73333-8

FILED
November 13, 2015
Court of Appeals
Division I
State of Washington

NO. 73333-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCO WENCES,

Appellant.

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

The Honorable Richard J. Thorpe, Judge
The Honorable George Appel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of the appellant's incriminating statements to police violated his Fifth Amendment rights.

2. Where the appellant's post-Miranda[1]-warning statements were the product of an impermissible two-step interrogation prohibited by Missouri v. Seibert,[2] the trial court erred in ruling that the statements were admissible.

3. The trial court erred in entering conclusion of law 4.2 (concluding statements made after full Miranda warnings were admissible).

4. The sentencing court violated the appellant's constitutional right to a jury trial by sentencing the appellant to a term corresponding to a firearm enhancement where the jury returned only a deadly weapon special verdict.[3]

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

[3] Although this is a direct appeal, the trial in this case occurred in 2004, and therefore the case implicates an issue more frequently litigated in years past. The Supreme Court's opinion in State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) remains dispositive of the issue.

Issues Pertaining to Assignments of Error

1. Where the appellant's post-Miranda statements were the product of an impermissible two-step interrogation, did admission of the statements violate the appellant's Fifth Amendment rights?

2. Where the jury entered only a deadly weapon special verdict, did the court's sentence for a firearm enhancement violate the appellant's constitutional rights to a trial by jury?

B. STATEMENT OF THE CASE[4]

1. Charges, verdicts, and sentence

The State charged Marco Wences with possession of a controlled substance, methamphetamine, with intent to manufacture or deliver. CP 88-89; former RCW 69.50.401(a)(1)(ii) (1998). The State also alleged that Wences was armed with a firearm at the time of commission of the crime. CP 88; former RCW 9.94A.602 (2001) (recodified as RCW 9.94A.825 by Laws 2009, ch. 28, § 41).[5]

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[4] This brief refers to the verbatim reports as follows: 1RP – 7/2/04 (suppression hearing); Supp. RP – 2/22/05 (proceedings prior to jury selection); 2RP – 2/22/05 (proceedings after jury selection); 3RP – 2/23/05; 4RP – 4/8/05; 5RP – 2/9/15; 6RP – 2/10/15; and 7RP – 3/23/15.

[5] Current RCW 9.94A.825, which retains the same language as its processor, states:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an

After obtaining information about Wences from a confidential informant, the State obtained a search warrant in early September of 2003. The charge in this case stems from a September 12, 2003 traffic stop of Wences and subsequent search. CP 86-87.

A jury convicted Wences as charged as to the underlying offense. CP 31. As to the enhancement, the jury was instructed that "[f]or purposes of a special verdict, the State must prove beyond a reasonable doubt that [Wences] was armed with a deadly weapon at the time of commission of the crime." CP 50; 11 Wash. Prac., Pattern Jury Instr. Crim. (WPIC) 2.07.02 (3d Ed. 2008). The special verdict form asked

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> accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

jurors if Wences was "armed with a deadly weapon at the time of commission of the crime." The jury answered, "Yes." CP 30.

Wences did not appear for his initial sentencing hearing in 2004. 4RP 2-4. He was ultimately sentenced in 2015. 7RP 2-9. The court sentenced Wences to 100 months of confinement including a 36-month firearm enhancement and a base sentence within the standard range. CP 19-20; former RCW 9.94A.510(3)(b) (2001) (recodified as RCW 9.94A.533 by Laws of 2002, ch. 290, § 11) (three-year firearm enhancement for class B felonies and crimes with maximum sentence of 10 years).

Wences timely appeals. CP 1-12.

2. Suppression hearing

Wences filed a motion to suppress his statements to police officers. He argued in part that his statements should be suppressed because he was provided incomplete Miranda warnings and because he invoked his right to counsel prior to interrogation. CP 70, 73-74.

A CrR 3.5 hearing was on July 2, 2004. Officer Bruce Bosman of the Everett Police Department testified that he began investigating Wences after a confidential informant informed him that Wences sold methamphetamine. 1RP 5. Bosman eventually obtained a search warrant

for Wences's person and a Toyota Corolla associated with Wences. 1RP 6-7.

Bosman spotted the Toyota on September 9, 2003. 1RP 6. He and another officer activated their emergency lights and stopped Wences. 1RP 7. Bosman explained to Wences that there was a search warrant for Wences's person as well as the Toyota. 1RP 7. He advised Wences of his "basic rights" and then began questioning Wences. 1RP 7, 20. According to Bosman, "basic rights" meant that he told Wences only that he had a right to remain silent and had a right to an attorney before questioning. 1RP 8, 12.

As Bosman testified at the hearing, he asked Wences if there was a gun in the car. Wences said there was, but it was not his. 1RP 18. Bosman then asked if there were any drugs in the car. Wences said, "just some [i]ce."[6] Supp. RP 7.

After the "basic rights" and initial questioning, Bosman detained Wences in his patrol car and searched the Toyota. 1RP 8. He found suspected methamphetamine, a firearm, and a "substantial" amount of

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[6] Wences's statement regarding drugs was not explicitly addressed at the suppression hearing. See 1RP 8 (Bosman's testimony that after Wences was informed of "basic rights," he made statements as listed in Bosman's incident report). However, the State later argued that the pre-Miranda warning statements, including the drugs statement, were admissible for impeachment purposes. Supp. RP 7.

cash. 1RP 9. Bosman then arrested Wences, explaining that Wences was under arrest for manufacture or delivery of a controlled substance as well as possible firearm charges. 1RP 9. At that point, Bosman read Wences full Miranda warnings from his department-issued card[7] and asked Wences more questions. 1RP 9, 12, 19. Wences made additional incriminating statements, which the State later introduced at trial and used in closing argument to argue guilt. 1RP 11, 19.

At the suppression hearing, however, Wences denied making the statements attributed to him and testified he requested an attorney, but Bosman ignored his request. 1RP 25, 28-30.

At the close of testimony, the court found Wences's claims were not credible. 1RP 36-37; CP 53 (conclusion 3.1). The court nonetheless suppressed the statements made after the partial warnings. It found, however, that all statements made after the full Miranda warnings were

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[7] Officer Bosman read Wences his rights as follows:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have right, at this time, to a lawyer and to have him present with you while you are being questioned. If you can not afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.

1RP 9-10.

admissible. 1RP 37; CP 53 (Conclusions 5.1, 5.2); see also Supp. RP 7 (prosecutor's later summary of excluded statements). There was no discussion of Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), which had been decided only days earlier.

3. Trial testimony

Everett police officers obtained a search warrant for Wences's car and followed the car after spotting it in traffic. 2RP 4-6, 15. Officer Bosman conducted a "felony" traffic stop. 2RP 15. Bosman placed Wences in his patrol car while Bosman searched the Toyota. 2RP 16.

Bosman found over a thousand dollars in cash on the floorboard under the driver's seat. 2RP 17, 78. He also found a semiautomatic handgun[8] under the driver's seat. 2RP 17-18, 59, 69-70. In the glove compartment and in a "fanny pack" on the passenger seat, Bosman found baggies of varying sizes filled with suspected methamphetamine. 2RP 18-22, 28-29, 47, 49. Some of the small baggies had distinctive designs on them. 2RP 24-25, 27-28. Many of the bags contained amounts commonly sold on the streets, although some quantities were larger than those typically sold in a "street level" transaction. 2RP 23, 49.

[8] The State's firearm expert testified the gun was operable. 3RP 33.

Bosman also located a small scale,[9] two cell phones, and an electric data organizer. 2RP 32. He found a "bong," a glass device typically used for smoking marijuana, but he did not find any device that would normally be used to ingest methamphetamine. 2RP 32-33.

The State crime lab tested only two of the various baggies found in the car. 3RP 22. One baggie came back positive for methamphetamine, but another tested negative for methamphetamine as well as a variety of controlled substances. Rather, the crime lab scientist opined the substance was a nutritional supplement. 3RP 9-14. Officer Bosman testified that, in his training and experience, it was not unusual to find material that only *appeared* to be controlled substances in the presence of actual controlled substances. For example, the material could be used to "cut" the real drugs to make more money. 2RP 36; see also 3RP 13 (crime lab scientist's similar testimony).

After reading Wences his Miranda warnings, Bosman asked Wences a number of questions. Wences admitted the gun was his and had been given to him "for protection." 2RP 34-35, 42. When Bosman asked where the money came from, Wences said it had come from his bank account. 2RP 35.

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[9] Officer Bosman testified such scales are commonly used by buyers and sellers of controlled substances. 2RP 55.

Wences admitted to smoking marijuana, but said he did not use other drugs. 2RP 35. He also admitted to selling drugs and commented that it was "better than working" and "I can make more money selling dope." 2RP 35. Police found paperwork in the car bearing Wences's name and the names of family members. 2RP 72-73, 82-85; 3RP 50.

Wences testified at trial. The Toyota belonged to a friend, José, but Wences acknowledged that he drove it often and that Wences's paperwork was in the car. 3RP 43-47. He testified that he had given a woman a ride earlier on the day that the car was stopped. 3RP 44, 48.

C. ARGUMENT

1. WENCES'S POST-MIRANDA WARNING STATEMENTS SHOULD BE SUPPRESSED BECAUSE OBJECTIVE CRITERIA SHOW THE POLICE OFFICER ENGAGED IN AN IMPERMISSIBLE TWO-STEP INTERROGATION PROCESS

The Fifth Amendment commands "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth

Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). "Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

A trial court's determination that police did not obtain a confession in violation of Miranda is reviewed de novo. State v. Johnson, 94 Wn. App. 882, 897, 974 P.2d 855 (1999).

Wences moved to suppress his statements, although he did not raise the precise issue below, likely due to the fact that Seibert had been decided only days before the suppression hearing. Nonetheless, the record is adequate and therefore he may make these arguments for the first time on appeal. See State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (when an adequate record exists, the appellate court may carry out its "long-standing duty to assure constitutionally adequate trials" by engaging in review of manifest constitutional errors raised for the first time on appeal); see also State v. Robinson, 171 Wn.2d 292, 305-06, 253 P.3d 84 (2011) (in cases of "new controlling constitutional interpretation material to the defendant's case," principle that waiver of a constitutional

right must be "knowing, intelligent, and voluntary" militates against any argument that failure to raise an issue in the trial court waives its consideration on appeal).

"When a law enforcement officer interrogates a suspect in custody but does not warn the suspect of his Miranda rights until after he has made an inculpatory statement, the inquiry is whether the officer engaged in "'a deliberate two-step interrogation.'" United States v. Barnes, 713 F.3d 1200, 1205 (9th Cir. 2013) (quoting United States v. Williams, 435 F.3d 1148, 1150 (9th Cir. 2006)). "Such an interrogation occurs when an officer deliberately questions the suspect without Miranda warnings, obtains a confession or inculpatory admission, offers mid-stream warnings after the suspect has admitted involvement or guilt, and then has the suspect repeat his confession or elaborate on his earlier statements." Barnes, 713 F.3d at 1205. The burden rests on the prosecution to disprove deliberateness. United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010).

The United State Supreme Court addressed the issue in Seibert, 542 U.S. 600.[10] There, interrogating officers deliberately questioned a suspect without providing Miranda warnings until the suspect confessed, at which point officers advised the suspect of her Miranda rights, obtained

[10] The case was decided June 28, 2004, four days before the suppression hearing.

a waiver from her, and then resumed interrogation while referring to the suspect's earlier pre-Miranda admissions to elicit a post-Miranda confession. Seibert, 542 U.S. at 604-06. The Court, in a plurality opinion, determined this interrogation technique rendered Miranda warnings ineffective and held that the post-Miranda warning statements were inadmissible, observing that "[t]he object of question-first [interrogation practice] is to render Miranda warnings ineffective by waiting for a particularly opportune time to give [the warnings], after the suspect has already confessed." Seibert, 542 U.S. at 611.

Justice Kennedy's concurring opinion in Seibert applied a narrower test applicable only when "the two-step interrogation technique was used in a calculated way to undermine the Miranda warning." Seibert, 542 U.S. at 622. Division Two of this Court has deemed Justice Kennedy's concurrence representative of the narrowest holding of Seibert. State v. Hickman, 157 Wn. App. 767, 774, 238 P.3d 1240 (2010). Hickman held the controlling constitutional rule of Seibert is that which has been articulated in Williams: "[A] trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning—in light of the objective facts and circumstances—did not effectively apprise the suspect

of his rights." Hickman, 157 Wn. App. at 774 (quoting Williams, 435 F.3d at 1157-58).

In Williams, the Ninth Circuit also stated that Seibert requires "a trial court [to] suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights." Williams, 435 F.3d at 1157. Under the Williams interpretation of Seibert, a court addressing the admissibility of statements obtained during a two-step interrogation procedure must first determine whether the interrogating officer deliberately used the two-step procedure to undermine the effectiveness of Miranda warnings. Williams, 435 F.3d at 1158-59. This inquiry into deliberateness, however, does not require courts to evaluate the subjective intent of the interrogator, although it may be considered if there is available evidence. Hickman, 157 Wn. App. at 775 (citing Williams, 435 F.3d at 1158).

If a court determines that the use of the two-step interrogation procedure was deliberate, it then must "determine, based on objective evidence, whether the midstream warning adequately and effectively apprised the suspect that he had a 'genuine choice whether to follow up on [his] earlier admission.'" Williams, 435 F.3d at 1160 (quoting Seibert, 542 U.S. at 616 (Souter, J., plurality opinion)). In making this

determination, courts may consider whether any curative measures were taken to insure the suspect's understanding of his or her Miranda rights. Williams, 435 F.3d at 1160-61. Such curative measures may include a significant break in time and place between the pre- and post-Miranda questioning or an additional warning that the suspect's pre-Miranda warning statements could not be used against the suspect in a subsequent criminal prosecution. Williams, 435 F.3d at 1160-61.

"[W]here law enforcement officers deliberately employ a two-step interrogation to obtain a confession, and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court should suppress the confession." Id. at 1158.[11]

Officer Bosman's testimony does not reveal a subjective intent to deliberately subject Wences to a two-step interrogation process. This comes as no surprise, as a law enforcement officer's intent will rarely be admitted. Seibert, 542 U.S. at 617 (Souter, J., plurality opinion); see also People v. Lopez, 229 Ill.2d 322, 361, 323 Ill. Dec. 55, 892 N.E.2d 1047 (Ill. 2008) ("police officers will generally not admit on the record that they

[11] "In situations where the two-step strategy was not deliberately employed, [Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)] continues to govern the admissibility of postwarning statements." Williams, 435 F.3d at 1158. Elstad holds that postwarning statements are admissible if voluntary. Elstad, 470 U.S. at 318.

deliberately withheld Miranda warnings from a suspect in order to obtain a confession").

But trial courts need not look to the subjective intent of the interrogator. Hickman, 157 Wn. App. at 775. Instead, the Williams court determined that the Seibert test requires trial courts to consider whether objective evidence (as well as any available subjective evidence) supports an inference that the two-step interrogation procedure was used to undermine the Miranda warning. Hickman, 157 Wn. App. at 775. Such objective evidence includes "'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.'" Id. (quoting Williams, 435 F.3d at 1158-59.

Several factors weigh in favor of Wences's argument that a deliberate, two-step interrogation process took place here. Officer Bosman was the only interrogator involved. The continuity of police personnel weighs in favor of a deliberate, two step strategy being employed.

The overlapping content of the pre-warning and post-warning statement also supports Wences's argument. Wences's pre-warning statements acknowledging the presence of drugs, in particular, "[i]ce," overlaps with his post-warning statements admitting to dealing drugs. The

overlapping content of Wences's two confessions is evidence of "the temptations for abuse inherent in the two-step technique." Seibert, 542 U.S. at 621 (Kennedy, J., concurring).

The completeness of the pre-warning interrogation further weighs in favor of concluding that a deliberate two-step interrogation process took place here. Although brief, the interrogation was essentially complete once Wences confessed he knew there were drugs in the car and the nature of the drugs. Supp. RP 7. The post-warning interrogation was a reiteration of that central factual admission.

As for the second inquiry, no curative measures support that Wences had a "genuine choice" whether to follow up on his earlier admissions. Williams, 435 F.3d at 1160. Such curative measures may include a significant break in time and place between the pre- and post-Miranda questioning, or an additional warning that the suspect's pre-Miranda warning statements could not be used against him a subsequent criminal prosecution. Williams, 435 F.3d at 1160-61. There was no significant break in time and no additional warning was given that the pre-Miranda warning statements could not be used. Significantly, while Officer Bosman told Wences before the first interrogation that he had a right to remain silent, he did not inform Wences of the significance of that right, namely, the corollary warning that if he talked to police, his

statements would surely be used against him. 1RP 8. As in Seibert, "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." Seibert, 542 U.S. at 616-17 (Souter, J., plurality opinion). Thus, the second inquiry also weighs strongly in favor of suppression. In summary, Wences's statements should have been suppressed as the product of an impermissible, deliberate two-step interrogation process.

The next inquiry is whether the error was harmless beyond a reasonable doubt. When statements obtained in violation of the Fifth Amendment are erroneously admitted, reversal is required unless the error was harmless beyond a reasonable doubt. In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is therefore harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State cannot meet this burden. Wences's inculpatory post-Miranda warning statements were vital to the State's claims that possession occurred "[w]ith the intent to manufacture or deliver." CP 41 (to-convict instruction). In closing, the State relied heavily on Wences's post-Miranda warning admission that he sold "dope" and his admission that he was not a user of methamphetamine to argue that it had established the requisite intent. 3RP 59. Again, these admissions flowed directly from the earlier interrogation.

Prejudice is presumed. Reversal and remand for a new trial is required because the State cannot show beyond a reasonable doubt that Wences's admissions could not have possibly influenced the jury and contributed to the guilty verdict.

2. WHERE THE JURY'S VERDICT AUTHORIZED ONLY A DEADLY WEAPON ENHANCEMENT, THE SENTENCING COURT VIOLATED WENCES'S RIGHT TO A JURY TRIAL BY SENTENCING HIM TO A TERM CORRESPONDING TO A FIREARM ENHANCEMENT.

"The right of trial by jury shall remain inviolate. . . ." Const. art. I, sec. 21. Under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22[12] of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury' s verdict. State v. Williams-Walker, 167 Wn.2d 889, 895, 225 P.3d 913 (2010)

"Other than the fact of a prior conviction, 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 v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In Blakely v. Washington, the Court clarified this rule, holding

[12] Article 1, section 22 provides that:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

"that the 'statutory maximum' [in this context] 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.*" 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original).

Even before the Court decided Apprendi, Washington provided similar protections. In State v. Frazier, the Supreme Court held:

> Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

81 Wn.2d 628, 633, 503 P.2d 1073 (1972). The failure to submit a sentencing factor to a jury thus violates the right of an accused to a jury trial under both the federal and state constitutions. Williams-Walker, 167 Wn.2d at 899.

Under former RCW 9.94A.510(3)(b) (2001), currently codified at RCW 9.94A.533, a court is directed to impose an additional three years to the sentence of any offender who was armed with a firearm during the commission of a class B felony or a crime with a statutory maximum sentence of ten years. Possession of methamphetamine with intent to deliver or manufacture is such a crime. Former RCW 69.50.401(a)(1)(ii)

(1998) (identifying statutory maximum as 10 years).[13] For an offender armed with a deadly weapon, the court is directed to impose one additional year of incarceration. Former RCW 9.94A.510(4)(b).

In Williams-Walker, the Court held that, in the case of a class A felony

> Where a jury finds by special verdict that a defendant used a "deadly weapon" in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a two-year "deadly weapon" enhancement is authorized, not the more severe five-year firearm enhancement. When the jury makes a finding on the lesser enhancement, the sentencing judge is bound by the jury's determination.

Id. at 897-98.

Here, as in Williams-Walker, the jury's verdict authorized a deadly weapon enhancement only. CP 30. Thus, the jury's verdict authorized a single year, not a three year, enhancement in addition to Wences's 64-month base sentence.

For purposes of sentence enhancement, the sentencing court is bound by the jury's special verdict findings. A court's disregard of the sentence enhancement authorized by the special verdict violates the right of the accused to a jury trial. Williams-Walker, 167 Wn.2d at 897. Wences's sentence, which includes the unauthorized firearm

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[13] The crime was not designated a class B felony until 2004. Laws of 2003, ch. 53, § 331 (eff. July 1, 2004).

enhancement, therefore violates his constitutional rights. Remand for sentencing is therefore required. Id. at 903.

D. CONCLUSION

The admission of Wences's post-Miranda warning statements violated his constitutional rights, and the error was not harmless beyond a reasonable doubt. This Court should therefore reverse the conviction. In any event, this Court should remand for resentencing because the jury's verdict authorized only a deadly weapon enhancement.

DATED this 13TH day of November, 2015.

Respectfully submitted,

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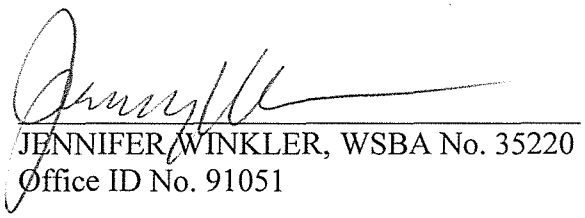

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