

Supreme Court No. 94254-4  
Court of Appeals No. 33247-1-III

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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ANSWER TO CROSS PETITION FOR REVIEW

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## I. ISSUES PRESENTED

- A. Does the Cross Petition for Review, arguing that the trial court should have allowed the jury to convict the defendant of the lesser charge of Assault in the Third Degree, present an “issue of substantial public interest that should be determined by the Supreme Court”?
- 1) Was the trial court correct in not instructing the jury on Assault in the Third Degree?
  - 2) Is the defendant’s argument that the defendant’s truck could not be a “deadly weapon” for the purposes of Assault in the Second Degree correct?
  - 3) Does this issue involve “a substantial public interest?”

## II. STATEMENT OF FACTS

The State incorporates the “Statement of Facts” made in the Petition for Review.

## III. ARGUMENT

- A. **This Court should not accept review on the issue of whether the trial court correctly did not instruct the jury on Assault in the Third Degree.**
1. **The trial court correctly refused to instruct the jury on Assault in the Third Degree.**

The defendant correctly states the requirements for a trial court giving an instruction on a crime of a lesser degree than that charged: 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. *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997).

The first two elements are satisfied; the third is not. The evidence is that the defendant told his mother earlier in the evening that he would harm police officers if they were called; he accelerated his vehicle to speeds up to 100 MPH; and he slammed his vehicle into the patrol cars, which were well-illuminated. RP at 171, 183, 185, 188, 213-15, 266-67. The force of the impact was tremendous, resulting in one patrol car ending up on top of the other. RP at 190. The experienced patrol officers at the scene stated this was one of the worst collisions they had ever seen and would have resulted in a death if Sgt. Clarke were still in his patrol car. RP at 196, 215.

If the jury had accepted the defense argument that he was not able to form the intent to harm the two police officers, he would have been found not guilty. But, either the defendant intended to assault the police by ramming them with his truck or he did not. Once the jury concluded that

he used his truck to assault the officers, the jury necessarily concluded that the defendant used his truck as a deadly weapon.

The defendant argues that when he collided with the patrol vehicles, they were unoccupied. Therefore, he argues, his truck was not a deadly weapon. But, this misses the mark.

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. *Id.* 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.

When the defendant slammed his truck into the police vehicles, he assaulted the police and was using a deadly weapon.

**2. The defendant is incorrect on whether a vehicle is a deadly weapon.**

The defendant argues, "The trial court's reasoning was erroneous, as a vehicle is not a deadly weapon as a matter of law pursuant to RCW 9A.04.110(6)." Answer to Petition for Review/Cross Petition at 14.

This is incorrect. RCW 9A.04.110(6) specifically includes a vehicle in the definition of deadly weapon, depending on how it is used.

The defendant may have been referring to RCW 9.94A.825 which does not include a vehicle in the list of deadly weapons for a sentencing enhancement.

**3. The issue does not involve a “substantial public interest.”**

The trial court and the Court of Appeals ruled correctly.

Nevertheless, the defendant requests that this Court accept review under RAP 13.4(b)(4), because the cross-petition involves an issue of “substantial public interest.” While the RAPs are liberally interpreted to promote justice and facilitate the decision of cases on the merits, *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), it is difficult to see a “substantial public interest” in the issue of whether the trial court should have instructed on Assault in the Third Degree.

*Watson* dealt with a memo by the Pierce County Prosecuting Attorney sent to judges, the Department of Assigned Counsel, and the Department of Corrections stating that the prosecutor’s office would no longer recommend drug offender sentencing alternative (DOSAs) sentences. The issue was whether this was an ex parte communication, and the *Watson* court stated that the Court of Appeals’s ruling would potentially affect every sentencing in Pierce County in which a DOSA sentence was requested.

“Substantial public interest” is the test for whether a technically moot case should be decided. *In re Mines*, 146 Wn.2d 279, 45 P.3d 535 (2002). In determining whether the requisite degree of public interest for the court to consider a moot issue, the following factors should be considered: 1) the public or private nature of the question presented, 2) the desirability of an authoritative determination for the future guidance of public officers, and 3) the likelihood of future recurrence of the question.

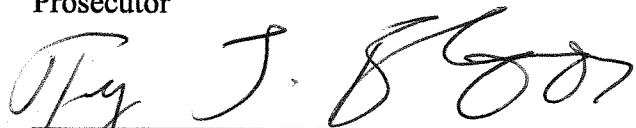
In this case, the issue on whether the defendant’s acts could constitute an Assault in the Third Degree is private, not public, in nature. It is decided by the facts in the case. There is no substantial public interest involved.

#### IV. CONCLUSION

For the reasons stated above, the Cross Petition for Review on the issue of whether the trial court should have included instructions for Assault in the Third Degree should be denied.

**RESPECTFULLY SUBMITTED** this 5th day of May, 2017.

**ANDY MILLER**  
Prosecutor



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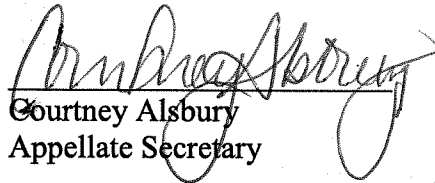
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on May 5, 2017.

  
Courtney Alsbury  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**May 05, 2017 - 8:44 AM**

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