

78611-9

NO. 78876-6  
NO. 79074-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CURTIS E. GRAHAM,

MATTHEW R. RUTH,

Petitioners.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
08 SEP -2 AM 8:00  
BY RONALD R. CARPENTER  
CLERK

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SUPPLEMENTAL BRIEF OF RESPONDENT  
PURSUANT TO RAP 13.7(d)

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## **I. ISSUES**

1. Where a defendant is charged with being armed with a firearm, and the jury verdicts reflect that the defendant was armed with a firearm, did the "deadly weapon" language on the special verdict forms preclude the court from imposing a firearm enhancement?

2. Is an error in imposing a firearm enhancement harmless if the defendant was charged with a being armed with a firearm, the defendant admitted being armed with a firearm, the evidence that he was armed with a firearm was overwhelming, and the jury would have found he was armed with a firearm if properly instructed?

## **II. STATEMENT OF THE CASE**

### **A. STATE V. GRAHAM.**

The facts surrounding defendant Graham's crimes are adequately set out in the Court of Appeals opinion, State v. Graham, No. 54975-8-1, review granted, 163 Wn.2d 1046 (2008). A copy of the opinion is attached to defendant's Petition for Review.

Defendant Graham was charged with first degree assault with a firearm while armed with a firearm and second degree unlawful possession of a firearm. The assault count read:

That the defendant, on or about the 14th day of January, 2004, with intent to inflict great bodily harm,

did assault another person, to-wit: Mohammed Sylla, with a firearm and any deadly weapon and by any force or means likely to produce great bodily harm or death, to-wit: a .380 caliber pistol; proscribed by RCW 9A.36.011(a), a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602.

1 GCP 111.<sup>1</sup>

During the trial, one of the detectives testified that defendant Graham had confessed to shooting the victim. The detective said defendant Graham told him that the victim's car was coming at him, so defendant Graham took the gun he had in his possession and fired two shots into the car.<sup>2</sup> 8/18 GRP 317.<sup>3</sup> The detective also said defendant told him he threw the gun into Lake Washington. 8/18 RP 318.

After both sides rested, the court instructed the jury that to convict defendant Graham of first degree assault, it had to unanimously find, "That the assault was committed with a firearm[.]"

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<sup>1</sup> For clarity, the clerk's papers in Graham are denoted GCP. The clerk's papers in Ruth are denoted RCP.

<sup>2</sup> Videotapes of the interview were admitted as Exhibits 6 and 7 in the CrR 3.5 hearing and are part of the record on appeal. Based on rulings that only parts of these tapes were admissible, the State decided not to try to introduce the tapes at trial. 8/18 GRP 309.

1 GCP 61. In defining terms, the court instructed the jury that "The term 'deadly weapon' includes any firearm, whether loaded or not."

1 GCP 67.

The court instructed the jury that to find defendant guilty of second degree unlawful possession of a firearm, it had to unanimously find that on the same date as the assault, defendant "had a firearm in his possession or control[.]" 1 GCP 68.

In instructing the jury on the special verdict, the court said:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the assault.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

1 GCP 73.

The jury found defendant Graham guilty of first degree assault and second degree unlawful possession of a firearm. By special verdict, the jury found defendant Graham was armed with a deadly weapon at the time of the assault. 1 GCP 48, 46, 47.

Before sentencing, defendant acknowledged that his offender score was 5, and that the standard range sentence he was

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<sup>3</sup> For clarity, the record of proceedings in Graham are denoted GRP. The record of proceedings in Ruth are denoted RRP.

facing for the first degree assault with the firearm enhancement was 198 to 244 months. 8/31 GRP 20-21. The court sentenced defendant Graham to a standard range sentence of 161 months for the first degree assault and 22 months for the second degree unlawful possession of a firearm. The court added a 60 month firearm enhancement to the assault sentence. 1 GCP 26, 8/31 GRP 29-30.

The Court of Appeals affirmed defendant Graham's judgment and sentence. In addressing the firearm enhancement, the Court of Appeals held:

The jury specifically convicted Graham of unlawful possession of a firearm. Also, they could not have convicted Graham of first degree assault without finding that he was armed with a firearm. . . . The jury convicted Graham of first degree assault. Because the jury explicitly found beyond a reasonable doubt that Graham was armed with a firearm, the firearm enhancement was proper.

Graham, slip op. at 7.

#### **B. STATE V. RUTH.**

The facts surrounding defendant Ruth's crimes are adequately set out in the Court of Appeals opinion, State v. Ruth, No. 56318-1-I, review granted, 163 Wn.2d 1018 (2008). A copy of the opinion is attached to defendant's Petition for Review.

Defendant Ruth was charged with two counts of first degree assault with a firearm. The second amended information read:

COUNT I: FIRST DEGREE ASSAULT (WITH A FIREARM), committed as follows: That the defendant, on or about the 5th day of November, 2003, with intent to inflict great bodily harm, did assault another person, to-wit: Drew Eden, with a firearm and any deadly weapon and by any force or means likely to produce great bodily harm or death, to-wit: a .22 caliber handgun; proscribed by RCW 9A.36.011(1)(a), a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.062.

COUNT II: FIRST DEGREE ASSAULT (WITH A FIREARM), committed as follows: That the defendant, on or about the 5th day of November, 2003, with intent to inflict great bodily harm, did assault another person, to-wit: Jeremy Custer, with a firearm and any deadly weapon and by any force or means likely to produce great bodily harm or death, to-wit: a .22 caliber handgun; proscribed by RCW 9A.36.011(1)(a), a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.062.

1 RCP 85.

Defendant testified:

I went and I grabbed my .22. It's only for target practicing. My uncle had given it to me. This happened so, so fast. At that time Jeremy came in and then Drew came behind him. And I already had the gun. . . . I was backing away from the purple carpet and Jeremy was advancing toward me and

Drew was going up the stairs to where my girlfriend was and Jeremy went for his gun and that's when I started shooting.

12/8 RRP 246.

After both sides rested, the court instructed the jury that to convict defendant Ruth of first degree assault, it had to unanimously find for each count, "That the assault was committed with a firearm[.]" 1 RCP 67, 69. In defining terms, the court instructed the jury that "The term 'deadly weapon' includes any firearm, whether loaded or not." 1 RCP 66. In instructing the jury on the special verdict for each count, the court said:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count [I][II].

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

1 RCP 68, 70.

The jury found defendant Ruth guilty of two counts of first degree assault, and that defendant Ruth was armed with a deadly weapon at the time of each assault. 1 RCP 52, 50, 51, 49.

Before sentencing, new counsel was appointed to represent defendant. 2/4 RP 3. He objected to any sentence that included any enhancement. Defendant's argument was that since the

instruction required the jury to determine whether or not defendant was armed with a firearm, but the special verdict form asked if he was armed with a deadly weapon, the inconsistency precluded any enhancement. 2/4 RRP 8-10. The court denied the motion. 2/4 RRP 11.

Defendant then argued that since the jury, using the special verdict form, only found defendant was armed with a deadly weapon, only the 24 month enhancements could be added to the sentences. 2/4 RRP 11. Again, the court denied the motion. 2/4 RRP 21-13. The court sentenced defendant to two standard range sentences with firearm enhancements. 2/4 RRP 25, 1 RCP 32-35.

The Court of Appeals affirmed defendant Ruth's judgment and sentence. In addressing the firearm enhancement, the Court of Appeals held:

As in Pharr<sup>4</sup>, despite the imprecise language of the verdict form, there is no doubt that the jury found Ruth was armed with a firearm, and the instructions did not violate Blakely.<sup>5</sup>

Ruth, slip op. 13.

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<sup>4</sup> State v. Pharr, 131 Wn. App. 119, 126 P.3d 66 (2006), review denied, 160 Wn.2d 1022 (2007).

<sup>5</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

On July 8, 2008, this Court granted review “solely on the issue of the firearm enhancement” in these two cases. This Court also consolidated the cases and appointed counsel for defendant Ruth.

### III. SUPPLEMENTAL ARGUMENT

#### A. INTRODUCTION.

“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “[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 (emphasis in the original).

There are four factors on which the trial court may rely to impose a constitutionally valid aggravated sentence: (1) facts the defendant admits; (2) facts found by a jury as reflected in its verdict; (3) facts found by the court after the defendant has stipulated to judicial fact-finding for sentencing purposes; and (4) facts relating to prior convictions. The first three factors are considered “Blakely-compliant.” The fourth is “Blakely-exempt.”

People v. Smith, 183 P.3d 726, 729 (Colo. App. 2008).

Here, the facts that the defendants were armed with firearms at the time they committed their first degree assaults were reflected in the jury verdicts. Based on these Blakely-compliant facts, the court properly imposed firearm enhancements on the sentences in both cases.

However, should this Court determine that the court committed a Blakely error by imposing firearm enhancements, it should also determine that the error was harmless beyond a reasonable doubt. Given the overwhelming evidence that the defendants were armed with firearms when they committed their assaults, including their admissions, the result would have been the same had the error not occurred.

#### **B. FACTS REFLECTED IN THE VERDICTS.**

Both defendants were charged with first degree assault with a firearm while armed with a firearm. Both juries were instructed that to convict the defendants of first degree assault, they had to unanimously find beyond a reasonable doubt “that the assault was committed with a firearm[.]” 1 GCP 61, 1 RCP 67, 69. The juries found both defendants guilty of first degree assault. The verdicts reflected the fact that each defendant was armed with a firearm when he committed each assault.

In the present case the jury was advised . . . during the reading of the jury charges, that the State sought to prove the defendant committed an armed robbery while armed with a gun . . . we deduce that by returning a verdict of "guilty of armed robbery" the jury found the dangerous weapon used in the armed robbery was a gun.

State v. Fuller, 980 So.2d 45, 54 (La. App. 5th Cir. 2008).

In defendant Graham's case, the jury was also instructed that to convict him of second degree unlawful possession of a firearm, it had to find defendant Graham had a firearm in his possession or control. 1 GCP 68. A defendant is armed with a firearm when he has actual possession of a firearm, unless there is evidence that the possession was unrelated to commission of the underlying crime. State v. Easterlin, 159 Wn.2d 203, 209 n. 3, 149 P.3d 366 (2006). Here, defendant Graham admitted he used the firearm he unlawfully possessed to commit a first degree assault. The jury finding that defendant was in possession of a firearm reflected the fact that he was armed with a firearm.

In defendant Ruth's case, the jury was also instructed that in considering the special verdict, it had to find that the State proved beyond a reasonable doubt that defendant Ruth was armed with a firearm at the time he committed the assaults. 1 RCP 68, 70. The special verdict reflected the factual finding that defendant Ruth was

armed with a firearm when he committed the assaults, despite the wording of the special verdict forms. Pharr, 131 Wn. App. at 124 (where a jury is instructed that it must find the defendant was armed with a firearm, but the special verdict form reflects only that the defendant was armed with a deadly weapon, the jury is presumed to follow instructions, thus its verdicts incorporate the instructions on which they are grounded and a firearm enhancement is appropriate).

The United States Supreme Court has looked at what facts are reflected in a jury verdict in a similar context and provided this guidance:

[I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

United States v. Taylor, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), cited with approval, Shepard v. United States, 544 U.S. 13, 17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

This Court is faced with a similar analysis. First degree assault can be committed "with a firearm or any deadly weapon or

by any force or means likely to produce great bodily harm or death[.]” RCW 9A.36.011(b). Here, the information in each case shows that the defendants were only charged with committing first degree assaults with a firearm – a .380 caliber pistol and a .22 caliber handgun. Each jury was instructed that it could convict the defendants of first degree assault if it found the assault was committed with a firearm. The juries returned verdicts of guilty of first degree assault. These verdicts reflected the fact that in each assault, the defendant was armed with a firearm.

This Court should hold that a fact the jury must necessarily find to convict based on its instructions is a fact reflected in a general verdict of guilty. That fact may then be used to determine the statutory maximum sentence.

Relying on State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005) (Recuenco I), reversed in part, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II), affirmed, 163 Wn.2d 428, 180 P.3d 1276 (2007) (Recuenco III), both defendants argue that since the special verdict forms used the phrase “armed with a deadly weapon,” the jury did not explicitly find that that they were armed with a firearm. Graham Petition for Review 23, Ruth

Petition for Review 11, 20. Recuenco does not apply to the facts of these cases.

The State charged Mr. Recuenco with second degree assault with a deadly weapon while armed with a deadly weapon. The jury was instructed on the deadly weapon enhancement. It “returned a verdict on the assault charge and a special verdict that Recuenco was armed with a deadly weapon.” Recuenco I, 154 Wn.2d at 158.

This Court found Mr. Recuenco’s Sixth Amendment jury rights had been violated. It reversed the sentence holding that a Sixth Amendment violation could never be harmless. Recuenco I, 154 Wn.2d at 164.

The United States Supreme Court reversed in part because failure to instruct on a sentence enhancement, like failure to instruct on an element of the offense, may be a harmless error. Recuenco II, 548 U.S. at 220.

On remand, this Court held that based on the State’s decision to only pursue a deadly weapon enhancement, the requirement that the jury only find the defendant was armed with a deadly weapon, and the jury’s specific finding, the only error occurred when the sentencing court imposed a firearm

enhancement, a sentence “not authorized by the charges.”  
Recuenco III 163 Wn.2d at 442.

Here, the defendants were charged with first degree assault with a firearm, while armed with a firearm. At least two verdicts in each case reflect the fact that the defendant was armed with a firearm. The error in Graham’s case was the failure of the court to instruct the jury that it had to find the defendant was armed with a firearm in the special verdict and the failure of the special verdict form to recite that the defendant was armed with a firearm. The error in Ruth’s case was the failure of the special verdict form to recite that the defendant was armed with a firearm.

Since the facts reflected in the jury verdicts allowed the court to impose firearm enhancements, Recuenco does not apply.

### **C. HARMLESS ERROR.**

“Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.” Recuenco II, 548 U.S. at 222. Accordingly, if this Court determines that the special verdict form wording, not the instructions, determines what facts are reflected in the verdict, the defendants are not entitled to relief if, beyond a reasonable doubt, the result would have been the same had the error not occurred. Chapman v. California, 386 U.S.

18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). A failure to instruct on an element of an offense is harmless if the reviewing court determines “beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence[.]” Neder v. United States, 527 U.S. 1, 17, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

Here, not only did neither defendant contest that he was armed with a firearm, both defendants affirmatively admitted they were armed with a firearm and assaulted their victims by shooting them.<sup>6</sup>

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<sup>6</sup> In all Federal Circuits and most states that consider Blakely issues, the admissions of the defendants could be used to enhance the sentence. “However a defendant admits to facts, they may serve once admitted as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt.” United States v. Revels, 455 F.3d 448, 450 (4th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 127 S.Ct. 299 (2006) (citations omitted). See also e.g. People v. Landaverde, 157 Cal. App.4th 28, 34, 68 Cal. Rptr.3d 26 (2nd Dist. 2007); United States v. Huffman, 461 F.3d 777, 786 (6th Cir. 2006), cert. denied, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1863 (2007) (statements made to police may be used to determine sentence enhancements); and State v. Richard, 144 Wn. App. 27, 34, 180 P.3d 863 (2008); Johnson v. State, 830 N.E.2d 895, 897 (Ind. 2005); United States v. Confredo, 528 F.3d 143, 156 (2nd. Cir. 2008) (facts

In addition the admissions of the defendants, the evidence showed that the only injuries inflicted on the victims were gunshot wounds. All the victims testified that they were shot by the defendants. That evidence, coupled with the admissions of the defendants, is overwhelming.

Nothing in Recuenco III indicates that a Blakely error can never be harmless.

No harmless error analysis can apply to a case where the State specifically (and properly) adds an enhancement allegation and asks the jury to make the specific finding supporting the enhancement sought, and where the jury returns the verdict. In this case, the error occurred during the sentencing proceedings when the sentencing judge exceeded the authority issued to the court by the jury's determination.

Recuenco III, 163 Wn.2d at 441.

In contrast to Recuenco, the errors here related to the use of the term "deadly weapon" in the special verdict forms in both cases, and to the instruction on the special verdict in Graham. According

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admitted in trial testimony or during plea colloquy may be used to enhance sentences); but see People v. Isaacks, 133 P.3d 1190, 1192 (Colo. 2006); State v. Brown, 212 Ariz. 225, 230, 129 P.3d 947 (2006) (unless jury waived, admissions of the defendant may not be used to enhance a sentence). Since the Court of Appeals did not discuss the admissions of the defendants, the State uses their admissions in the context of harmless error.

to this Court's precedents and those of the United States Supreme Court, this type of error must be subjected to a harmless error analysis. The result of that analysis is that any error in these cases was harmless beyond a reasonable doubt.

#### **IV. CONCLUSION**

The opinions of the Court of Appeals should be affirmed.

Respectfully submitted on August 28, 2008.

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