IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 78611-9
Respondent,	)	(consolidated with
	)	No. 78876-6 and
v.	)	No. 79074-4)
	)	
ARO T. J. WILLIAMS-WALKER,	)	
	)	
Petitioner.	)	
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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
CURTIS EUGENE GRAHAM,	)	
	)	
Petitioner.	)	En Banc
----------	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
MATHEW ROBERT RUTH,	)	
	)	
Petitioner.	)	
_____	)	Filed January 14, 2010

C. JOHNSON, J.—In these consolidated cases, five-year firearm

enhancement sentences were imposed on the defendants, where the juries were instructed and asked to find by special verdict whether the defendants were armed with a deadly weapon. We must decide, first, whether this sentence was an error and, second, whether under article I, sections 21 and 22 of the Washington Constitution, this type of error is subject to a harmless error analysis. We hold that this sentence is an error to which the harmless error doctrine does not apply. In *State v. Williams-Walker*, noted at 132 Wn. App. 1009, 2006 WL 701942, the Court of Appeals vacated a five-year firearm enhancement. In *State v. Graham*, noted at 132 Wn. App. 1053, 2006 WL 1237275, and *State v. Ruth*, noted at 134 Wn. App. 1018, 2006 WL 2126311, the Court of Appeals upheld five-year firearm enhancements based on harmless error. We affirm in *Williams-Walker* and reverse *Graham* and *Ruth*; we remand for resentencing consistent with this opinion.

FACTS

A. *State v. Williams-Walker*

On August 26, 2002, Aro Té Jhon Williams-Walker and Carlos Fuentes arranged to meet with and sell illegal drugs to Ty Harden, Gene Chamberlin, and Jackie Karol. During the sale, Williams-Walker or Fuentes[1] shot Chamberlin with a

[1]Karol testified she saw Williams-Walker shoot Chamberlin. But Hardin testified Fuentes was the

.22 caliber semiautomatic pistol and then fled, and Chamberlin died before medical help arrived.

The State charged Williams-Walker with first degree robbery and first degree murder, as a principal or accomplice in felony murder, with a firearm enhancement. At trial, the jury was provided a special verdict form that asked, "[w]as the defendant armed with a *deadly weapon* at the time of the commission of the crime . . .?" CP (Williams-Walker) at 287-89 (emphasis added). The jury answered the special verdict form in the affirmative. The trial court sentenced Williams-Walker to 381 months, including a 60-month firearm enhancement. The Court of Appeals, Division Three, affirmed Williams-Walker's conviction, reversed the sentencing enhancement, and remanded for resentencing consistent with the deadly weapon special verdict. *Williams-Walker*, 2006 WL 701942.

B. *State v. Graham*

The State charged Curtis Eugene Graham with one count of first degree assault with a firearm and one count of unlawful possession of a firearm in the second degree. The information alleged that on January 14, 2004, Graham assaulted Mohammed Sylla, with a .380 caliber pistol.

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shooter.

At trial, a deadly weapon special verdict form was provided to the jury because the State sought a sentencing enhancement. Regarding the special verdict, the trial court instructed the jury that the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the assault. The jury returned the special verdict form indicating it found that Graham was armed with a deadly weapon during the commission of first degree assault. CP (Graham) at 9.

The trial court sentenced Graham to 121 months for the first degree assault conviction and added a 60-month firearm enhancement based upon the deadly weapon special verdict. The Court of Appeals affirmed Graham's conviction and sentence. *Graham*, 2006 WL 1237275.

C. *State v. Ruth*

Matthew Robert Ruth was charged with two counts of first degree assault with a firearm, specifying Ruth was armed with a firearm during the commission of an assault against Drew Eden and Daniel Custer on November 5, 2003.

At trial, the special verdict form asked the jury to determine whether the defendant was armed with a deadly weapon during the commission of the offenses.

The jury answered in the affirmative.

At sentencing, based upon the jury's special verdict finding, the trial court applied the 60-month firearm enhancement to each count. The Court of Appeals, Division One, in a per curiam opinion, affirmed Ruth's conviction and sentence. *Ruth*, 2006 WL 2126311.

D. *Petitions for Review*

We granted review in each case solely as to the issue of the firearm sentence enhancement and consolidated the three cases under *State v. Williams-Walker*, 163 Wn.2d 1059, 187 P.3d 753 (2008). We deferred review pending the United States Supreme Court's decision in *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d (2006) (*Recuenco* II). In *Recuenco* II, 548 U.S. at 222, the Court held a harmless error analysis may be applied to *Blakely* errors for Sixth Amendment purposes. The Court noted that whether a *Blakely* error was subject to harmless error under a state constitutional analysis remained an open question. *Blakely v. Washington*, 542 U.S. 296, 218, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In supplemental briefs, Ruth and Graham argued this court should hold that

harmless error does not apply to *Blakely* violations under a state constitutional analysis. Ruth, Graham, and Williams-Walker incorporated one another's arguments pursuant to RAP 10.1(g).

ISSUES

(A) Did the trial courts violate the defendants' state constitutional right to a jury trial when they imposed firearm enhancements after the juries found by special verdict that the defendants committed their crimes using deadly weapons?

(B) Under our statutes and precedent, may harmless error analysis apply in the above situation?

ANALYSIS

(A) Did the trial courts violate the defendants' right to a jury trial?

Our state constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." CONST. art. I, § 21. Our prior cases have held this language to establish that in some circumstances, our state constitution provides greater protection for jury trials than the federal constitution. *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (stating that the textual differences between the federal and state constitutions indicate the general importance of the right to jury

trial in the Washington Constitution); *see also City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (noting that "our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789").[2] But under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict.

The United States Supreme Court held, "Other than the fact of a prior conviction, any 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). In *Blakely*, the Court clarified this rule, holding "that the '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*." 542 U.S. at 303. Even before the Court decided *Apprendi*, we

[2] Consequently, here, it is unnecessary to engage in a full *Gunwall* analysis, as Ruth argued, to determine whether a claim under article I, section 21 warrants an inquiry on independent state grounds. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *See McNabb v. Dep't of Corrections*, 163 Wn.2d 393, 399-400, 180 P.3d 1257 (2008); *see also State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (*Recuenco* III) (discussing the greater protection for a defendant's right to a jury under our state constitution).

provided similar protections. In *State v. Frazier*, we held:

> Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

81 Wn.2d 628, 633, 503 P.2d 1073 (1972). The failure to submit a sentencing factor to a jury for a finding thus violates a defendant's right to a jury trial under both the federal and state constitutions.

Three statutory provisions govern sentence enhancements based on the defendant's use of a firearm or other deadly weapon. Former RCW 9.94A.510(3), (4) 2001, specified two separate sentence enhancements: five years when a firearm was used to perpetrate a class A felony[3] and two years when a "deadly weapon other than a firearm" was used to commit a class A felony.[4] Different jury findings

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[3] Former RCW 9.94A.510(3) stated the following:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements . . . .
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> (a) Five years for any felony defined under any law as a class A felony . . . .

[4] Former RCW 9.94A.510(4) stated:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon

thus authorize different sentence enhancements.[5] A third provision, former RCW 9.94A.602 (2001), clarified that "deadly weapon" includes firearms and requires a jury to find the defendant's use of such a weapon by special verdict.[6] Taken together, these provisions establish that while a jury must find by special verdict a defendant's use of both types of deadly weapons (firearms and others), in order to authorize either the firearm or deadly weapon enhancement, the finding also must specify the type of weapon used. Where a jury finds by special verdict that a defendant used a "deadly weapon" in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a two-year "deadly weapon" enhancement is authorized, not the more severe five-year firearm enhancement. When the jury makes a finding on the lesser enhancement, the

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enhancements . . . .

(a) Two years for any felony defined under any law as a class A felony . . . .

[5] Though former RCW 9.94A.510(4) by its plain language appears to apply only to deadly weapons other than firearms, our cases demonstrate that a defendant may in fact be given a deadly weapon enhancement for use of a firearm. *See, e.g.*, *Recuenco* III, 163 Wn.2d at 431-32.

[6] Former RCW 9.94A.602 stated:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, . . . if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
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> For purposes of this section, 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. The following instruments are included in the term deadly weapon: . . . pistol, revolver, or any other firearm . . . .

sentencing judge is bound by the jury's determination.

We have recognized that a sentencing court violates a defendant's right to a jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (*Recuenco* III). In *Recuenco* III, the trial court's imposition of a firearm enhancement—where only a deadly weapon enhancement had been charged by the State or authorized by the jury—was unauthorized and therefore in error. The cases before us present a different and much closer question: whether a trial court may impose a firearm enhancement in the absence of a jury finding *by special verdict* that the defendant used a firearm (or deadly weapon).

In each of the three cases here, the court submitted to the jury the special verdict form for a deadly weapon enhancement, not the form for a firearm enhancement, which was originally alleged, and the jury returned answers to those deadly weapon special verdict forms. In each case, the jury thus authorized only a deadly weapon enhancement, not the more severe firearm enhancement.

The State argues that the firearm enhancement was authorized in the cases of

Ruth and Graham because the juries implicitly found, by their guilty verdicts, that the defendants committed the crimes using a firearm.[7] Both Ruth and Graham were charged with first degree assault with a firearm, a conviction of which requires the jury to find that a firearm was used.[8] *See* former RCW 9.94A.510; RCW 9.41.010; former RCW 9.94A.602. We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of a deadly weapon or firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

In the cases before us, the juries were given special verdict forms for a deadly weapon enhancement, and they returned answers in the affirmative. The fact that

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[7] The State also relied on *State v. Pharr* for the proposition that underlying crimes necessarily establishing the use of a firearm support imposing a firearm enhancement when only a deadly weapon enhancement is authorized by the jury. *See* 131 Wn. App. 119, 126 P.3d 66 (2006). In that case, the Court of Appeals found no error because the trial court instructed the jury to answer the deadly weapon special verdict form in the affirmative if it found Pharr had been armed with a firearm when he committed the crime. To the extent *Pharr* is inconsistent with this opinion, we disapprove of *Pharr*.

[8] In contrast, the convict and special verdict instructions in *Williams-Walker*, 2006 WL 701942, did not require the jury to find Williams-Walker had been armed with a firearm. Because our holding requires the jury to authorize a firearm enhancement by special verdict, the lack of a firearm element in the underlying offense in that case is not relevant here.

the State provided notice in the information to each of the defendants that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding.

By imposing firearm enhancements, the trial courts here relied not on the juries' special verdicts but rather on the underlying guilty verdicts. This results in sentences unsupported by the juries' findings. Disregard of the sentence enhancement authorized by the special verdicts violates the defendants' rights to a jury trial under article I, sections 21 and 22. For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict. Where a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings. A sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict.

(B) May the imposition of an unauthorized sentence ever be harmless?

In *Recuenco* II, the United States Supreme Court held that the "[f]ailure to

submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." 548 U.S. at 222. Therefore, under a federal Sixth Amendment analysis, a *Blakely* error may, under certain circumstances, be subject to a harmless error analysis. *Recuenco* II, 548 U.S. at 219-20. "'[M]ost constitutional errors can be harmless.'" *State v. Frost*, 160 Wn.2d 765, 781, 161 P.3d 361 (2007) (alteration in original) (internal quotation marks omitted) (quoting *Recuenco* II, 548 U.S. at 218).

Here, however, the question is whether a sentencing enhancement that violated the defendant's right (under article I, sections 21 and 22) to have a jury determine all the factors that subject him to greater punishment can be harmless under our state constitution. In these cases, the error was made, not in the jury instruction, but in the trial court's imposition of a sentence.

On remand from *Recuenco* II, we determined that harmless error analysis does not apply where "no error occurred in the jury's determination of guilt." *Recuenco* III, 163 Wn.2d at 441. There, we did not decide whether a *Blakely* error may ever be harmless under a state constitutional analysis. Instead we held in part that harmless error analysis was not applicable because the error occurred when the

trial court exceeded its authority in imposing a sentence neither charged nor authorized by the jury. 163 Wn.2d at 440, 442.

Unlike in *Recuenco* III, it is undisputed here that the State charged the defendants with crimes and/or introduced evidence consistent with the use of a firearm. And, from an evidentiary view, no dispute exists that the deadly weapon was a firearm. But this distinction from *Recuenco* III makes no difference. In that case, we based our holding on the fact that the trial court exceeded its authority by imposing a firearm enhancement without a jury determination that the defendant was armed with a firearm. 163 Wn.2d at 440 (noting "[*f*]*urther*, Recuenco lacked any notice that he could be sentenced under the firearm enhancement" (emphasis added)). The trial court's error in *Recuenco* III—imposing the firearm enhancement without a special verdict to support it—occurred in the sentencing phase; no error occurred during trial. As in *Recuenco* III, the errors in the cases before us occurred during sentencing, not in the jury's determination of guilt. Thus, as in that case, because the trial courts' errors occurred after the jury verdicts were reached, the harmless error doctrine does not apply.

The dissent mischaracterizes the error that occurred. No error exists in the

charging document, and no error exists in the instructions or jury findings. The error occurred when the judge imposed a sentence not authorized by the jury's express findings. The problem arises from the statutory definition of "deadly weapon" as including a firearm. Former RCW 9.94A.602. Because of this definition, the only way to determine the applicable sentence enhancement is to look to the jury's findings. Quite simply, only three options exist: First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies. Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings. Where the jury makes such a finding, the sentencing judge is bound by that finding. Where the judge exceeds that authority, error occurs that can never be harmless.

CONCLUSION

We affirm the Court of Appeals in *Williams-Walker* and reverse the Court of Appeals in *Graham* and *Ruth*. We remand the cases for resentencing consistent with this opinion.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice Susan Owens

Justice Gerry L. Alexander

Justice Richard B. Sanders
Justice Debra L. Stephens