32248-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD LEE DYSON JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The court's instruction defining a deadly weapon as applied to assault in the first degree misstated the law, caused confusion, and diluted the State's burden of proof.

2. The court's instruction defining a deadly weapon as applied to the special verdict misstated the law, caused confusion, and diluted the State's burden of proof.

3. The court's instruction on transferred intent misstated the law and diluted the State's burden of proof.

4. Mr. Dyson's and the public's rights to an open trial were violated when the for-cause challenges and conferences were conducted at sidebar.

5. Mr. Dyson and the public's rights to an open trial were violated when preemptory strikes were made on paper, outside the public specter.

6. Mr. Dyson's and the public's rights to an open trial were violated when evidentiary matters were discussed at sidebar.

7. The court violated Mr. Dyson's right to a jury trial by finding Mr. Dyson used force or means likely to result in death or intended to kill and by imposing a five-year mandatory minimum sentence for each count.

II. ISSUES

A. Does the inclusion of the word "also" in a jury instruction give the jury leeway to pick any definition of "deadly weapon" that they choose?

B. Does the inclusion of the word "also" in the special verdict forms allow the jury to use any definition of "deadly weapon" they choose?

C. Were the trial court's "transferred intent" instructions erroneous?

D. Did the trial court's use of sidebars violate the defendant's right to a public trial?

E. Did the sentencing court err in making a judicial finding as opposed to a jury determination?

III. STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV. ARGUMENT

A. THE USE OF THE WORD "ALSO" DOES NOT PERMIT THE JURY TO SUBSTITUTE ANY RANDOM DEFINITION FOR "DEADLY WEAPON."

The defendant argues that the fact that the word "also" that appears in Jury Instruction No. 13 allows the jury to supply any definition they

choose for "deadly weapon." App. Br., p.8. The word "also" is nothing more than an adverb that is a shorthand way of saying "in addition."

Instruction No. 9 states: "A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a deadly weapon or by any force or means likely to produce great bodily harm or death." CP 78.

Instruction No. 13 reads: "Deadly weapon also means any weapon, device, instrument, or article 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." CP 82. Instruction No. 13 defines for the jury exactly what a deadly weapon is.

In actuality, the definitional Instruction No. 13 simply tells the jury in more precise terms than Instruction No. 9 exactly what constitutes a deadly weapon. The defendant claims that the use of "also" caused confusion. There is nothing in the record indicating that the jury was confused. The instructions were not erroneous.

The Washington Pattern Jury Instructions, while "an immense aid" to the practitioner and preferred over individually drafted instructions are *not* mandatory. *Bradley v. Maurer*, 17 Wn.App. 24, 28, 560 P.2d 719 (1977). Jury instructions are sufficient if they allow the parties to argue their theories, do not mislead the jury, and properly inform the jury of the

applicable law. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). The specific language of jury instructions is within the discretion of the trial court. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991). We review jury instructions *de novo*, asking first whether an instruction is erroneous, and second whether the error prejudiced a party. *Stevens v. Gordon*, 118 Wn.App. 43, 53, 74 P.3d 653 (2003).

Despite the defendant's arguments, the record does not show that the jury was misled by the inclusion of the word "also" in Instruction No. 13. CP 82. The defendant supports his arguments with *State v. LeFaber*, 128 Wn.2d 896, 902-03, 913 p.2d 369, (1996) (overruled on other grounds). *Lefaber* dealt with a different statute and is only tangentially related to the defendant's arguments.

The defendant creates a logic sequence that is structurally unsound. The defendant correctly notes that the court included the word "also" in Instruction No. 13. According to the defendant's arguments, the jury could view the word "also" as a license to insert any definition for deadly weapon that they might choose. App. Br., pp.10-11.

The defendant is incorrect when he states that there was no other definition of "deadly weapon" provided. Actually, Instruction No. 9 reads: "A person commits the crime of assault in the first degree when with

intent to inflict great bodily harm, he or she assaults another with a deadly weapon or by any force or means likely to produce great bodily harm." CP 78. Thus, "deadly weapon" was discussed before the instruction alleged to be a defective definition of "deadly weapon." The defendant's construct falls because it is an illogical stretch to view the word "also" as telling the jury to pick any definition that they wished, whether in the instructions or not. The State maintains that the word "also" tells the jury that they can consider any of the definitions contained in the rest of the instruction that follows "also."

The instructions would have been defective in the manner argued by the defendant if the trial court *had not* given the deadly weapon Instruction No. 13. Instruction No. 9 stated that the defendant had used a "…deadly weapon, or by any force or means likely to produce great bodily harm or death." CP 78. Without the definitions provided in Instruction No. 13, the jury would not have been provided with the legal definitions of "deadly weapon."

There has been no showing that the instructions, read as a whole and in a *commonsense* manner, were defective. *See generally, State v. O'Hara*, 167 Wn.2d 91, 765-766, 217 P.3d 756, (2009).

B. THE SPECIAL VERDICT INSTRUCTIONS ARE NOT DEFECTIVE.

The defendant did not object to the giving of either special verdict form and this Court may choose not to hear arguments on this topic. CrR 2.5(a).

The defendant brings the same set of arguments to the special verdicts as were used in the previous section. The defendant maintains that the instructions pertaining to the special verdicts used the word "also." The fallacy of the defendant's arguments is, if anything, even more obvious when applied to the special verdict forms.

The last paragraph of Instruction No. 25 reads: "A deadly weapon is also an implement of instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death." CP 95.

The defendant argues that the word "also" tells the jury to use any definition they want. Actually, the "also" in this instruction "pins down" the jury and instructs them to consider the definitions in the instructions. The word "also" tells the jury where the thought track goes and how to follow the instruction. So, far from the defendant's position, the word "also" charges the reader (juror) to use only the definitions in the instruction.

There was no error in the special verdict instructions.

C. THE COURT'S INSTRUCTION PERTAINING TO TRANSFERRED INTENT DID NOT CHANGE THE STATE'S BURDEN OF PROOF AND WAS NOT A MISTATEMENT OF THE LAW.

The defendant contends that because the trial court put the transferred intent language into a separate instruction, the jury could infer that the State did not need to prove intent as to any specific person. According to the defendant, this lowered the standard of proof the State needed to meet. The issue of the lowering of the State's burden is answered by looking at the two "To convict…" instructions. CP 85-86. These two instructions require the State to prove that the defendant had the requisite intent to inflict great bodily harm upon Spencer Schwartzenberger (Instruction No. 16, CP 85) and Arthur Ward (Instruction No. 17, CP 86).

The defendant appears to desire a "do-over." He argues several factual issues, none of which have relevance to this appeal. The defendant re-argues the question of the intoxication state of the individuals, the presence of a "deadly weapon," the State's burden of proof, and other factual issues. Ostensibly, this argument bears on the issue of "harmless error." Since the State has not raised the issue of "harmless error," the defendant's recitation of facts is pointless.

Defense counsel did not directly object to the instruction used by the trial court. Mr. Dressler stated:

> While it may have some bearing to the case, I do not believe that it actually comports with the evidence as it was introduced to this point. Of course we're still not at the end of testimony. I don't believe 10.01.01 -- that there is anything to have been produced so far that in considering the injuries to Mr. Ward -- I believe that is who this is applying to, but I could be wrong -- that there is an actual issue of transferred intent.

RP 642.

The defense counsel was not objecting to the instruction itself, but rather he was saying that, in his opinion, the facts of the case did not warrant the giving of a transferred intent instruction. The trial court disagreed and gave the transferred intent instruction. Instruction No. 12, CP 81.

All factual issues have been decided. The defendant was convicted by a jury, the same jury that found against the defendant on both special verdicts. There was no error in the instructions on transferred intent.

D. THERE WAS NO CLOSURES OF THE COURTROOM FOR THE PURPOSES OF THE RIGHT TO PUBLIC ACCESS.

"We hold that sidebars do not implicate the public trial right." *State v. Smith*, 2014 WL 4792044, at ¶2 (Wash. Sept. 25, 2014).

E. THE MANDATORY MINIMUM DOES NOT NEED TO BE STRICKEN.

The defendant argues that there was an error in sentencing because the statutory minimum sentence under RCW 9.94A.540 was set by the trial/sentencing judge rather than by a jury. The defendant points to *Blakley* and *Alleyene,* as well as numerous others, to prove the defendant's position that the statutory minimum must be found by the jury rather than by a judge. The mandatory minimum of five years effectively imposes a five year period in which "good time" does not apply. RCW 9.94A.540(2).

The defendant has created an argument which, if accepted, would mean that all statutes used in a case would need to be "found" by a jury. The end result of the defendant's arguments would be endless hearings and jury panels to establish the parameters and application of individual statutes. This approach would strip sentencing authority from the legislature and place that authority in the hands of juries.

When confronted with the issue raised by the defendant, Washington courts have applied a more reasonable approach:

> McChristian contends that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), requires a jury to find whether the facts underlying the defendant's

> first degree assault conviction warrants a mandatory minimum sentence under the statute. We disagree.

State v. McChristian, 158 Wn.App. 392, 403, 241 P.3d 468 (2010), *review denied* 171 Wn.2d 1003, 249 P.3d 182 (2011). The Washington State Supreme Court has held that *Blakely* does not apply to exceptional minimum sentences that do not exceed the maximum sentence allowed. *State v. Clarke*, 156 Wn.2d 880, 884, 134 P.3d 188 (2006), *cert. denied*, 552 U.S. 885, 128 S.Ct. 365, 169 L.Ed.2d 143 (2007). In reaching its decision, our Supreme Court noted that in order to violate the Sixth Amendment under *Blakely*, the defendant's exceptional minimum sentence must exceed the relevant statutory maximum. *Clarke*, *supra*, at 886.

That is the situation in this case. The mandatory minimum under RCW 9.94A.540 does not exceed the statutory maximum for either count. Thus, *Blakely* does not apply.

Under *Blakely*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely, supra,* at 303–304. Accordingly, the Sixth Amendment does not bar judicial fact-finding related to a minimum sentence that does not exceed the relevant statutory maximum. *Clarke*, *supra,* at 891.

V. CONCLUSION

The defendant has shown no errors in the trial and the State respectfully requests that the convictions be affirmed.

Dated this 17 day of October, 2014.

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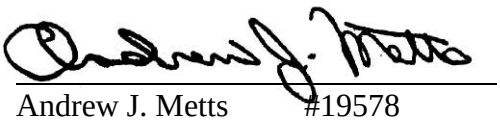

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. DONALD LEE DYSON JR., Appellant,	NO. 32248-3-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 17, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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