IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 103834-8
Court of Appeals No. 39752-1-III

STATE OF WASHINGTON, Petitioner,

v.

KARLI ANN HAAS, Respondent.

ANSWER TO PETITION FOR REVIEW

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AUTHORITIES CITED

Cases

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I. IDENTITY OF RESPONDENT

Karli Ann Hass, Respondent, submits this brief in opposition to the State's petition for review and respectfully requests that this Court deny review.

II. DECISION OF THE COURT OF APPEALS

The Court of Appeals interpreted the major Violation of the Uniform Controlled Substances Act ("VUCSA") aggravator established in RCW 9.94A.535(3)(e)(i), which may apply only when a current offense involves at least three separate transactions, consistent with the plain language of the statute, its relationship to related provisions in the Sentencing Reform Act, and the intent of the Sentencing Reform Act as a whole. Because the State fails to show the issues presented satisfy this Court's standards for review under RAP 13.4(b)(2) and (4), review should be denied.

III. ISSUES PRESENTED FOR REVIEW

The State asks this Court to review the following issues:

1. Whether Ms. Haas waived her challenge to the exceptional sentence predicated on the Major VUCSA aggravator (Pet. for Review, p. 1);
2. Whether, when Ms. Haas was charged in separate counts with a single controlled substance transaction, thereby increasing her offender score and standard range sentence, the State can also seek an exceptional sentence under an aggravator that applies only when the current offense involves three or more separate transactions (Pet. for Review, p. 1).

IV. STATEMENT OF THE CASE

The State collectively charged Karli Haas with eight counts of delivering a controlled substance or a counterfeit substance arising from three separate controlled buy transactions initiated by law enforcement. CP 7-10. Each

count was distinguished by the type of substance delivered and the date of the transaction, and each count carried a major VUCSA aggravator alleging that the offense involved three or more separate transactions. *Id.*

At trial, the State's confidential informant testified to controlled buys occurring on three separate dates:

- Between 3/28/22 and 4/2/22: Methamphetamine (Count 1), fentanyl (Count 3), and a counterfeit pill[1] (Count 6);
- Between 4/18/22 and 4/23/22: Methamphetamine (Count 2), fentanyl (Count 4), and a counterfeit pill (Count 7);
- Between 5/16/22 and 5/21/22: Fentanyl (Count 5) and a counterfeit pill (Count 8).

[1] The counterfeit pills were stamped to look like Oxycodone pills but actually contained a fentanyl compound. RP 164-69. Thus, the separate charges for delivering fentanyl and delivering a counterfeit substance were based on the same sale of the pills.

CP 7-10; RP 71-94. The jury convicted Ms. Haas on all counts and returned special verdicts finding that each of the counts was a major VUCSA violation involving at least three separate transactions, as charged in the information. CP 98-113.

At sentencing, consistent with prior case law, the trial court found that the deliveries of multiple substances occurring on the same day constituted the same criminal conduct. RP 419; CP 118. Accordingly, because Ms. Haas had no prior felony history, each count carried an offender score of "2" with a standard range sentence of 12+ to 20 months based on the controlled buys occurring on the other dates. CP 119. But the trial court also found that the jury's verdict on the major VUCSA aggravators supported an exceptional sentence. CP 119. Accordingly, it imposed a sentence of twice the high end of the standard range – 40 months. CP 121.

Ms. Haas appealed and argued that the major VUCSA aggravators were unsupported by sufficient evidence in her case

because it applied only when the current offense involved three or more transactions, while each of her current offenses involved only a single transaction. CP 140; *Appellant's Brief*, p. 7. The Court of Appeals agreed, concluding that the term "current offense" is used throughout the Sentencing Reform Act to denote the individual charge for which a sentence is being calculated or imposed and the plain language meaning of "involved" is "included." *Opinion*, at 6-7. Likewise, the Court of Appeals noted that this interpretation is consistent with the stated purposes of the Sentencing Reform Act to ensure that punishment is commensurate with the seriousness of the offense and with the punishment imposed on others committing similar offenses. *Opinion*, at 7. This is because prosecutors have the discretion to determine whether to charge multiple transactions as separate individual counts, thereby obtaining a higher offender score, or in the aggregate as a single count, thereby permitting an exceptional sentence under the major

VUCSA aggravator. *Opinion*, at 7-8; *see also Appellant's Brief*, pp. 12-13.

The State now seeks review, largely repeating the arguments raised in and rejected by the Court of Appeals. *See generally Petition for Review*, pp. 8- 22.

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The State dedicates none of its briefing to supporting an argument that the RAP 13.4(b) standards for accepting review apply to this case. It merely repeats the arguments previously raised in the Court of Appeals and contends that Ms. Haas's position below was incorrect.

> [T]he primary purpose of a petition for review is to persuade the Supreme Court to accept review, by reference to the considerations specified in subdivision (b) of the rule. The petition should demonstrate why one or more of those considerations point towards acceptance of review. The purpose is not to reargue the appeal on the merits . . ..

Turner, Elizabeth A., 3 WASH. PRAC., Rules Practice RAP 13.4 (9th ed.), Author's Note 4. Because the State fails to show that RAP 13.4(b) considerations warrant review by this Court and seeks merely to reargue the issues presented to and decided by the Court of Appeals, the petition should be denied.

A. The Court of Appeals' proper application of *State v. Ford*[2] to a sentencing error does not satisfy the RAP 13.4(b) standards for review.

The State first requests this Court to review whether Ms. Haas waived any error relating to the imposition of an exceptional sentence on the basis of the major VUCSA aggravator by not objecting to the aggravator in the trial court. *Petition for Review*, pp. 6-8. But the State advances no argument that this issue satisfies any of the standards for review articulated in RAP 13.4(b).

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[2] 137 Wn.2d 472, 973 P.2d 452 (1999).

Instead, in electing to review Ms. Haas's exceptional sentence, the Court of Appeals properly applied *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), which provides that illegal sentences can be raised for the first time on review. *Opinion*, at 4. The State does not contend that *Ford* is incorrectly decided or inapplicable to Ms. Haas's challenge to her exceptional sentence. The Court of Appeals' decision to review Ms. Haas's exceptional sentence does not conflict with any prior published Supreme Court or Court of Appeals decisions, does not present a constitutional issue, and is not an issue of substantial public interest warranting this Court's review. Consequently, because none of the RAP 13.4(b) standards apply, the Court should decline to accept review of this issue.

B. The Court of Appeals' interpretation of RCW 9.94A.535(3)(e)(i) does not conflict with prior published precedent and does not present an issue of substantial public interest.

In its sole citation to the standards applicable to this Court's review, the State cites RAP 13.4(b)(2) and (4). *Petition for Review*, p. 6. Neither applies.

First, as implicitly conceded by the State, the Court of Appeals' opinion does not conflict with any published opinion of the Court of Appeals as required to support review under RAP 13.4(b)(2). *See Petition for Review*, p. 6. Because, below, the State relied upon an *unpublished* decision of a sister court as persuasive but unbinding authority pursuant to GR 14.1, the Court of Appeals considered that decision and respectfully disagreed with it. *Opinion*, at 2, 5. Disagreement with a non-precedential ruling from another division of the Court of Appeals does not satisfy RAP 13.4(b)(2).

Nor does the State establish that the Court of Appeals' interpretation of a sentencing aggravator applicable only in certain commercial drug cases presents an issue of substantial public interest. The State forwards no argument as to how

effective law enforcement or public safety are in any way undermined by the Court of Appeals' conclusion that the Sentencing Reform Act does not allow the State the discretion to simultaneously separately charge drug transactions for purposes of maximizing the offender score and aggregate the same transactions for purposes of imposing an exceptional sentence.

The closest the State comes to advancing an argument that the Court of Appeals' interpretation presents an issue of substantial public interest is its argument that if the State charges drug transactions in the aggregate in order to apply the major VUCSA aggravator, and the State fails to prove one of the transactions beyond a reasonable doubt, the jury might acquit. *Petition for Review*, pp. 19-22. This outcome, however, is remote because the unanimity instruction required in this circumstance assures that only one transaction needs to be proven beyond a reasonable doubt to convict.

When the State alleges that numerous acts could each comprise the basis to convict for a single count, the jury must be instructed that it must unanimously agree beyond a reasonable doubt that at least one of the charged acts has been committed. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1994), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). What this means is, contrary to the State's assertion, a jury could in fact fail to be convinced beyond a reasonable doubt that two of the three charged transactions took place and still convict the defendant based on unanimous agreement as to the third. However, this same jury would also presumably find that the major VUCSA aggravator requiring three separate transactions was not proven. Failing to return a verdict for the State when the State fails to meet its burden of proof is not a bug that needs fixing; it is, to the contrary, a core feature of our criminal justice system. The prospect that a properly-instructed jury would decline to return a verdict that is unsupported by the evidence at trial is not an

issue of substantial public interest warranting review under RAP 13.4(b)(4).

In essence, the State's argument for review appears to be that it believes it should be able to distort the language and purposes of the Sentencing Reform Act to selectively decide when it should not be bound by standard range sentences in prosecuting controlled buy cases. If the State believes that harsher sentences than provided for in the Sentencing Reform Act should be available, its recourse is with the Legislature, not this Court.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 1,751 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24 day of February, 2025.

TWO ARROWS, PLLC

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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Answer to Petition for Review upon the following parties by e-mail through the Court of Appeals' electronic filing portal to the following:

Kittitas County Prosecuting Attorney
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 24 day of February, 2025 in Kennewick, Washington.

Jeff Burkhart

TWO ARROWS, PLLC

February 24, 2025 - 10:38 AM

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