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SUPREME COURT

**FILED**  
**Mar 13, 2017**  
Court of Appeals  
Division III  
State of Washington

No. 33247-1-III

94254.4

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**THE STATE OF WASHINGTON,**

**Petitioner**

**v.**

**SHANE KYLE DEWEBER,**

**Respondent**

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**PETITION FOR REVIEW**

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## **I. IDENTITY OF PETITIONER**

The State of Washington, by and through its attorney, Andy Miller, Prosecuting Attorney, and Terry J. Bloor, Deputy Prosecuting Attorney, asks this Court to accept review of the Court of Appeals's decision, as designated in part II of this petition.

## **II. COURT OF APPEALS DECISION**

The State seeks reviews of the decision of the Court of Appeals filed February 14, 2017, vacating the exceptional sentence.

A copy of the decision is attached as Appendix A.

## **III. ISSUES PRESENTED FOR REVIEW**

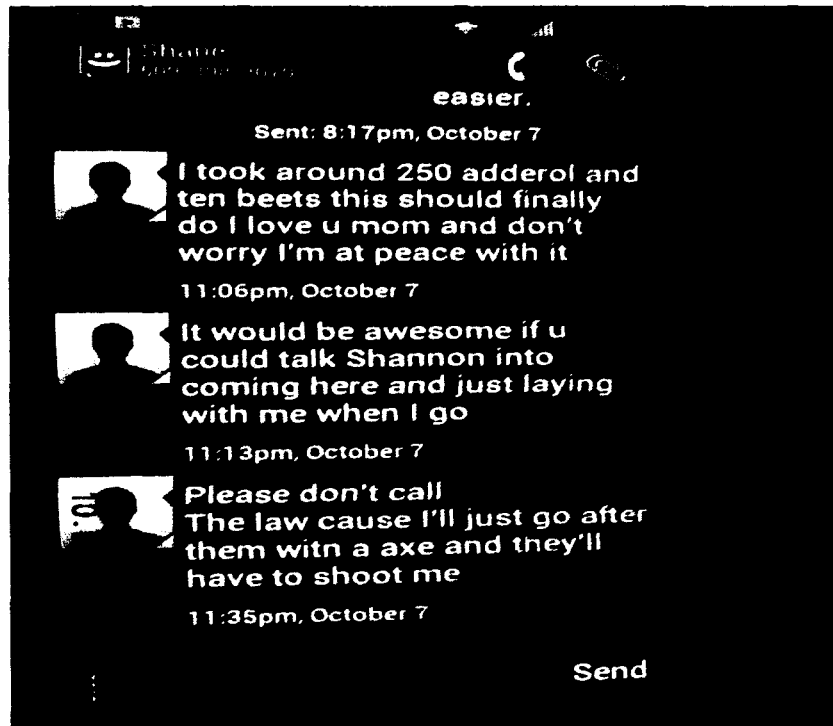
- A. Where the jury is properly instructed on the elements of an aggravating factor but the verdict form does not include all of those elements, is the decision of the Court of Appeals that the sentence should be vacated in conflict with another published decision of the Court of Appeals?
- B. Is the Court of Appeals's decision holding that a harmless error analysis is not applicable in conflict with another published decision of the Court of Appeals or Supreme Court?

#### IV. STATEMENT OF THE CASE

**A. Facts relating to the crime:**

**Prior to collision: The defendant tells his mother that he will assault police officers if they try to intervene.**

The defendant sent the below texts to his mother on October 7, 2013, claiming he was suicidal (RP at 432) and threatening to “go after” the police with an axe or a gun if she called them.



Clerk's Paper No. 14

The defendant testified that he did not remember leaving his residence on this evening. RP at 431. But he did go to the residence of

Shannon Deweber, his estranged wife, as he had the last several nights. RP at 394. She called the police. RP at 396.

**Confrontation with police prior to collision: The defendant consciously chooses to endanger the police and the public.**

The police arrived at Shannon Deweber's residence around 4:18 a.m. RP at 134. The defendant then engaged in the following acts:

- Threatened Deputies Jech and Ramos with a sword. RP at 115-16.
- Told them they were "not going to shoot him with that . . . pussy Taser . . ." RP at 117.
- Successfully negotiated his truck around two patrol cars, to the surprise of the police officers. RP at 121, 138.
- Engaged in a high-speed attempt to out-run the police, including turning off his headlights and swerving from fog line to fog line. RP at 126, 296.

**The collision: The defendant intentionally rammed two patrol cars.**

Thinking that the defendant may make a loop and drive back to Shannon Deweber's residence, Sgt. Mathew Clarke and Kennewick Police Department Officer Elizabeth Grant parked their patrol cars in a cutout on a roadway near Ms. Deweber's residence. RP at 182-83, 212. Clerk's

**Paper Number 35 shows this cutout. Officer Grant was parked directly behind Sgt. Clarke. RP at 182. The patrol cars were not at an angle. RP at 198.**



**Clerk's Paper No. 35**

**Both patrol cars had their emergency overhead lights on. RP at 183, 214. Sgt. Clarke also had his headlights on. RP at 183. The area was well-lit by the patrol car overhead lights. RP at 171.**

**Both police officers heard the defendant accelerate. RP at 185, 213. Sgt. Clarke saw the defendant swerve straight at the patrol cars. RP at 188. Officer Grant saw the defendant swerving directly toward them. RP at 213. The defendant's truck was coming directly where both of them**

were parked and where they had been standing. RP at 213. The officers ran, missing the collision by 10-15 feet. RP at 214-15. They both felt debris from the collision hit them as they were running. RP at 203, 215. Both are experienced patrol officers—Sgt. Clarke has been with the Benton County Sheriff's Office since 2003, and Officer Grant had been a patrol officer with the Kennewick Police Department for about five and one-half years. RP at 173, 209. They were familiar with an intoxicated driver who may drift into oncoming traffic. RP at 226. The defendant's action was a deliberate swerve, not a drift caused by intoxication. RP at 226.

A witness, Brian Stockman, was up at this hour and wrote that the defendant's truck deliberately swerved into the patrol cars. RP at 161, 165. He noted that there was no curve in the road and that there was no reason to swerve into the police cars, barring some equipment failure. RP at 165, 167.

As a result of the collision, Sgt. Clarke's patrol car ended up on top of Officer Grant's patrol car. CP 42; RP at 190. Officer Grant believed that there was no chance Sgt. Clarke would have survived the collision if he had been hit. RP at 221. Sgt. Clarke concurred, saying there was no way anyone inside his patrol car would have survived the collision. RP at



196. The collision was worse than that seen in fatality collisions. RP at 215.



Clerk's Paper No. 42

**After the collision:** The defendant makes suicidal statements, but still threatens the police.

The defendant screamed at the police, "[K]ill me," after the collision. RP at 193. However, he still would not listen to commands and ran at Sgt. Clarke. RP at 193. The defendant collapsed after Deputy Gerry hit him with a Taser. RP at 302.

**The verdicts:**

The defendant was found guilty of Assault in the Second Degree against Sgt. Clarke in Count I, Assault in the Second Degree against Officer Grant in Count II, and Attempting to Elude a Pursuing Police Vehicle in Count III. CP 146, 148-49. The jury also found that the “law enforcement victim” aggravating factor applied in Counts I and II. App. B – Special Verdict Forms, CP 150-51.

**B. Procedural facts relating to jury verdict allowing an exceptional sentence:**

Pursuant to RCW 9.94A.535(3)(v), the jury was instructed that if there were guilty verdicts of Assault in the First or Second Degree, they must “determine if the following aggravating circumstance exists: Whether the crime was committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and the defendant knew the victim was a law enforcement officer.” App. C – Jury Instruction 22, CP 118; CP 137.

The jury answered “yes” to the following special verdict forms:

**QUESTION:** Was the crime of Assault in the First Degree as charged in Count I [or Count II in CP 151] or the lesser crime of Assault in the Second Degree, regarding Mathew D. Clarke [or Elizabeth K. Grant in CP 151], committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

**ANSWER:** Yes.

App. B – Special Verdict Forms, CP 150-51.

The trial court entered Findings of Fact and Conclusions of Law on  
Exceptional Sentence, finding:

The jury by special verdict has found that Counts I and II, both Assault in the Second Degree, were committed against a law enforcement officer who was performing his or her official duties at the time of the offenses and that the defendant knew the victims were law enforcement officers.

App. D – Findings of Fact, CP 191. The court imposed an exceptional sentence of 86 months. *Id.*

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The jury was correctly instructed on the elements of the “law enforcement victim” aggravating factor. The majority’s decision that the verdict form also had to include those elements is contrary to prior case law. Further, the majority’s holding that “harmless error” analysis did not apply is not applicable in this scenario and is contrary to other case law. The defendant was talking about harming the police or committing suicide-by-cop before and after he drove off the roadway and directly into two police vehicles. Using a “harmless error” analysis, the exceptional sentence should be affirmed.

- A. The Court of Appeals’s decision that the special verdict form must contain all elements of an aggravating factor, even if the jury was correctly instructed on the aggravating factor, is contrary to established case law.**

The dissent correctly cited several cases in which an instruction regarding the elements for a special verdict and the special verdict form

did not match. The key is whether in considering the instructions in their entirety they 1) permit each party to argue his theory of the case; 2) are not misleading; and 3) when read as a whole, properly inform the jury of the applicable law. *Capers v. Bon Marche*, 91 Wn. App. 138, 142, 955 P.2d 822 (1998).

In *Capers*, an employment termination case, the jury was correctly instructed regarding a special verdict form on whether race was a “substantial factor” in the termination. However, the special verdict form omitted the requirement that race was a “substantial factor” in the termination. The court held that a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction. But, the special verdict form cannot contain inconsistent or contradictory language.

In accord is *Hue v. Farmboy Spray Co. Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995), which regarded damages to farmlands from the drift of pesticides. The jury was instructed that the plaintiffs had to prove that a particular defendant applied the pesticides at issue, a portion of an application drifted and entered Badger Canyon, and “the off target drift of the pesticides was a proximate cause of damage to an individual . . . plaintiff’s property or crops within a particular year.” *Hue*, 127 Wn.2d at 91-92. However, the special verdict question asked, “Do you find that any

individual aerial application of any pesticide(s) by Farmboy during the period 1986 to 1989 inclusive was a proximate cause of loss or damage to any one or more of the plaintiffs?" *Id.* at 90.

The plaintiff's theory was that there was a long distance drift of a cloud of pesticides formed from many individual applications, rather than any individual application. *Id.* at 92. However, the court concluded that the special verdict did not mislead the jury or contain a clear misstatement of the law.

This case has the same fact pattern. The jury was correctly instructed on the elements of the special verdict. The defendant could argue his theory of the case. There was nothing misleading about the instruction regarding the special verdict and the special verdict form when read together.

The State respectfully argues that the Court of Appeals's decision is not consistent with the *Capers* and *Hue* line of cases.

**B. The rejection of the harmless error analysis is contrary to established case law.**

As pointed out by the dissenting opinion, *State v. Fehr*, 185 Wn. App. 505, 341 P.3d 363 (2015), provides a helpful discussion on special verdicts and using a harmless error analysis. In *Fehr*, the defendant was convicted of three counts of delivery of methamphetamine. 185 Wn. App.

at 508. She was charged with a sentencing enhancement of delivering the methamphetamine within 1000 feet of a school bus stop. *Id.* However, the special verdict asked if the deliveries occurred within 1000 feet of a school bus route, rather than school bus stop. *Id.* at 509.

The *Fehr* court held that this misstated the law by relieving the State of its burden to prove the essential elements of the special verdict. *Id.* at 516. Using the above criteria for analyzing jury instructions (permit each party to argue their theory, not misleading, and properly inform the jury of the applicable law), the special verdict form failed because it was not an accurate statement of the law. Indeed, there is no sentencing enhancement for delivering drugs within 1000 feet of a school bus route.

If an instruction relieves the State of proving an element of an offense, or enhancement, the instruction is in error and the verdict is subject to automatic reversal. *Id.* at 514. However, *Fehr* held that a special verdict form is reviewed under the same standards applied to decisions regarding jury instructions. *Id.* If automatic reversal is not required—where the jury instructions meet the requirements of allowing each party to argue their case, are not misleading, and inform the jury of the applicable law—the claimed error is subject to a harmless error analysis. *Id.*

A close reading of *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010), also supports the position that a harmless error analysis applies in this case. That court held that a *Blakely*<sup>1</sup> error may, under certain circumstances, be subject to a harmless error analysis. *Williams-Walker*, 167 Wn.2d at 900. However, in that case, the jury instructions were correct. Although a “firearm enhancement” was alleged, the trial court instructed the jury on a “deadly weapon enhancement.” *Id.* at 898. Those instructions properly set forth the law for a deadly weapon enhancement and were not misleading. The *Williams-Walker* court held that harmless error did not apply because the sentencing judge was in error, not the jury instructions.

The dissenting opinion herein is correct that a harmless error analysis should have been used; the majority’s rejection of the harmless error analysis is contrary to established case law.

Under a harmless error analysis, the exceptional sentence should be affirmed. The only dispute is whether the defendant knew the victims were law enforcement officers. The jury should be assumed to follow the instructions in *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), which required the jurors to answer “yes” to the special verdict only if they determined the defendant had that knowledge. It was not an accident

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

that the defendant veered off the roadway into two police cars with flashing lights. The defendant had been talking about harming the police or committing suicide-by-cop before and after the collision.

The trial court's Finding that the jury verdict included a decision that the defendant knew the victims were police officers is supported by the evidence. The jury was correctly instructed and would not have returned that verdict unless they were convinced of that element.

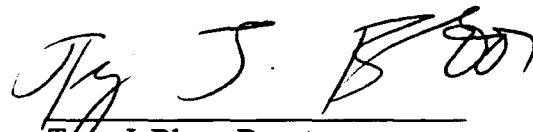
The State respectfully argues that the Court of Appeals misread the case law regarding a harmless error analysis and that its decision reversing the exceptional sentence is in error.

## VI. CONCLUSION

The State requests that this Court grant the State's Petition for Review.

**RESPECTFULLY SUBMITTED** this 13th day of March, 2017.

**ANDY MILLER**  
Prosecutor



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Terry J. Bloor, Deputy  
Prosecuting Attorney  
Attorney for Petitioner  
Bar No. 9044  
OFC ID NO. 91004



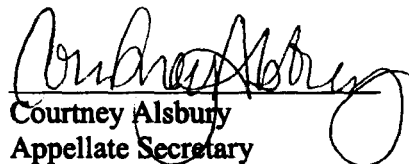
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Kathleen Shea  
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E-mail service by agreement  
was made to the following parties:  
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Signed at Kennewick, Washington on March 13, 2017.

  
Courtney Alsbury  
Appellate Secretary

APPENDIX A

Opinion Filed in *State v. Deweber*, Court of  
Appeals Number 33247-1-III, on February 14,  
2017

**FILED**  
**FEBRUARY 14, 2017**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33247-1-III
Respondent,	)	
	)	
v.	)	
	)	
SHANE KYLE DEWEBER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Following a jury trial, Shane Deweber was convicted of two counts of second degree assault and one count of attempting to elude a pursuing police vehicle. He contends his right to a jury trial was violated when the trial judge imposed an exceptional aggravated sentence that was not supported by a factual finding by the jury, and the trial court erred when it denied his request for a jury instruction on third degree assault. We affirm the convictions, but because the court committed *Blakely*<sup>1</sup> error, we vacate the exceptional sentence and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

After Mr. Deweber separated from his wife he became depressed and suicidal. On October 7, 2013, he learned his wife had started seeing someone else. Distraught, he purchased beer and began drinking. After an upsetting phone call with his wife, Mr.

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

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Deweber consumed hundreds of Adderall<sup>2</sup> pills along with more beer. While he claims no memory of the following events, he admits he wanted to commit suicide that night.

Between 11:06 and 11:35 p.m., Mr. Deweber sent text messages to his mother, two of which stated:

“I took around 250 Adderall and 10 beers. This should finally do it—this should finally do. I love you, mom, and don’t worry, I’m at peace with it.”

...  
... “Please don’t call the law because I’ll go after them with an ax and they’ll have to shoot me.”

Report of Proceedings (RP)<sup>3</sup> at 267.

Several hours later, Mr. Deweber drove his pickup truck to the recreational vehicle (RV) where his wife was living and started banging on her RV, telling her he “just wanted to talk.” RP at 394. Ms. Deweber later testified that her husband was not himself, was “twitching and jerking,” was running his hands up and down the RV, and at one point, started licking the RV’s windows. RP at 393. She called police.

Deputies Jerrad Jech and Michael Ramos were the first to respond to her call. Upon arriving, they got out of their vehicle and Mr. Deweber came toward them,

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<sup>2</sup> Adderall is a medication used to treat attention-deficit/hyperactivity disorder (ADHD). See <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111441.htm> (last visited February 9, 2017).

<sup>3</sup> All references to the report of proceedings are to the four volume report that begins with a status hearing on August 7, 2014, and continues through trial and the return of the jury’s verdict.

behaving strangely. Deputy Jech ordered Mr. Deweber to show his hands, which he failed to do. Instead, he reached inside the nearby passenger side door of his pickup truck and pulled out what Deputy Jech would later describe as a Samurai sword, which Mr. Deweber swung up over his head, sending its sheath flying. He took a couple of steps towards the officers with the sword raised and tried to coax them into shooting him. A standoff ensued as Deputies Jech and Ramos waited for additional officers to respond so they would be better able to subdue Mr. Deweber.

Mr. Deweber then began to back off and the two deputies repositioned. At that point, Mr. Deweber suddenly ran around to the driver's side of his truck, got in, managed to navigate around their vehicle and a second police vehicle that was arriving, and drove away.

Officers followed Mr. Deweber but terminated the chase when it became a danger to the public. Mr. Deweber, traveling at high speed, had turned off his vehicle lights and was traveling mostly, and seemingly intentionally, in oncoming lanes of traffic.

Thinking Mr. Deweber might return to his wife's RV, Supervising Patrol Sergeant Mathew Clarke and Kennewick Police Officer Elizabeth Grant traveled to the vicinity of Ms. Deweber's RV and positioned themselves along the route they expected Mr. Deweber to follow if he returned. They pulled off the highway onto a gravel cut out. One patrol car was parked behind the other, and overhead lights were illuminated on both.

Mr. Deweber did return just as Sergeant Clarke was getting his spike strips undone and ready to deploy. As Mr. Deweber's pickup truck approached, the officers heard it revving and accelerating. Realizing that "something wasn't right," Sergeant Clarke told Officer Grant to run, and both fled from their vehicles. RP at 185. This proved prudent, since Mr. Deweber swerved toward and drove into the police vehicles at high speed, causing one to flip over and land on top of the other. To the astonishment of Sergeant Clarke and Officer Grant, who expected Mr. Deweber to be badly injured, he jumped out of the passenger side window of his truck and although bloodied, ran toward them, screaming, "[J]ust fucking shoot me." RP at 218. After several taser deployments, officers on the scene were able to immobilize and detain him.

Mr. Deweber was eventually charged with two counts of assault in the first degree and with attempting to elude a pursuing police vehicle. The assault charges included an allegation that he used a deadly weapon—his vehicle<sup>4</sup>—and a special allegation that the victims were members of law enforcement.

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<sup>4</sup> The Washington Criminal Code, Title 9A RCW, defines "deadly weapon" to include vehicles:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, 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.

RCW 9A.04.110(6) (2011).

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At trial, the court instructed the jury on first degree assault and the lesser degree crime of second degree assault, but refused a defense request to instruct the jury on third degree assault. Unlike first and second degree assault, third degree assault does not include any method that involves use of a deadly weapon. As the trial court explained, “[F]or the jury to find the defendant guilty of only Assault in the Third Degree, they would have to find, beyond a reasonable doubt, that the defendant assaults the officers but did not use a deadly weapon. I don’t think there is substantive evidence to support that. . . . [I]f in fact he did commit the assault at all, I don’t think a jury could find that he committed assault but did not use a deadly weapon.” RP at 444.

On the issue of the law enforcement victim aggravator, the jury was instructed that if it found Mr. Deweber guilty of assault in the first or second degree, it “must determine if the following aggravating circumstance exists:

Whether the crime was committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and the defendant knew the victim was a law enforcement officer.

Clerk’s Papers (CP) at 118 (Jury Instruction 22).

Jurors were given special verdict forms to complete with their determination about the law enforcement victim aggravator; both special verdict forms asked, for the respective assault count:

Was the crime . . . committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

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CP at 150-51. Thus worded, the special verdict forms omitted the required statutory element that a defendant knows the victim to be a law enforcement officer.

The jury found Mr. Deweber guilty of eluding a police vehicle and of both counts of second degree assault, and answered yes to both law enforcement victim special verdict forms.

At sentencing, defense counsel objected to the imposition of an exceptional sentence based on the law enforcement victim aggravator, arguing that because the special verdict forms framed the question for the jury in terms of some, but not all of the elements of the aggravator (omitting the requirement that Mr. Deweber knew the victims were law enforcement officers) the jury did not find every element of the aggravator. But the trial court was persuaded by the State that the jury instructions correctly stated the elements of the aggravator. It imposed an exceptional sentence of 86 months of confinement. It entered findings that the jury had found (along with other required elements of the aggravator) that "the defendant knew the victims were law enforcement officers," that the jury's special verdict was supported by substantial evidence, and that the standard range for the crimes was clearly too lenient in light of the purposes of the Sentencing Reform Act of 1981, ch. 9.94A RCW. CP at 191. Mr. Deweber appeals.



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## ANALYSIS

### *Exceptional sentence*

Mr. Deweber contends the trial court imposed an exceptional sentence based on an aggravator all of whose elements were not found by the jury, in violation of his constitutional right to a jury trial.

Under the Sixth Amendment to the United States Constitution, which includes the jury trial guarantee for criminal defendants, any fact “[o]ther than . . . a prior conviction . . . 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). “[T]he ‘statutory maximum’ for *Apprendi* purposes 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.*” *Blakely*, 542 U.S. at 303. Washington law, applying article I, sections 21 and 22 of the Washington Constitution, is in accord. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (citing *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)). If a jury “has not found all the facts” the law makes necessary to impose the punishment, a judge exceeds his authority by inflicting a “punishment that the jury’s verdict alone does not allow.” *Blakely*, 542 U.S. at 304.

As earlier recounted, both special verdict forms addressing the law enforcement aggravator put a straightforward question to the jury:

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Was the crime . . . committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

CP at 150-51. As the appellant points out, “[H]ad the special verdict form simply asked the jurors if they found the aggravator, without reference to any of the three findings [that must support the aggravator], then it could be presumed the jury answered the question based on the accurate instructions.” Reply Br. at 4.<sup>5</sup> Instead, the verdict form asked for and secured the jury’s findings on only two of the three elements. In order to impose the aggravator the trial court had to find, or infer that the jury found, the third element.

The State argues that because the jury’s instruction 22 identified all elements of the aggravator whose existence (or not) the jury was asked to determine, the trial court could legitimately infer that in answering “yes” to the special verdict forms, the jury found all the elements included in the instruction—not just the incomplete elements included in the verdict forms. To begin with, the trial court could not draw that inference. The jury was given 22 instructions, which covered 28 pages. It was asked to complete only 6, single page verdict forms, each of which posed straightforward

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<sup>5</sup> Here and elsewhere, Mr. Deweber’s briefing belies the dissent’s “straw man” argument that Mr. Deweber contends special verdict forms must recite the elements of an offense or aggravator. In Mr. Deweber’s opening brief, he pointed out that in the trial court, the State mischaracterized his position in this fashion, “fail[ing] to address the issue raised by Mr. Deweber.” Br. of Appellant at 11-12. Mr. Deweber contends only that if the court *chooses* to frame the question in a special verdict form by asking about elements, it must ask about all the elements, since the trial court cannot make its own finding on an omitted element or infer a jury finding of that element.

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questions for jurors to answer. Presumably, they answered the questions posed.

Moreover, the fact that the court was required to draw an inference at all about what the jury had in mind, going beyond the question it was asked, is fatal to the State's defense of the exceptional sentence. In *Williams-Walker*, our Supreme Court held that under a state constitutional analysis, *Blakely* error is never harmless. 167 Wn.2d at 900-02. "Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings." *Id.* at 901-02. The fact that substantial evidence would support a finding that Mr. Deweber knew the victims to be law enforcement officers is irrelevant, because Mr. Deweber has not assigned error to the jury's verdicts but only to the court's imposition of an exceptional sentence that is unsupported by a sufficient jury finding.

The exceptional sentence must be vacated and Mr. Deweber resentenced.

*Refusal to instruct on third degree assault*

Mr. Deweber also contends the trial court erred when it denied his request for an instruction on the lesser degree offense of assault in the third degree. A defendant is entitled to a lesser degree offense instruction if

(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

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*State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The first two factors are the legal components of the test, while the third factor entails a factual inquiry. *Id.* at 454-55.

Only the factual component of the test for giving a lesser degree instruction was disputed in the trial court. To satisfy the factual component, “the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Id.* at 455. Accordingly, a trial court should give an instruction on a lesser degree offense “‘[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.’” *Id.* at 456 (alteration in original) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

“When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *Id.* at 455-56. “[T]he evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Id.* at 456.

The method of first degree assault with which Mr. Deweber was charged was that provided by RCW 9A.36.011(1)(a): intentional assault with a deadly weapon, likely to produce great bodily harm or death. The method of second degree assault on which the

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jury was instructed as an alternative was that provided by RCW 9A.36.021(1)(c): assault with a deadly weapon not amounting to assault in the first degree.

By contrast, a person is guilty of the method of third degree assault urged by Mr. Deweber as applying if he or she,

under circumstances not amounting to assault in the first or second degree:

....  
(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(g) (2013).

Mr. Deweber argues that if the jury concluded his pickup truck struck the police vehicles under circumstances in which the truck was not readily capable of causing death or substantial bodily harm, then it could find him guilty of third degree assault but acquit him of first and second degree assault. But the evidence as to the truck's capacity to cause harm consisted of the pictures of the vehicles; the testimony of many witnesses to Mr. Deweber's suicidal behavior; the testimony of a psychologist, testifying for the defense, that Mr. Deweber intended to cause great bodily injury to himself; the testimony of multiple officers as to high speeds driven that night by Mr. Deweber; the testimony that he accelerated before striking the police vehicles; the testimony of a nearby resident who saw the collision and estimated the speed of the pickup truck as at "[a]t least a hundred or more"; Sergeant Clarke's testimony that immediately after the collision he notified dispatch that he estimated the pickup truck's speed on impact at over a hundred

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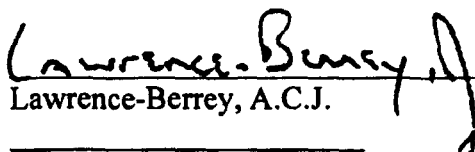
miles per hour; his testimony that having looked at his patrol car several times, it was his opinion that “there is no possible way anybody would have survived inside of my vehicle”; and Officer Grant’s testimony that the damage to the police vehicles was much worse than damage to vehicles involved in fatal accidents to which she had responded as a patrol officer and, while she might have survived the impact, “there is no way that Sergeant Clarke would have.” RP at 164, 196, 221. There was no affirmative evidence suggesting that Mr. Deweber’s truck struck the police vehicles in circumstances in which it was *not* readily capable of causing death or substantial bodily harm. The trial court did not err in refusing to instruct the jury on third degree assault.

We affirm the convictions and remand for resentencing.<sup>6</sup>

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Siddoway, J.

I CONCUR:

  
Lawrence-Berrey, A.C.J.

<sup>6</sup> A postargument motion by Mr. Deweber to deny appellate costs if the State substantially prevailed on appeal was referred to the panel for decision. Given Mr. Deweber’s successful challenge to the exceptional sentence, the issue is moot.

33247-1-III

KORSMO, J. (dissenting) — Labeling something a *Blakely*<sup>1</sup> error does not automatically make it so, let alone render it immune to harmless error analysis. This is a case in point. Appellant’s argument assumes that a *Blakely* error occurred without proving such was the case. Appellant points to no relevant authority suggesting that an allegedly erroneously worded verdict form constitutes *Blakely* error. But even if this were a *Blakely* error, it is absolutely harmless beyond a reasonable doubt because the jury was instructed on the “elements” of the question it had to answer and responded with a positive answer. The special verdict was found by the jury, distinguishing this case from that relied on by the majority. This case involves nothing more than run-of-the-mill instructional error in the context of the verdict form.

There is no requirement that a verdict form, even a special verdict form, recite all of the elements of the offense or special verdict. Typically a verdict form would state something along these lines: “We the jury find the defendant, John Doe, \_\_\_\_\_ [guilty or not guilty] of the crime of XX as charged in count I.” WPIC 180.01. The elements are

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

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not recited or discussed in the least. There is no authority I am aware of labeling this form as defective under *Blakely* because of the absence of the elements from the verdict. Similarly, most special verdicts forms simply recite the question to be answered: "Was the defendant armed with a deadly weapon at the time of the commission of the crime in count I? \_\_\_ (Yes or No)." WPIC 190.01. Again, the elements of the deadly weapon finding are not stated in the verdict form.

In some civil actions, and less often in criminal cases, the jury is asked to answer one or more questions. These inquiries are of varying complexity depending on the issues at hand and/or the creativity of the bench and bar. One example from the criminal side can be found in the capital sentencing statute where the legislature has propounded a detailed question for the jury to resolve. RCW 10.95.060(4). In some instances, the special verdict form recommended by the pattern form committee does consist of a question that includes the "elements" of the special verdict. *E.g.*, WPIC 36.09 (verdict distinguishing misdemeanor from felony harassment). However, no authority has been cited that requires this approach. Typically, element-inspired special verdicts are reserved for unusual circumstances such as harassment where an additional finding, somewhat overlapping the elements of the crime, defines the degree of the offense that the jury has just found. This helps avoid jury confusion.

As important here, however, nothing in our case law requires that the special verdict form set forth the underlying elements of the special verdict. As long as the jury



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was properly instructed on the elements—as was done in this case—the verdict form need only assure that the jury is returning a verdict on the question presented to them. An apt description is all that is necessary so that the jury’s determination concerning the aggravating factor as to each officer was understood by the court. Here, however, the verdict form reflects an answer to an incomplete interrogatory.

While certainly a plausible argument could be made that the special verdict conflicted with the definitional instruction, appellant does not pursue that theory. Instead, he likens this case to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), contending that the jury actually failed to find a necessary fact. The majority agrees, relying on the decision in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). That case is factually inapposite. There the jury returned a verdict finding that the defendants had used a deadly weapon rather than answering the enhancement charged and submitted to the jury—did the defendant use a firearm? *Id.* at 893-894. The trial court in each instance imposed a firearm enhancement. *Id.* The court reversed the findings, concluding that a judge could not make findings that a jury had not made. *Id.* at 898-899. Such a practice would render the statutory requirement of a jury finding meaningless. *Id.* at 899.

Critical to the court’s analysis was the fact that a deadly weapon finding was also authorized by statute, although none had been alleged in the consolidated cases in *Williams-Walker*. *Id.* at 897-899. The court concluded that a “sentence enhancement

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must not only be alleged, it also must be authorized by the jury in the form of a special verdict.” *Id.* at 900. The court then turned to the question of harmless error. Since the jury had not returned the special verdict on the charged allegation, the error could never be harmless because the judge imposed a sentence enhancement that was not authorized by the jury’s finding. *Id.* at 900-901.

There is distinction between a finding that was never made because the jury was never asked to respond to the charged enhancement—at issue in *Williams-Walker*—and a finding returned in a verdict form that contained error. Erroneous jury verdict forms are, unfortunately, a recurring problem. When presented with such occurrences, the reviewing court always has considered whether or not the error was harmless. For instance, in a prosecution for attempted possession of marijuana with intent to manufacture or deliver, the verdict form omitted the word “attempted.” *State v. Imhoff*, 78 Wn. App. 349, 350, 898 P.2d 852 (1995). On appeal, Division One concluded that the error was harmless because the defendant had been charged with the correct offense and the jury was properly instructed on the elements of attempted possession of marijuana with intent to manufacture or deliver. *Id.* at 350-351.

A case more squarely on point to this action is a civil case, *Capers v. The Bon Marche*, 91 Wn. App. 138, 955 P.2d 822 (1998). There the special verdict form failed to include language dictated by an intervening construction of the Washington Law Against Discrimination issued by the Washington Supreme Court. *Id.* at 142-143. The court

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concluded that, read as a whole, the instructions properly stated the law to the jury. *Id.* at 143. The “instructions were not legally erroneous merely because the special verdict form omitted the ‘substantial factor’ language where its accompanying instruction properly set forth the applicable law.” *Id.* Thus, “a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction.” *Id.* at 144. Nonetheless, the instruction was misleading because it conflicted with the definitional instruction, a problem further complicated by the defense argument. *Id.* at 143-144. A new trial was ordered. *Id.* at 145.

In support of its determination that the special verdict was not legally erroneous despite the missing language required by the intervening decision, *Capers* noted several earlier decisions supporting its view of the governing law. *Id.* at 143; *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 90-93, 896 P.2d 682 (1995) (rejecting argument that special verdict form conflicted with other instructions); *Smith v. Sturm, Ruger & Co.*, 39 Wn. App. 740, 745, 695 P.2d 600 (1985) (rejecting argument that special verdict did not contain all necessary elements since it need not unless it purports to do so).

A third case relied on in *Capers* and in *Smith* is particularly important in setting forth the governing law: *Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 587 P.2d 160 (1978). *Capers*, 91 Wn. App. at 143; *Smith*, 39 Wn. App. 745. There the allegation was that a jury instruction was erroneous and that other instructions should have been given. The court first noted the basic rule governing review of instructional issues—the

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appellate court will only consider arguments raised in the trial court. *Ryder*, 91 Wn.2d at

114. The court then defined the problem at hand:

An erroneous formula instruction has been said to be one that purports to contain all the elements necessary for a verdict for either party, but which neither includes all such elements nor refers to other instructions which do.

*Id.* at 115. *Ryder* then rejected the challenge to the instruction at issue because it did “not purport to summarize all of the issues of the case for the jury.” *Id.*

Similarly here, the special verdict did not purport to be the end-all and be-all instruction concerning the law enforcement victim aggravating factor. That factor was defined for the jury by instruction 22. Thus, the special verdict was not erroneous for the failure to include the entire statutory definition on its form. In combination, the differences between the definition and the special verdict had the possibility of confusing the jury, but Mr. Deweber does not raise that argument and we have no authority to consider it.<sup>2</sup> *Id.* at 114. Accordingly, on this record we have no basis for overturning the special verdict. The jury was properly instructed on the law and the special verdict form did not purport to be the entire law on the subject. We should affirm the special verdict.

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<sup>2</sup> If the issue had been properly preserved and successfully argued in this appeal, the remedy would have been remand for a new trial on the aggravating factor. *See generally, State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

But even if Mr. Deweber had established error, it was of a different variety from that in *Williams-Walker* and, hence, was subject to harmless error analysis.<sup>3</sup> A missing element is subject to harmless error. *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 340-341, 58 P.3d 889 (2002). The error found by the majority is that an element was missing from the verdict form. Therefore, it needs to address *Neder*.

In light of the evidence presented that Mr. Deweber was trying to commit “suicide by cop” when he rammed the patrol vehicles, both of which had overhead lights in operation, during his exceedingly dangerous efforts to provoke a fatal police response, it simply cannot be said that the missing language about knowledge of the officers’ identity was harmful in the least. The fact that patrol cars were driven by police officers is the very reason Mr. Deweber rammed into them in a scene that sounds like it came from a Hollywood movie. The knowledge aspect of the aggravating factor was never in doubt, factually or legally. Since the jury was correctly instructed on what it needed to find and

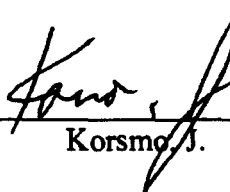
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<sup>3</sup> A case that is closer factually is *State v. Fehr*, 185 Wn. App. 505, 341 P.3d 363 (2015), where the verdict form asked if the crimes had been committed within 1,000 feet of a school bus *route* instead of a school bus route *stop*. However, *Fehr* does not support the defendant here because it does not appear that the jury was ever instructed on the bus stop aggravator. Like *Williams-Walker*, the jury answered a different factual question than was alleged in the charging document. Here, only one aggravating factor was alleged and the jury’s verdict was, at worst, an incomplete answer to the question presented. There is a difference between asking the jury to answer the wrong question (*Williams-Walker* and *Fehr*), and asking the correct question in the wrong manner (this case).

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*State v. Deweber*

the “missing” fact on the special verdict form was not a contested issue, the alleged error was harmless beyond a reasonable doubt.

Accordingly, the judgment and sentence should be affirmed. Since the majority concludes otherwise, I respectfully dissent.

  
\_\_\_\_\_  
Korsmo J.

**APPENDIX B**

**Special Verdict Forms 1 and 2**

JOSIE DELVIN  
BENTON COUNTY CLERK

JAN 30 2015

FILED

*KXS, 1*

IN THE SUPERIOR COURT OF  
STATE OF WASHINGTON FOR BENTON COUNTY

JUDGMENT DOCKET  
NO 15.9.00272.7

STATE OF WASHINGTON, )  
Plaintiff, )  
vs. )  
SHANE KYLE DEWEBER )  
Defendant.)

No. 13-1-01132-1

SPECIAL VERDICT FORM 1

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the crime of Assault in the First Degree as charged in Count I or the lesser crime of Assault in the Second Degree, regarding Mathew D. Clarke, committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: YES (Write "yes" or "no")

DATED this 30<sup>th</sup> day of January 2015.

*[Signature]*  
Presiding Juror



JOSIE DELVIN  
BENTON COUNTY CLERK

JAN 30 2015

FILED *K/1*

IN THE SUPERIOR COURT OF  
STATE OF WASHINGTON FOR BENTON COUNTY

JUDGMENT DOCKET  
NO 15-9-00272-7

STATE OF WASHINGTON, )  
Plaintiff, ) No. 13-1-01132-1  
vs. )  
SPECIAL VERDICT FORM 2  
SHANE KYLE DEWEBER )  
Defendant.)

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the crime of Assault in the First Degree as charged in Count II or the lesser crime of Assault in the Second Degree, regarding Elizabeth K. Grant, committed against a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: Yes (Write "yes" or "no")

DATED this 30<sup>th</sup> day of January 2015.

*[Signature]*  
Presiding Juror

0-000000151

**APPENDIX C**

**Jury Instruction 22**

INSTRUCTION NO. 22

If you find the defendant guilty of Assault in the First Degree as charged in Counts I or II, or the crime of Assault in the Second Degree as a lesser offense of Counts I or II, then you must determine if the following aggravating circumstance exists:

Whether the crime was committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and the defendant knew the victim was a law enforcement officer.

0-000000118

**APPENDIX D**

**Findings of Fact and Conclusions of Law on  
Exceptional Sentence**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SHANE KYLE DEWEBER

Defendant.

NO. 13-1-01132-1

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
EXCEPTIONAL SENTENCE

FINDINGS OF FACT

1. The jury by special verdict has found that Counts I and II, both Assault in the Second Degree, were committed against a law enforcement officer who was performing his or her official duties at the time of the offenses and that the defendant knew the victims were law enforcement officers.
2. The special verdict is supported by substantial evidence. Specifically, Officer Elizabeth Grant and Sgt. Mathew Clarke were the victims in Counts I and II. They were attempting to stop the defendant, who had eluded other police officers in a high speed pursuit. Further, the defendant may have been attempting to contact his estranged wife. Officer Grant and Sgt. Clarke were acting in the interest of the community and were properly performing their duties as law enforcement officers.
3. The standard range of 33-43 months is clearly too lenient in light of the purposes of the Sentencing Reform Act, which include ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense, to promote respect for the law by providing punishment which is just, protecting the public and reducing the risk of reoffending by offenders in the community.

CONCLUSIONS OF LAW

An exceptional sentence of 36 months should be imposed.

March 4, 2015

DATED: ~~February 27, 2015~~

  
Cameron A. Mitchell, Judge  
Cxm

0-000000191