NO. 32248-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONALD DYSON, JR.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. *LeFaber* compels reversal for the improper and ambiguous use of the word "also" in the deadly weapon jury instructions.

The inclusion of the word "also" in instruction No. 13 created the risk that Mr. Dyson could be convicted of first degree assault with jurors using their own, unspecified definition for the deadly weapon element of assault. The State now contends this error can be overlooked in spite of *State v. LeFaber*, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) *abrogated by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). However, *LeFaber* does apply and cannot be so ignored.

"The standard for clarity in a jury instruction is higher than for a statute" and a jury "requires a manifestly clear instruction." *Id.* At 902. Simply put, badly written instructions that allow for an erroneous reading cannot stand. "Although a juror **could** read instruction 20 to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading." *Id.* at 902-03 (emphasis added).

2. The flaws in the transferred intent jury instruction also require a new trial.

The trial court mistakenly told the jury that if they found Mr. Dyson acting with specific intent to harm one complainant, they had to see

him as acting with specific intent against the other. Instruction No. 12 read: "If a person acts with intent to assault another, but the act harms a third person, **the actor is deemed to have acted with intent to assault a third person**." CP 81. (emphasis added)

This language incorrectly instructed the jury that Mr. Dyson was automatically "deemed" to have intended to assault a second complainant if the jury found he intended to assault a first. That is less than what the State was required to prove under RCW 9A.36.011. *See State v. Wilson*, 125 Wn.2d 212, 213, 218-19, 883 P.2d 320 (1994).

Mr. Dyson's convictions must be reversed because the faulty instructions gave his jury the option of convicting on lower proof than what the law requires. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1975); *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 1999 (2011).

3. **The court closure during jury selection requires reversal.**

The trial court ordered that for-cause challenges would be handled at the bench and peremptory strikes would be exercised silently on paper. IRP 170-74. The for-cause challenges were made at the bench, on the record, but out of earshot of the public. IRP 171-72. The peremptory strikes were conducted on paper and then the final jury was simply announced. IRP 170-74. The public in the courtroom – where the silent

proceedings occurred – thus did not see or hear which party struck the jurors, in what order, or whether this was done for cause or by peremptory challenge.

The appellant stands by the arguments set out in the opening brief that the procedure below had the same effect as impermissibly excluding the public from the courtroom. *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

The State's sole response is to cite to *State v. Smith*, __ Wn.2d. __, 334 P.3d 1049 (2014) for the proposition that "sidebars do not implicate the public trial right." Response at 8. However, *Smith* addressed sidebars for midtrial evidentiary matters, not jury selection, to which the public shall have access. To that extent, *Smith* may be dispositive of the midtrial closures below (e.g. IVRP 688-89, IIIRP 606-08) but does not reach the issue of the improper closure of jury selection.

4. **The finding supporting a mandatory term of confinement on each count must be stricken because it was found by the sentencing court rather than a jury.**

Appellant's opening brief sets out the constitutional error of the imposition of mandatory sentencing enhancements made on a judicial, rather than a jury, finding. In their response, the prosecution writes: "the mandatory minimum under RCW 9.94A.540 does not exceed the statutory

maximum for either count. Thus, *Blakely* does not apply." Response at 10. That is an erroneous and insufficient reading of *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

The State has an obligation to prove – to a jury – all facts that increase the statutory maximum **and** those that increase the mandatory minimum. Arguments to the contrary have been rejected. *State v. McEnroe*, ___ Wn.2d. ___, 333 P.3d 402, 404 (2014) ("there is no difference between facts that increase the statutory *maximum* and facts that increase the mandatory *minimum*... The prosecution must prove both to the fact finder beyond a reasonable doubt.") (emphasis in the original) (internal citation to *Alleyne* omitted).

Mr. Dyson's sentence must be vacated.

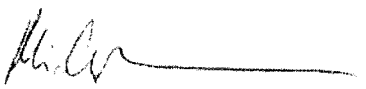
B. CONCLUSION

Mr. Dyson's convictions should be reversed and remanded for a new trial because the court's instructions misstated the law, diluted the State's burden, and were confusing. Furthermore, a new trial is required because portions of jury selection were closed to the public.

In the alternative, the Court should vacate the sentence and remand for resentencing because the sentence is premised on judicial factfinding in violation of the Sixth and Fourteenth Amendments.

DATED this 17th day of November, 2014.

Respectfully submitted,



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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X] MARK LINDSEY [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2014.

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