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STATE OF WASHINGTON
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NO. 102431-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CODY WADE,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. ISSUES

1. Does Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) change double-jeopardy analysis such as to preclude the State from imposing more than one firearm enhancement under these facts?

2. Did the trial court properly implement this Court's emergency COVID orders to allow remote voir dire even though the trial was held in person?

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an

issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

Cody Wade broke into the home of an elderly couple and their grandson with the intent to rob them. Wade was armed with a handgun. He used that handgun to shoot the grandmother in the stomach and beat her over the head, he brandished the weapon at the grandson to force him to remain where he was hiding in his room, and he pointed it at the grandfather as the grandfather came to assist his wounded wife lying in a pool of blood. The grandmother survived.

Wade was convicted of first degree burglary (count I), second degree assault 2 (count II, grandmother); second degree assault (count III, grandson), and robbery in the first degree (count IV). CP 181-83, 463-71, 582; 4/29/21RP 1931-33. The verdicts included findings as to firearm enhancements on each count. The court imposed a mitigated exceptional sentence of

197 months, where the underlying crimes were punished by 41 months in prison and the firearm enhancements amounted to 156 months. CP 526, 528; 7/23/21RP 2001.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Review should be denied as to the two issues Wade raises in his petition. The firearm enhancements applied to Wade violate no constitutional provisions, are consistent with long-standing authority from this Court, and raise no issue of substantial public import because the enhancements comport with Washington's public policy of increasing punishment for armed offenders like Wade. The jury selection issue, too, does not merit review, because the trial court logically and faithfully applied emergency orders issued by this Court and the King County Superior Court during the greatest public health emergency to befall this state in over a hundred years.

1. USE OF A FIREARM IN COMMISSION OF A CRIME ENHANCES PUNISHMENT FOR THAT CRIME; IT IS NOT A SEPARATE CRIME.

Wade's double-jeopardy argument is a somewhat confusing pyramid but it appears to boil down to the following: Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) requires that firearm enhancements are elements; firearm enhancements thus must be treated as if they are separate crimes; the unit of prosecution for this enhancement "crime" is one crime per gun; thus, the double-jeopardy clause prohibits more than one enhancement per gun per criminal episode. This argument is incorrect. It does not follow from Alleyne that enhancements create a separate stand-alone crime.

Double-jeopardy "unit of prosecution" analysis is essentially a question of separation of powers and analysis under the doctrine focuses on statutory interpretation and legislative intent. The doctrine is designed to prevent a court from imposing punishment beyond what was intended by the

legislature. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). "The 'unit of prosecution' analysis applies when a defendant has multiple convictions under the *same* statutory provision, and it asks 'what act or course of conduct has the Legislature defined as the punishable act.' " State v. Villanueva-Gonzalez, 180 Wn.2d 975, 980, 329 P.3d 78 (2014); (quoting Adel, 136 Wn.2d at 634). The court in Adel held that the defendant could not be punished under the drug possession statute for the same drug possessed at the same time but held in different containers, because there was no evidence the legislature intended to punish as two crimes possession that occurred at the same moment.

Even assuming, arguendo, that firearm enhancements are elements under Alleyne for double-jeopardy purposes, the logic of Adel does not apply because enhancements, by their very nature, do not stand alone like, for example, the drug possession statute. An enhancement can exist only together with the thing it enhances. Nobody could ever be charged with only an

enhancement; that would be absurd. Because the underlying crime and the enhancement are inextricably linked, it follows that the "unit of prosecution" analysis must examine "what act or course of conduct has the Legislature defined as the punishable act" by looking at *two* statutes, not just one. Villanueva-Gonzalez, 180 Wn.2d at 980; Adel, 136 Wn.2d at 634. The "act or course of conduct" that the legislature has defined as "the punishable act" includes both the underlying crime and the enhancement. Thus, it cannot follow, as Wade argues, that the firearm enhancement is a "crime" separate and distinct from the underlying count.

There is no language in the enhancement statute or elsewhere suggesting that the legislature intended to create a new stand-alone crime of "firearm enhancement." It makes no sense to talk about a "unit of prosecution" for a statute that cannot stand alone. Thus, there can be no double-jeopardy analysis solely as to the firearm enhancement. Because the key premise of Wade's argument—that the legislature intended to

create a new stand-alone crime—necessarily fails, his double-jeopardy argument fails, too, even if, under Alleyne, firearm enhancements are elements of the crime that must be pled and proved to a jury.

As to the multiple punishments prong of double-jeopardy analysis, multiple punishments are permitted if the legislature plainly intended such a result. State v. Arndt, 194 Wn.2d 784, 818, 453 P.3d 696 (2019).[1] In State v. Kelly, this court found no double- jeopardy multiple punishments violation where Kelly pointed a gun at a victim and sentence was imposed on both assault in the second degree (deadly weapon prong) and a firearm enhancement. 168 Wn.2d 72, 78-80, 226 P.3d 773 (2010). This Court held that the legislature's intent to impose punishment for both the assault and the enhancement "could hardly be clearer." Kelly, 168 Wn.2d at 78 (citing RCW

[1] Arndt dealt with multiple punishments under different statutes, not multiple punishments under the same statute, so the "same elements" test and the "merger" test applied rather than the "unit of prosecution" test. Arndt, at 818.

9.94A.533(3)(e) ("Notwithstanding any other provision[s] of law, all firearm enhancements under this section are mandatory.")). This Court also rejected an argument that there is an exception where the underlying crime was premised on a deadly weapon.

> From the outset it was apparent that the statute would mandate imposition of firearms enhancements on those committing second degree assault with a deadly weapon. The same was (and is) true of other offenses where being armed with a deadly weapon is an element of the offense. See, e.g., RCW 9A.52.020(1)(a) (burglary in the first degree) (LAWS OF 1975 1ST EX.SESS. ch. 260, § 9A.52.020); RCW 9A.56.200(1)(a)(i) (robbery in the first degree) (LAWS OF 1975 1ST EX.SESS. ch. 260, § 9A.56.200).

Kelly, 168 Wn.2d at 83. Alleyne does not alter this analysis because the fundamental question remains one of legislative intent and the intent still could not be clearer.

State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) is consistent with Kelly. Two firearm enhancements were imposed on DeSantiago because he possessed two guns during conviction for a single crime and this Court found no

double-jeopardy violation because this was consistent with legislative intent. In Kelly, as here, a single enhancement was applied to each crime the defendant committed. This is exactly what the legislature intended, that commission of a crime with a gun would enhance punishment for that crime.

Finally, Wade's repeated references to "a single criminal episode" are immaterial. There is no indication that the legislature intended such a vague exception to applications of a firearm enhancement. Nor does the exception make policy sense. Shooting or pointing a gun at multiple people is worse than shooting or pointing a gun at a single person. Wade's suggestion that the legislature would have thought that he should be treated the same as someone who hurt or traumatized only one person is simply not persuasive.

For these reasons, Wade's argument depends on an alleged change in federal constitutional law that does not change the fundamental question of double-jeopardy analysis in Washington. Review is not warranted.

2. VOIR DIRE DURING COVID.

Wade asks this Court to grant review because "the Court of Appeals erred in concluding this Court's COVID Emergency Orders from October 2020 and June 2020 allowed the trial court to conduct voir dire using Zoom in March 2021 even though the Superior Court was conducting the remainder of the trial in person and Mr. Wade objected." Pet. at 14. He argues that this Court's emergency orders were "outdated" by March of 2021 because the rest of trial was being conducted in person. Pet. at 15. This very narrow claim does not meet the criteria under RAP 13.4(b).

The trial court followed an elaborate and well-justified protocol used by the King County Superior Court to mitigate risk of COVID transmission among citizens compelled by law to leave the safety of their homes and sit as jurors. These protocols were particularly apt as to voir dire because the risk of transmission of airborne disease was much higher in voir

dire. Effective voir dire requires that scores of jurors gather cheek to jowl in closed spaces like courtrooms where social distancing is impossible. At the actual trial, a dozen or so jurors can be seated in a socially distant manner.

Moreover, the COVID pandemic did not end with the switch of a light; the process was gradual. Given the demands of the Confrontation and Due Process Clauses, it essentially was impossible to conduct the actual criminal trial in a remote fashion. Hence, it makes perfect sense that as the pandemic wound down, trial could be in person but voir dire would continue to be remote. Nothing about the Court of Appeals decision on this narrow question implicates the factors in RAP 13.4(b).

Additionally, Wade argues that "this is a question of first impression that is likely to recur in appeals from COVID-era trials." Pet. at 16. He is mistaken. This or similar claims have been raised in a handful of cases tried in the COVID era. See, e.g., State v. Kiner, 26 Wn. App. 2d 1056 (2023), review

denied, 537 P.3d 1032 (Wash. 2023); State v. Bell, 83378-2-I, 2023 WL 6388244 (Wash. Ct. App. Oct. 2, 2023), as amended (Oct. 3, 2023). The claims are unique to that era. Moreover, Wade's argument in his petition is limited to whether there is a conflict between this Court's emergency order and a local rule and practices in King County, so it is not clear whether the same issue applies outside of that one county. And an objection must have been lodged below to preserve the claim. Many lawyers likely did not object to remote voir dire given its benefits, including fewer health risks to the lawyers, their clients, and court staff. Some lawyers may have believed, too, that remote voir dire fosters turnout from a broader spectrum of jurors in the community. For all these reasons, it seems likely that this question raises an important recurring issue.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 1,963 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 12th day of January, 2024.

Respectfully submitted,

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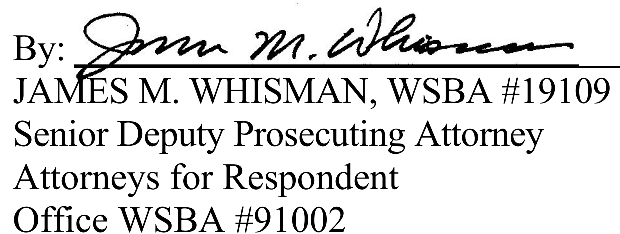
By: 
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