NO. 99326-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RONALD WILKINS,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION ONE
Court of Appeals No. 81833-3-I
Pierce County No. 17-1-02843-8

PETITION FOR REVIEW

ANSWER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Statutes

Rules

I. INTRODUCTION

The Defendant Wilkins demands that a deadly weapon enhancement requires a death. The court of appeals properly found sufficient evidence for the enhancement where the penetrating stab wound to the victim's kidney put him at risk of death.

The Defendant mischaracterizes the record to allege that the court refused to accept the jury's verdict. In fact, the jury foreperson indicated to the judge that the omission on the verdict form had been inadvertent and that the jury had reached a verdict. The court permitted the jury to recess for two minutes to reduce their deliberation to writing. A poll affirmed the unanimous verdict.

The Defendant complains about the prosecutor providing a summary of the elements of the charges and commenting that officers would testify rather than provide written reports. He does not explain how this was error or prejudicial or how it suggests any consideration under RAP 13.4(b).

The Defendant misstates that the court of appeals found the LFO interest provision was error. It did not, therefore, there was nothing to correct and no basis for remand.

II. RESTATEMENT OF THE ISSUES

A. Has the Defendant demonstrated a basis under RAP 13.4(b) to review the court of appeals' holding that there was sufficient evidence for the deadly weapon verdict where the Defendant stabbed the victim in the kidney and shattered his rib, leaving the victim at risk of organ failure and death?

B. Has the Defendant demonstrated a basis under RAP 13.4(b) to review the court of appeals' holding that the trial judge did not influence the verdict by allowing the jury two minutes to reduce their deliberation to a writing?

C. Has the Defendant demonstrated a basis under RAP 13.4(b) to review the court of appeals' holding that the prosecutor's remarks summarizing the law and evidence did not prejudice the Defendant?

D. Has the Defendant demonstrated a basis under RAP 13.4(b) to review the court of appeals' holding that the interest provision referencing the statute was not error?

III. STATEMENT OF THE CASE

After celebrating a Tacoma Pride event with other army friends at Club Silverstone, Deonta Wilkerson backed out of a parking spot and hit bumpers with a pickup truck that was backing out from the opposite side of the street. 5RP 667-68; 6RP 813, 815-16, 819-22, 887-89, 891, 895, 897-98, 900-01. Defendant Michael Ronald Wilkins and his friends exited the pickup, taunted Wilkerson and his friend Rakim Robinson with racial slurs, blocked them from leaving, and began a brawl. 5RP 666, 668, 671-74; 6RP 822, 826-29, 830-32, 833-37, 879-80, 900-01, 905-06, 908-10.

The Defendant removed a knife[1] from a leather sheath on his belt and stabbed Wilkerson in the back. 5RP 596-97, 607-08, 614-15, 674; 6RP 840, 912-14. 6RP 840, 913-14. Throwing up blood, Wilkerson knew he had internal bleeding and worried he was "bleeding out." 6RP 917-18. He lay down. 6RP 917-18. Wilkerson asked someone on the street to remove his shirt and put pressure on the wound. 6RP 840, 914, 918. "You need to help me right now so I don't die on this sidewalk." 6RP 918.

Ruston Police Officer Grubb found Wilkerson "in obvious pain" with "a decent amount of blood … soaking the shirt that was being used to apply pressure to his wound." 4RP 471. Wilkerson had large lacerations on his back and side. 4RP 464. He was classified critical upon arrival at Saint Joseph's Medical Center. 6RP 782-83, 799.

Wilkerson's twelfth rib was shattered, his lip had to be "glued back together," and he had been cut twice – a slash to his left side and a puncture to his kidney. 6RP 789, 795, 800, 923-25. The penetrating wound was 5.5 inches wide and approximately three inches deep, close to the diaphragm and lungs. 6RP 797-98, 801, 923. The location of the kidney wound threatened damage to veins, arteries, and the collecting system. 6RP 789-93, 802-03, 811. Wilkerson's damaged hilum put him at risk of infection

[1] Witness Robert Williams had informed police that the Defendant's knife had a blade that was 5-6 inches long. CP 4; 5RP 694. However, at trial, he did not have an independent recollection of the blade length. 5RP 694.

due to leakage of urine into the body. 6RP 793-94. Dr. Long Tran testified that "if you have a penetrating injury and it does penetrate a solid organ, the risk of death is always in our thoughts." 6RP 803.

However, surgery posed its own risk. RP 798 ("If you do go in there, there's a high risk that he could lose the whole kidney."). Wilkerson was kept on a secure hospital floor with five cameras in his room. 6RP 928. After four days, Wilkerson had stabilized sufficiently for the doctors to decide against surgery. 6RP 928. The doctors proposed serial abdominal exams and blood level tests with urologists and radiologists in hopes that the body can repair itself without surgery. 6RP 798-99. Doctors continue to monitor Wilkerson's kidney function to this day. 6RP 928-29.

During jury selection, defense counsel repeatedly objected during the prosecutor's voir dire. 3RP 268, 323-30. After numerous interruptions, the judge excused the jury to explain that she was sustaining the objections insofar as the questions may be interpreted as legal instruction on the reasonable doubt standard, i.e. a right reserved to the court, or insofar as the jurors might speculate about their verdicts. 3RP 330-31.

When defense counsel made a motion for mistrial. 3RP 331. The prosecutor explained that her questions were designed to insure that jurors "can work within the confines of what they will be instructed." 3RP 332. The defense motion was denied. 3RP 331.

The defense again repeatedly interrupted the prosecutor's opening statement, complaining that any discussion of the elements was argument. 4RP 429-30. The prosecutor explained that it was important in a multi-week trial to apprise the jury in advance, not just about the anticipated evidence, but about "what they are going to be asked to evaluate those facts against." 4RP 434. The court advised: "You absolutely have a right to talk about it's Assault in the First Degree, this is generally what it means, but you're going through each of the elements, which is inappropriate." 4RP 435. The court advised that it would "give the law at the end." 4RP 435.

After the presentation of evidence, the court instructed the jury that it was their duty:

> … to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.
> ….
> One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

CP 36.

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the

> law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 37.

When the jury advised it had a verdict, the court noted aloud which forms had been filled out and which had been left blank. 8RP 1220-21. Upon hearing that the special verdict form was among the forms left blank, the presiding juror indicated that this was an oversight.

> THE COURT: Verdict Forms C and D are blank and the Special Verdict Form is blank.
>
> PRESIDING JUROR: Did we forget that?
>
> THE COURT: Yes.
>
> I'm just going to send you right back in with all the instructions. ***If you can't agree, there's an option for that, too.***
>
> I'm going to excuse you to fill out the Special Verdict Form.

8RP 1221 (emphasis added). The jury stepped out, without objection from either party. 8RP 1221. When the jury returned, it acquitted the Defendant of first degree assault and convicted him of second degree assault with a deadly weapon enhancement. CP 67; 8RP 1221-22. The court confirmed by a raise of hands that the verdicts reflected the personal votes each of the twelve jurors. 8RP 1222. The Defendant made no request for further examination of the jury verdicts.

After receiving the verdict, the Defendant objected for the first time, arguing that the court should not have permitted the jury to render a verdict on the enhancement, arguing that the apparent omission had actually been "the verdict of the jury, and that is it." 8RP 1223. The court disagreed:

> THE COURT: Just to clarify, the Special Verdict Form indicates, "The answer section above has been intentionally left blank," and that wasn't signed either. And it's clear to me, given that it was Verdict Form A, B and then C and D, which were blank -- the Special Verdict Form was after that and it was also blank -- that it was oversight on their part. And, for the record, they were out maybe two minutes to fill in the form and come back. The record is made. I'm just completing the record.
>
> Whatever motion you have, I'm denying that at this point.

8RP 1223.

The trial court sentenced the Defendant Wilkins to 14 months for the assault in the second degree and 12 months for the deadly weapon enhancement, for a total of 26 months confinement. CP 80; 9RP 1246. The trial court imposed the $500 crime victim assessment and $12,056 in restitution. CP 78, 111. Wilkins timely appealed. CP 88.

IV. ARGUMENT

A petition for review will "only" be accepted if it demonstrates a conflict of published Washington case law, a significant constitutional, question, or a matter of substantial public interest. RAP 13.4(b). This is the

hurdle that a petition must surmount. However, the petition engages in little to no analysis of how the court rule might apply to the challenged opinion.

A. The court of appeals' decision upholding the deadly weapon verdict where the Defendant stabbed the victim in the kidney putting him at risk of death does not conflict with any case or involve an issue of substantial public interest.

The Defendant claims that the Unpublished Opinion "is contrary to other cases." Petition at 11. The Defendant does not use the word "conflict," because no case cited in the petition undermines the outcome here. He also claims that there is a substantial public interest in redefining "deadly weapon." *Id.* He would render the statute generally inapplicable when the victim survives. This is contrary to the public interest and legislative intent.

"[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." RCW 9.94A.825. *See also* CP 47; RCW 9A.04.110(4)(b).

The evidence at trial was that the Defendant penetrated the victim's kidney and shattered his rib, leaving the victim at continuing risk of organ failure and death. The surgeon testified that the stab wound to the back penetrated the victim's right kidney and fractured a rib, raising concerns of injury to "a multitude of potential organs, solid organs, vascular organs, intestines." 6RP 787-89, 803, 900. "[I]f you have a penetrating injury and

it does penetrate a solid organ, the risk of death is *always* in our thoughts." 6RP 803 (emphasis added).

> At trial, the Defendant did not contest the damage that was done.
>
> Deonta is stabbed. We don't deny that fact. You can't deny that fact. He's got the wounds. He was treated. But the issue is, who stabbed him.

8RP 1152. At sentencing, he conceded:

> [A]ny time a person gets stabbed, it is life-threatening. *We are not disputing that fact*. What we have disputed at this trial, and what we have always disputed and what Mr. Wilkins still continues to dispute, is the fact that he was the person who wielded the knife and that he is the person who actually stabbed Mr. Wilkerson.

9RP 1243 (emphasis added).

In the petition, the Defendant suggests that internal bleeding is less serious than external bleeding. Petition at 9-10. Earlier, he argued that the evidence is insufficient, because Wilkerson survived his injuries. Brief of Appellant at 12-13 (claiming the enhancement is reserved for "actually lethal situations" and that the state failed to prove the knife severed Wilkerson's blood vessels and destroyed his kidneys). The argument is premised on rewriting the statutory definition.

A deadly weapon is one which "has the capacity" to inflict death and which, from the manner in which it is used, "is likely to produce or may easily and readily produce death." RCW 9.94A.825. A deadly weapon is not defined as one that *actually* or *always* results in death. What matters is

the manner in which it is used. *Cf. State v. Peterson*, 138 Wn. App. 477, 482-83, 157 P.3d 446 (2007) (a knife used only to cut wires and to pry a stereo from an unoccupied car in a deserted parking lot is not a deadly weapon).

> The character of an implement as a deadly weapon is determined by ***its capacity*** to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances, such as the ***intent*** and ***present ability*** of the user, ***the degree of force***, ***the part of the body*** to which it was applied and ***the physical injuries inflicted***.

State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977) (emphasis added). The success of the attack is irrelevant under the statutory definition. A death is not required.

In particular, the Defendant relies upon *State v. Zumwalt*, 79 Wn. App. 124, 901 P.2d 319 (1995). Petition at 10-11. There the court found the knife was not used in a deadly manner, because it was only used to stab someone in the hand. *Zumwalt*, 79 Wn. App. at 126. It does not support the Defendant's claim.

Viewing the evidence in the light most favorable to the State, the evidence shows the weapon Wilkins stabbed the victim with had the capacity to cause death and from the manner in which it is used, was likely to produce or may have easily and readily produced death. Accordingly, sufficient evidence supports the conviction for the deadly weapon

enhancement. The decision does not conflict with any published Washington case. And rewriting the statute does not serve a substantial public interest.

B. Allowing the jury to reduce their verdict to a writing does not raise a consideration under RAP 13.4(b).

Previously, the Defendant argued that the trial court had "suggest[ed] the need for agreement." Brief of Appellant at 15. In the petition, the Defendant's claim has become more dramatic – arguing the court "intervened" and "involved" itself in the jury's decision, "refused" to accept the jury's verdict, and "pressure[d]" them to reach a different decision, Petition at 11, 13, 15. None of this is the record. Nor does the Defendant make any pretense of a RAP 13.4(b) analysis.

In a claim of improper judicial interference with the verdict, the defendant must first establish that the jury was still within its deliberative process and still "undecided when sent back to the jury room." *State v. Ford*, 171 Wn.2d 185, 188–93, 250 P.3d 97, 99 (2011) (lead opinion in plurality decision). Once the jury announces it has ended deliberations and reached a verdict, CrR 6.15(f) "has no application." *Id.* at 190-91. And the defendant must show the judge improperly acted to compel a decision. *Ford*, 171 Wn.2d at 193.

In *Ford*, the court did not improperly influence the jury where it observed that a verdict form had been left "completely blank" and instructed

the jury to return to the jury room and complete it. *Ford*, 171 Wn.2d at 186-87, 189. The jury returned in less than five minutes with the completed form, and a poll confirmed the verdict. *Ford*, 171 Wn.2d at 186-87. There was no reason from this record to believe that the jury had been deadlocked or experiencing any difficulty reaching a decision. *Ford*, 171 Wn.2d at 189.

The facts in our case are similar to those in *Ford*. The jury announced it had reached a verdict. 8RP 1220. At that point, CrR 6.15(f), had no application. There was no verdict to coerce.

The presiding juror indicated that the blank form was an oversight. 8RP 1223 ("Did we forget that?"). The court instructed the jury that the form could be completed in any manner, including by indicating that they could not come to an agreement. *Id.* ("If you can't agree, there's an option for that, too."). The jury stepped out "maybe two minutes to fill in the form and come back." 8RP 1223. A passage of mere minutes suggests, consistent with the jury's announcing a verdict, that there were no further deliberations. *Ford*, 171 Wn.2d at 191. And then they were polled three times as to each of the three completed verdict forms, indicating the verdicts represented their personal votes. 8RP 1222. There is no suggestion on this record that the jurors were deadlocked, but only that they had overlooked memorializing their verdict in the form.

The Defendant relies on *State v. Guzman Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012), a case which did not address any allegation of judicial pressure on a jury to reach a verdict. The case decided that jury unanimity was required for aggravating circumstances. In its discussion, the court reviewed *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), in which the jury was instructed to denote lack of unanimity by leaving the form blank. *Guzman Nunez*, 174 Wn.2d at 714 (quoting *Brett*, 126 Wn.2d at 173).

But the form in our case was different. It provided a failsafe to determine whether the jury had considered the form at all. The presiding juror was to sign and date to indicate that the jury intended a non-answer.

QUESTIONS: Was the defendant Michael Wilkins armed with a deadly weapon at the time of the commission of the crime?

ANSWER: YES (Write "yes" if unanimous agreement that this is the correct answer)

2-28-2019
DATE

PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR

CP 67. Notably, the line specifying "The answer section above has been intentionally left blank," which would indicate that the jury could not reach a unanimous decision, was not signed or dated. 8RP 1221. The jury had not

intended a non-answer. *Id*. It had reached a decision but failed to properly record it.

On this record, it is apparent that the trial court did not suggest or coerce a verdict on the weapon enhancement. The court simply permitted the jury to communicate its verdict in written form.

The petition does not demonstrate a conflict in cases or other consideration necessary for review.

C. The prosecutor's remarks correctly summarizing the law and evidence do not provide a basis for review under RAP 13.4(b).

The Defendant alleges that the prosecutor's remarks violated the court's orders. Petition at 18. The State disputed this allegation below. And the court of appeals held the prosecutor's remarks did not prejudice the Defendant. Unpub. Op. at 13. Nowhere does the Defendant explain how this claim satisfies a RAP 13.4(b) requisite.

A defendant bears the burden of showing that, in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and that there was substantial likelihood that the conduct affected the jury verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126, 135 (2008). The challenged statements are reviewed in the context of the entire case. *State v. Russell*,

125 Wn.2d 24, 86, 882 P.2d 747, 785-86 (1994). The trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *Id.*

The Defendant claims that the prosecutor told the jury pool that there was evidence "substantiating their claims" that was being suppressed. Petition at 16 (citing 3RP 267-68). In fact, the record shows the prosecutor merely stated that police officers who had authored reports would testify, rather than submit their reports into the record. 3RP 268. She did not state that any information would be withheld, much less that it was material to the question of guilt. The prosecutor may inform the jury in advance of testimony what the State's evidence is expected to show. *Magers*, 164 Wn.2d at 191.

At several points in the trial, the police officers and eyewitnesses in this case testified *from the police reports* such that the jury actually received the facts contained in the reports that were alluded to during voir dire. 4RP 467, 469, 532, 715, 739, 760. Accordingly, even if the State's comments during voir dire were improper, they were not prejudicial in the context of the whole record, because the comments did not inform the jury of any evidence that was not presented at trial.

The Defendant claims that the prosecutor violated the court ruling. Petition at 17. But the court ruling was to avoid instructing the jury on the law and to resume questioning the jurors as to their qualifications. 3RP 268.

This is what the prosecutor did. The prosecutor asked jurors about their ability to make a fair determination of guilt based on oral testimony and in the absence of written materials, such as full police reports or transcripts. RP 268, 323, 325-27, 329-30. This line of questioning did not suggest that such evidence, if it existed, would be inculpatory versus exculpatory. It did not suggest any specific evidence at all. Therefore, the prosecutor did not suggest that evidence not presented at trial provided additional grounds for finding a defendant guilty. *Russell*, 125 Wn.2d at 87. The prosecutor's questions were not improper. *See also State v. Brown*, 132 Wn.2d 529, 562-63, 940 P.2d 546 (1997) (holding prosecutor's statement in an aggravated murder trial that the jury would come to know the deceased victim only through the testimony of witnesses was proper).

Even if the prosecutor's comments improperly referred to facts not in the record, defense counsel's objections and the trial court's prompt response and eventual written jury instructions cured any resulting prejudice. *Russell*, 125 Wn.2d at 88 (a new trial is unwarranted where defense objected to improper comments and the court promptly provided a curative instruction).

The Defendant does not allege that the prosecutor misstated the law, but only that she discussed the law at all during her opening statement. The Washington Supreme Court has held that an abbreviated rendition of the

elements of the alleged offenses during an opening statement "do[es] not strike us as improper or prejudicial." *Magers*, 164 Wn.2d at 191. Here the prosecutor "laid out the undisputed elements of the charged offenses," because, "there's no way to prepare a jury for what may be a multi-week trial without telling them and giving them an idea of what they are going to be asked to evaluate those facts against." 4RP 434. The superior court agreed. "If you want to briefly talk about what the State needs to prove, that's okay." 4RP 430.

The trial court stated various times, following defense objections, that it would instruct the jurors on the law and what evidence would be admitted. 3RP 268, 323, 330-31. It instructed the jury that the lawyer's remarks are not evidence; only the witness testimony and exhibits were evidence. CP 36. A reviewing court will presume jurors followed the trial court's instructions. *Russell*, 125 Wn.2d at 85-85. On this record, it cannot be said that the prosecutor's comments during voir dire prejudiced the outcome of the trial.

The Defendant does not demonstrate a consideration warranting discretionary review.

D. The court of appeals did not strike the interest provision, because it did not find it improper.

Misstating that the court of appeals found the interest provision improper, the Defendant argues that the LFO interest provision should have

been stricken,. Petition at 19. But, in fact, there was no finding of impropriety. The form language states that interest shall accrue under the terms of the statute. CP 79. That statute dictates that interest cannot accrue on the $500 victim assessment imposed. RCW 10.82.090(2). Interest will, however, accrue on the $12,056 in restitution. CP 111; RCW 10.82.090(1) ("Restitution shall bear interest from the date of judgment until payment at the rate applicable to civil judgments."). Restitution will be collected and distributed before any other LFO. RCW 9.94A.760(2).

Previously, the law had required interest to accrue on all LFOs. Laws of 2018, ch. 169, § 1 (effective June 7, 2018). When the law was changed, the state promptly updated JIS software guaranteeing the immediate implementation of amendments to RCW 10.82.090. As a matter of law and fact, there is no risk that any offender will accrue interest on non-restitution LFOs.

The Defendant does not demonstrate which provision of RAP 13.4(b), if any, applies to this challenge. Because the court of appeals found no error, there is nothing to correct.

V. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 22nd day of December, 2020.

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Certificate of Service:
The undersigned certifies that on this day she delivered by E-file to the attorney of record true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

12-22-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

December 22, 2020 - 9:55 AM

Transmittal Information

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