No. 33247-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SHANE DEWEBER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Reversal is required because the trial court impermissibly engaged in fact-finding in order to impose the exceptional sentence against Mr. Deweber.

a. *Blakely* prohibited the trial court from engaging in fact-finding in order to correct the error in the special verdict form and impose an exceptional sentence.

The State concedes that in order to impose an exceptional sentence against Mr. Deweber the trial court was required to engage in fact-finding. Resp. Br. at 7-8. However, it argues that if this Court determines the trial court's factual findings were supported by "substantial evidence," it should affirm. Resp. Br. at 8.

The State's argument is contrary to established law. Following the requirements established in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), our supreme court has repeatedly held that the trial court may not engage in fact-finding in order to impose an exceptional sentence against a defendant. *See State v. Suleiman*, 158 Wn.2d 280, 294, 143 P.3d 795 (2006); *State v. Hager*, 158 Wn.2d 369, 374, 144 P.3d 298 (2006); *In re Personal Restraint of Beito*, 167 Wn.2d 497, 505-06, 220 P.3d 489 (2009).

The sole case upon which the State relies, *State v. Clarke*, is inapposite. 156 Wn.2d 880, 134 P.3d 188 (2006). In *Clarke*, our supreme court found there was no *Blakely* violation where the trial court imposed the required maximum life sentence, and engaged in fact-finding to impose an exceptional *minimum* term. *Clarke*, 156 Wn.2d at 886. Because the relevant statutory maximum for *Apprendi* purposes was life in prison, and the defendant was not entitled to an earlier release, the exceptional minimum sentence he received was irrelevant under a *Blakely* analysis. *Clarke*, 156 Wn.2d at 890-91. In contrast, Mr. Deweber received a sentence that exceeded the standard range. CP 183, 186. The analysis in *Clarke* does not apply here.

In addition, the State wrongly claims, once again relying on *Clarke*, that this Court should apply the "clearly erroneous" standard to affirm. Resp. Br. at 7. However, our supreme court has explained that this standard is appropriate only when reviewing the "*legal conclusion* of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." *Suleiman*, 158 Wn.2d at 290-91 (emphasis added); Resp. Br. at 7. As the State repeatedly acknowledges, whether an aggravating factor is supported by the record is a factual question, not a legal one. Resp. Br. at 7-8; *Suleiman*, 158

Wn.2d at 290-91. Thus, the "clearly erroneous" standard is inapplicable here.

b. Because the special verdict form does not demonstrate the jury made the necessary factual findings, reversal is required.

The question is not, as the State claims, whether the record supports a finding that Mr. Deweber knew the victims were law enforcement officers. Resp. Br. at 7. Instead, the question is whether the jury made the factual findings necessary under *Blakely* to allow the court to impose an exceptional sentence against Mr. Deweber. Here, the special verdict form indicates it did not.

Although the jury was properly instructed on the aggravator, the State incorrectly asked the jury to make only two of the three required factual findings in the special verdict form. RCW 9.94A.535(3)(v); CP 150-51, 117-18, 223, 226. The State argues, without citation to authority, that the jury must be presumed to follow the court's instructions, and the trial court was therefore correct to assume the jury made the third finding because it was listed in the instructions. Resp. Br. at 10.

However, this Court has held that an error in a special verdict form requires reversal where the trial court fails to instruct the jury on

all of the essential elements of the special verdict. *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015) (citing *State v. Mills*, 154 Wn.2d 1, 9, 109 P.3d 415 (2005) and reversing where a special verdict form improperly asked the jury if a delivery of methamphetamine occurred within 1,000 feet of a school bus route, rather than a school bus route *stop*). Here, had the special verdict form simply asked the jurors if they found the aggravator, without reference to any of the three findings, then it could be presumed the jury answered the question based on the accurate instructions. But instead the special verdict form asked the jury a specific question about only two of the three required elements, and the jury answered it. Because the question was missing one of the elements, the trial court was required to engage in additional fact-finding to impose the exceptional sentence.

Indeed, the State does not dispute that the trial court corrected the error in the special verdict form by engaging in fact-finding. *See* Resp. Br. at 7; CP 191. This was impermissible under *Blakely*, 542 U.S. at 303. *See also Suleiman*, 158 Wn.2d at 293. As the State also concedes, a harmless error analysis is inappropriate when the court commits this error. Resp. Br. at 9; *State v. Williams-Walker*, 167 Wn.2d 889, 902, 225 P.3d 913 (2010). Reversal is required.

2. The trial court erred when it denied Mr. Deweber's request for a third degree assault instruction based on its finding that a vehicle is a deadly weapon as a matter of law.

The trial court erred when it found that a vehicle is a deadly weapon as a matter of law. RCW 9A.04.110(6); 1/29/15 RP 444. As explained in Mr. Deweber's opening brief, a rational jury could have found Mr. Deweber intended to commit assault, but that when he drove into the unoccupied police vehicles, his truck was not "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); Op. Br. at 18-20. Thus, reversal of Mr. Deweber's convictions is required because the trial court erred when it denied his request for the lesser degree instruction of assault in the third degree.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Deweber's conviction.

DATED this 16th day of June, 2016.

Respectfully submitted,

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v.	)	NO. 33247-1-III
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SHANE DEWEBER,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JUNE, 2016, 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]	TERRY BLOOR [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JUNE, 2016.

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