1
)	
vs.)	SPECIAL VERDICT FORM 2
)	
SHANE KYLE DEWEBER)	
	Defendant.)	

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the crime of Assault in the First Degree as charged in Count II or the lesser crime of Assault in the Second Degree, regarding Elizabeth K. Grant, committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: Yes (Write "yes" or "no")

DATED this 30th day of January 2015.
[Signature]
Presiding Juror

APPENDIX 3

Clerk's Papers 117-18 – Jury
Instructions 21 and 22 on Special
Verdicts 1 and 2

INSTRUCTION NO. 21

You will also be given two special verdict forms for the crimes of Assault in the First Degree as charged in counts I and II and the lesser crimes of Assault in the Second Degree. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of any of these crimes, you will then use the 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 forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must fill in the blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to the answer, then do not fill in the blank for that question.

0-000000117

INSTRUCTION NO. 22

If you find the defendant guilty of Assault in the First Degree as charged in Counts I or II, or the crime of Assault in the Second Degree as a lesser offense of Counts I or II, then you must determine if the following aggravating circumstance exists:

Whether the crime was committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and the defendant knew the victim was a law enforcement officer.

0-000000118

APPENDIX 4

Clerk's Papers 191-92 – Findings of Fact and Conclusions of Law on Exceptional Sentence

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SHANE KYLE DEWEBER

Defendant.

NO. 13-1-01132-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
EXCEPTIONAL SENTENCE

FINDINGS OF FACT

1. 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.
2. The special verdict is supported by substantial evidence. Specifically, Officer Elizabeth Grant and Sgt. Mathew Clarke were the victims in Counts I and II. They were attempting to stop the defendant, who had eluded other police officers in a high speed pursuit. Further, the defendant may have been attempting to contact his estranged wife. Officer Grant and Sgt. Clarke were acting in the interest of the community and were properly performing their duties as law enforcement officers.
3. The standard range of 33-43 months is clearly too lenient in light of the purposes of the Sentencing Reform Act, which include ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense, to promote respect for the law by providing punishment which is just, protecting the public and reducing the risk of reoffending by offenders in the community.

CONCLUSIONS OF LAW

An exceptional sentence of 86 months should be imposed.

March 4, 2015

DATED: ~~February 27, 2015~~


Cameron A. Mitchell, Judge

Cxm

0-000000191

Presented by:

Terry J. Bloor
Deputy Prosecuting Attorney
Offc. Id. No: 91004

Approved by:

Catherine Harkins
Attorney for Defendant
WSBA No:

0-000000192