72251-4

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Court of Appeals
Division I
State of Washington

72251-4

NO. 72251-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HOWARD ROSS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The rejection of the State's case by the jury sent the trial court the clear message that the testimony of Ken Jones, the only person to testify Howard Ross committed an assault or possessed a firearm, should not be credited. While there was no issue Mr. Jones had been assaulted on January 22, 2014, the jury unanimously determined Mr. Ross was not guilty of assaulting him. In making its findings, the jury also completed the special verdict form, finding Mr. Ross was not in possession of a firearm when Mr. Jones was assaulted.

At the same time the jury was determining Mr. Ross was not guilty of assault, the trial court was deciding whether there was proof beyond a reasonable doubt Mr. Ross was guilty of unlawful possession of a firearm. After the jury rendered its verdict, the court issued its contrary verdict finding Mr. Ross guilty of unlawful possession.

Collateral estoppel prevents a trial court from making findings contrary to those made in favor of a person accused of a crime. Because the jury rendered a favorable verdict on the same issues examined by the court on identical evidence, the court was collaterally estopped from issuing a contrary ruling. Rather than issue a verdict consistent with the findings made by the jury, the court issued an inconsistent

verdict which requires correction. It was based upon insufficient evidence of guilt and should have been dismissed.

B. ASSIGNMENTS OF ERROR

1. The court was collaterally estopped from rendering a guilty verdict on possession of a firearm after the jury rendered a not guilty verdict on assault in the first degree and made a special finding that Mr. Ross did not possess a firearm at the time of the assault.

2. The court rendered an inconsistent verdict.

3. There was insufficient evidence Mr. Ross possessed an actual firearm.

4. There was insufficient evidence that the firearm alleged to have been possessed by Mr. Ross was operable.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Collateral estoppel requires subsequent fact finders to adhere to favorable verdicts. Where the jury found beyond a reasonable doubt that Mr. Ross was not guilty of an assault involving a firearm and issued a special verdict that he was not in possession of the firearm when the offense was committed, did the trial court err in failing to follow this verdict when it found Mr. Ross guilty of possession of firearm after the jury had rendered its final verdict?

2. The justifications for allowing juries to return inconsistent verdicts do not apply to when the trial judge is the fact finder. Judges must instead attempt to render a verdict consistent with the jury's findings. Must a trial judge give effect to the unanimous verdict of the jury and issue a consistent verdict in a hybrid trial involving both the judge and jury as fact finders?

3. In order to prove possession of a firearm, the State must establish the defendant possessed an actual firearm capable of being discharged. Where no competent evidence is presented that the firearm was genuine or capable of being discharged, must the court find insufficient evidence and dismiss the charge?

D. STATEMENT OF THE CASE

1. Charged with assault in the first degree and unlawful possession of a firearm.

Howard Ross was charged with assault in the first degree and unlawful possession of a firearm in the first degree for assaulting "Kenneth Jones with a firearm and force and means likely to produce great bodily harm or death" on January 22, 2014. CP 1-2.[1] The State

[1] The record below consists of 8 volumes, with page numbers continuing from one volume to another. This brief will refer to the volume in which the citation to the record is made, along with the page number. E.g., 1 RP 20. References to the designated clerk's papers will refer also be by page number. E.g., CP 1-2.

also specially accused "the defendant, Howard Lee Ross at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010." *Id*. The information did not allege distinct charging periods or allege that the possession of the firearm was distinct from the assault on Mr. Jones. *Id*.

2. *Motion for severance.*

Mr. Ross moved to sever the assault and firearm charges in order to avoid the potential prejudice which could occur should the jury discover he had a prior felony conviction. 1 RP 20. The prosecutor replied that "It is clear that all of the testimony pretty much for one -- for Count 1 would satisfy the testimony for Count 2." *Id*. The court denied Mr. Ross' motion, finding "all of the evidence that would be admissible in the assault charge would be admissible and necessary for proof of the firearm charge." 2 RP 75.

3. *Decision to conduct a bench trial on count 2 (possession of a firearm).*

The State first suggested Mr. Ross "waive to the bench on the second count." 1 RP 21-22. When the court reconvened, Mr. Ross waived his right to a jury trial on the firearm charge. 3 RP 206. The court made the finding it was a knowing, intelligent and voluntary waiver. CP 26.

4. Joint jury and bench trial on counts 1 and 2.

The State's theory at trial was that Mr. Jones was assaulted by Mr. Ross with the handgun that was the basis of the possession charge. In her closing argument to the jury, the State argued the "firearm pretty much is the crime here because it's the mechanism of injury, the way that he [Mr. Ross] assaulted Ken Jones." 7 RP 861. In her rebuttal, the State reaffirmed this theory, telling the jury

> And so I'll ask you to find him [Mr. Ross] guilty because beyond a reasonable doubt he is guilty of the crime of assault in the first degree. He did shoot Ken Jones. I'll ask you to answer yes on that special verdict form. Yes, he did use a firearm to assault Ken Jones.

7 RP 894.

The only witness who testified at trial that Mr. Ross possessed a firearm or assaulted Mr. Jones was Mr. Jones himself. He told the jury he had no memory of the incident until his aunt told him the person who had assaulted him was the person who "got a settlement for, like, 250,000" and he "only knew one person that got this type of settlement out of all my friends." 6 RP 592-93, 634. Jones also testified he had been consuming alcohol and using cocaine the night he was assaulted. 6 RP 594. He admitted he had lied to the hospital personnel about his

drug use because he was "ashamed" and he didn't know if it "plays a big difference in anything." 6 RP 618.

In her closing argument to the jury, the State conceded there was little other evidence to connect Mr. Ross to this crime. While a car resembling one owned by Mr. Ross was seen shortly after Mr. Jones was shot, no person other than Mr. Jones was able to state they saw Mr. Ross in the car. 8 RP 840. Other than Mr. Jones, there was no testimony Mr. Ross shot Mr. Jones. 8 RP 840. The State admitted there was no physical evidence of the shooting, acknowledging no shell casings were recovered. 8 RP 845. The State also recognized the lack of forensic evidence, including that no blood or other DNA was found in Mr. Ross' vehicle. 8 RP 847-48.

In her closing to the court on count 2, the State made clear "the crux of this crime is that it was committed with a firearm." 7 RP 895. She focused on Mr. Jones testimony, highlighting conversations Mr. Ross was alleged to have had with Mr. Jones, observations Mr. Jones had made and the fact that Mr. Jones was "shot and injured" by Mr. Ross. *Id*. Other than the stipulation that Mr. Ross had previously been convicted

of a residential burglary, the State offered no additional

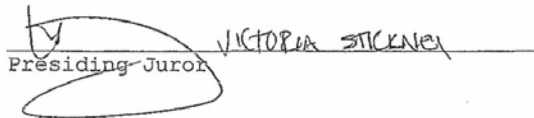
evidence for the court to consider on count 2.

5. *Acquittal on count 1 (assault in the first degree) by the jury and finding on special verdict (possession of a firearm during commission of the crime).*

The jury returned a unanimous verdict of not guilty on count 1, finding the State had failed to prove its case beyond a reasonable doubt. 8 RP 907. This finding was signed by the presiding juror. CP 50.

We, the jury, find the defendant HOWARD LEE ROSS NOT GUILTY (write in "not guilty" or "guilty") of the crime of Assault in the First Degree as charged in Count I.

6/12/2014
Date



VICTORIA STICKNEY
Presiding Juror

CP 50.

The jury answered the special verdict question of "was the defendant Howard Lee Ross armed with a firearm at the time of the commission of the crime in count 1 by stating "No." 8 RP 907. This was also endorsed by the presiding juror. CP 51.

QUESTION: Was the defendant HOWARD LEE ROSS armed with a firearm at the time of the commission of the crime in Count i?

ANSWER: NO (Write "yes" or "no")

6/12/2014 Date

VICTORIA STICKNEY Presiding Juror

CP 51. Upon taking the verdicts, the court acknowledged the jurors service and told them their work was "complete." 8 RP 907.

6. Conviction on count 2 by the court.

The court did not issue its ruling until after the "jury reached its verdict on count I." 8 RP 910. After reading her written findings of fact, the court found Mr. Ross guilty of unlawful possession of a firearm. 8 RP 913-14; *see also* CP 70-73. Although there was no record a second person was involved in the assault, the court stated the jury could easily have found reasonable doubt as to who actually was the shooter. 8 RP 914. The court declined to enter a finding "that the firearm was the one that was used to shoot [Mr. Jones]." CP 72. When Mr. Ross moved for an arrest of judgment, the court reasoned that it did not consider whether the firearm it found Mr. Ross possessed had been

used in the assault. 8 RP 920. The court reaffirmed its ruling and denied Mr. Ross' motion. 8 RP 927.

E. ARGUMENT

1. The court was collaterally estopped from finding Mr. Ross guilty of possession of a firearm.

a. Collateral estoppel requires subsequent fact finders to adhere to favorable verdict when identical issues have been settled favorably for the defendant.

The double jeopardy clauses of the federal and state constitutions prevent the state from litigating an issue decided in favor of the defendant. *Harris v. Washington*, 404 U.S. 55, 56-57, 92 S.Ct. 183, 30 L.Ed. 2d 212 (1971); U.S. Const. amends. 5, 14; Const. art. I, § 9. When applied to collateral estoppel, this principal "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *see also, Com. v. Wallace*, 411 Pa. Super. 576, 581, 602 A.2d 345 (1992) (Doctrine of collateral estoppel prevents relitigation between parties of an issue previously decided by a competent legal forum). Collateral estoppel applies in criminal cases to bar re-litigation of a particular issue or fact previously determined by a valid and final judgment. *State v. Williams*, 132 Wn.2d 248, 253-54,

937 P.2d 1052 (1997); *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968).

To determine whether a prior verdict controls a subsequent decision, the court must not use a "hypertechnical" analysis, but rather must look at the case "with realism and rationality" to decide what issue or issues the prior fact-finder decided. *Ashe*, 397 U.S. at 444. In *Ashe*, there was no dispute six poker players had been robbed, and in the first trial the State prosecuted Mr. Ashe on only one count of robbery although he had originally been charged with all six. 397 U.S. at 437-38. Although there was "unassailable" proof a robbery had occurred, there was "weak" evidence Mr. Ashe had committed it. *Id*. He was acquitted and subsequently prosecuted again, this time charged with having robbed a second person at the poker game. *Id*. at 39. He was convicted on substantially stronger evidence when retried. *Id*. at 440.

Explaining the collateral estoppel doctrine, the Supreme Court reasoned that after the first acquittal, the prosecution "could certainly not have brought [Ashe] to trial again" for robbing the first victim, as the first jury had determined the State did not prove Ashe's identity as a robber beyond a reasonable doubt. *Id*. at 446. Double jeopardy

principles would have prevented the State from pursuing a second trial "in the hope that a different jury might find the evidence more convincing." *Id* at 446. The Court then reasoned that it is "constitutionally no different" to bar a second trial for the same offense after an acquittal as is it to prohibit a second trial for the same issue when the State failed to prove that issue at an earlier trial. *Id*. The issue the State failed to prove was that Ashe was one of the people who participated in the robbery of both victims. Giving the prosecution another chance to prove the same fact after the acquittal "is precisely what the constitutional guarantee forbids." *Id*. at 447.

Likewise, the principals of collateral estoppel apply to issues decided in a split verdict, where the jury acquits on some counts and remains deadlocked on others. *Yeager v. United States*, 557 U.S. 110, 120, 129 S.Ct. 2360, 174 L.Ed. 2d 78 (2009). Where there is a hung jury and an acquittal, that acquittal is "entitled to the same effect as Ashe's acquittal" and it terminates jeopardy with respect to the issues that were finally decided. *Id*. at 122. A subsequent prosecution will be completely barred "if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution." *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir. 1997).

The doctrine of collateral estoppel can be applied here, where the court did not issue its verdict until after the jury had issued it final judgment on both the general and specific verdicts. To enforce the collateral estoppel rule, the movant must show that:

> "(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice."

State v. Bryant, 146 Wn.2d 90, 98–99, 42 P.3d 1278 (2002) (*quoting Williams*, 132 Wn.2d at 254). Jeopardy attaches in a jury trial when a jury is sworn in, and it terminates with a verdict of acquittal. *State v. Heaven*, 127 Wn. App. 156, 161, 110 P.3d 835 (2005) (*quoting State v. Corrado*, 81 Wn. App. 640, 646-47, 915 P.2d 1121 (1996)).

b. The court was collaterally estopped from finding Mr. Hall possessed a firearm.

i. The issue decided by the jury was identical to the one presented to the court.

When the jury issued its general and special verdicts, it found beyond a reasonable doubt Mr. Ross was not in possession of a firearm. 8 RP 907. The court's contrary opinion the following day is in direct conflict with the juror's findings. The jury was specifically instructed

that the assault on Mr. Jones "(a) was committed with a firearm or by a force or means likely to produce great bodily harm or death; or (b) resulted in the infliction of great bodily harm." CP 41. They were further instructed on the definition of firearm, consistent with the definition required for unlawful possession. CP 44. The special verdict form made clear "the State must prove beyond a reasonable doubt that the defendant was armed with a firearm." CP 48. The jury found both that Mr. Ross was not guilty of assault in the first degree and that he was not armed with a firearm at the time of the commission of the assault. CP 51-52.

At no point during the trial did the State suggest there was a second firearm or shooter involved in the assault on Mr. Jones. In fact, the State was clear to the jury that Mr. Jones "did use a firearm to assault Ken Jones." 8 RP 894. In her argument to the court on count 2, the State never tried to parse the possession of the firearm from the assault, instead asserting Mr. Ross "ultimately shot and injured Ken Jones with it." 8 RP 895. Rather than address the findings of the jury that Mr. Jones was not guilty of assault and did not possess a firearm at the time of the alleged assault, the court only discussed other evidence which was heard during the trial. CP 71-72. Instead, it was proper for

the court to focus on all of the evidence heard at trial and take into account the verdict already reached by the jury. By applying collateral estoppel principles, the court should have found the State failed to prove its case beyond a reasonable doubt.

ii. The jury's verdict was a final judgment on the merits.

Once the jury issued its verdict on both the general and special verdict, they became final. CrR 6.16(2); [2] *see also State v. Robinson*, 84 Wn.2d 42, 46, 523 P.2d 1192 (1974) (A jury's action does not become a verdict until it is finally rendered in open court and received by the trial judge). Jeopardy had attached when the jury was sworn. Mr. Ross could not have been retried once the jury issued its unanimous verdict of not guilty. The jury had also determined beyond a reasonable doubt Mr. Ross was not armed when Mr. Jones was assaulted.

iii. The prosecution is the party against whom the plea of collateral estoppel is asserted.

Collateral estoppel requires that the party against whom the plea of collateral estoppel is asserted had an opportunity to litigate the issue

[2] A jury returns a verdict when all members have agreed upon the verdict and the presiding juror completes and signs the verdict form, returning it to the judge in open court. CrR 6.16(2).

at hand. *Bryant*, 146 Wn.2d at 98–99. This element is clearly met and should not be in dispute.

iv. The application of the doctrine must not work an injustice.

While the trial court attempted to create a “hypertechnical” analysis in finding Mr. Ross guilty of unlawful possession of a firearm, the court should examine the issue of collateral estoppel with “with realism and rationality.” *Ashe*, 397 U.S. at 444. This case involves a clear course of conduct involving one firearm. There are no allegations there was a second assailant, never mind a second firearm. To the contrary, at no time did the State ever allege the firearm used to assault Mr. Jones was not the same firearm Mr. Ross was alleged to have possessed all evening. *See, e.g.* 7 RP 861 (the “firearm pretty much is the crime here because it's the mechanism of injury”).

The only way to reach the verdict the trial court did is to have found some other person assaulted Mr. Jones, a theory never argued by the State. In examining this matter with rationality and realism, this Court should reject the notion that at some point after Mr. Jones alleged he saw Mr. Ross with a firearm that some other person suddenly appeared to assault him or that another firearm was used. The State’s theory was always that there was only one assailant armed with one

firearm. When the jury found Mr. Ross not guilty of assault, they also considered the question of whether he had been armed with a firearm, again finding beyond a reasonable doubt that we was not. The court created an absurd result that was contrary to the argument of the State and the evidence when it determined the "gun that was in the vehicle" supported finding Mr. Ross guilty of possession of a firearm and then did not make a finding the gun was or was not the same gun used to assault Mr. Jones. *See* 8 RP 920. At no time during the trial was there ever a suggestion the firearm alleged to have been possessed by Mr. Ross was not the same one the State alleged he used to assault Mr. Jones.

Despite the court's finding that Mr. Jones was credible, there were many reasons why the jury determined he was not. He admitted that he lied about drug use to his medical providers, a type of testimony for which courts have found confrontation is not required because it is so "trustworthy that adversarial proceedings can be expected to add little to its reliability." *White v. Illinois*, 502 U.S. 346, 357, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). He told the jurors it was only after his aunt had reminded him Mr. Ross had received a settlement of "250,000" that he remembered it was Mr. Ross who had assaulted him.

6 RP 592-93. He made a number of other inconsistent statements, many of which he could not explain. The jurors also heard medical testimony that initial assessments showed Mr. Jones' "severe deficits and short term memory" problems. 6 RP 465. They also heard that recovery from his assault "could be as minimal as alterations to memory…" 7 RP 670.

Courts have also examined this question with respect to whether the party against whom collateral estoppel has been applied had a fair opportunity to litigate the issues. *Bryant*, 146 Wn.2d at 99. Unlike *Bryant*, where the prosecutors came from different counties, the State in this case was given a complete opportunity to litigate both charges. There should be no question the State was given a complete opportunity to present its evidence of firearm possession to the fact finder. No injustice occurs by finding collateral estoppel applies.

Enforcing the collateral estoppel doctrine will not result in an injustice. Instead, it creates consistent verdicts between the jury and the court. This Court should find no injustice would be created by enforcing the collateral estoppel doctrine.

c. <u>This court should dismiss the firearm charge under the collateral estoppel doctrine.</u>

When the jurors issued their final verdict on the assault in the first degree charge and their special finding that Mr. Ross was not in

possession of a firearm during the commission of the offense, the court was estopped from finding otherwise. The court attempted to find evidence of guilt without considering Mr. Ross' acquittal and the special verdict that he was not in possession of a firearm at the time of the assault. This is a hypertechnical analysis of the facts which the Supreme Court rejects. This Court should find that the trial court was collaterally estopped from finding Mr. Ross guilty of possession of a firearm and should dismiss count 2.

2. The inconsistent verdicts of the jury and judicial factfinder must be resolved.

a. Judicial fact finders must render verdicts consistent with jury verdicts.

Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity. *Dunn v. United States*, 284 U.S. 390, 393–94, 52 S.Ct. 189, 76 L.Ed. 356 (1932). Where a jury's verdict is supported by sufficient evidence, it will not be reversed because of inconsistencies. *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict that the Sixth Amendment requires. *Andres v. United States*, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed. 1055 (1948).

This rule is not applied when the fact finder is a judge. There is no need to permit inconsistency from a judicial officer so that the court may reach unanimity with itself. *United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960). In civil matters, federal courts have held that, where equitable claims are to be resolved by the court and legal claims are to be resolved by the jury, the judge is "without power" to reach a conclusion inconsistent with that of the jury. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988). Applying experience and logic in criminal cases, the *Marbury* court held a judicial officer may not "indulge in 'vagaries' in the disposition of criminal charges" and that the justifications for allowing inconsistent verdicts by juries do not apply when the fact finder is a judge. *Marbury,* 274 F.2d at 903*; see also Galloway v. State*, 371 Md. 379, 416, 809 A.2d 653, 675 (2002) (where inconsistency was created by trial court when it rendered a verdict inconsistent with verdict rendered by jury, remedy was reversal of court's verdicts). While Washington does not appear to have addressed the issue of inconsistent verdicts issued by a jury and judge, the *Maybury* analysis has been adopted in other jurisdictions. *See, e.g., U.S. v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 (9th Cir.1981); *Haynesworth v. United States*, 473 A.2d 366, 368

(D.C.1984); *People v. Vaughn*, 409 Mich. 463, 295 N.W.2d 354 (1980); *People v. Williams*, 99 Mich.App. 463, 297 N.W.2d 702 (1980).

b. The trial court issued an inconsistent verdict after the jury had rendered a verdict of not guilty on the identical facts.

The court held a bifurcated trial where the jury determined whether Mr. Ross had committed an assault, while the court was asked to determine whether Mr. Ross possessed the firearm used to assault Mr. Jones. There was only one issue or scenario presented to both the judge and the jury: that Mr. Ross either possessed the firearm that was used to assault Mr. Jones or he did not. 7 RP 861. The jury found that he did not commit the assault and made the special finding he did not possess a firearm at the time of the offense. CP 50-51. The only additional evidence presented to the court and which required an independent finding was whether Mr. Ross had previously been convicted of a felony. 8 RP 819-20. Based upon otherwise identical evidence presented at the same trial, the court found that he was. CP 72. This verdict, without question, is inconsistent.

c. Possession of a firearm should be dismissed in order to reconcile the trial's court inconsistent verdict.

The *Galloway* court makes clear that to approve an inconsistent verdict issued by a judicial officer in a bifurcated trial "would undermine the historic role of the jury as the arbiter of questions put to it." 371 Md. at 406. Respect for the law or for the court is not enhanced by allowing a judge to indulge in the same compromises a jury may make in rendering its verdict. *Maybury*, 274 F.2d at 903. Instead, *Galloway* cautions that approving inconsistent verdicts rendered by a trial judge in a bifurcated trial would authorize "a practice that would permit the State to achieve a judgement of conviction that overrides a jury's finding of acquittal. 371 Md. at 676. Upon receiving the jury's verdict, the trial court should have dismissed count 2. This court should find the verdicts are inconsistent and, in order to give effect to the unanimous verdict of the jury, dismiss count 2.

3. There was insufficient of the evidence that Mr. Ross possessed a firearm.

a. Possession of a weapon requires a finding of operability.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S.

358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. 14; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When viewing evidence in the light most favorable to the State, evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 192, 414 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (*citing Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

An essential element of possession of a firearm is that it is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. RCW 9.41.010(9). Sufficient evidence must be presented to the fact finder for it to determine that the object is a true firearm and not a gun-like object incapable of being fired. *State v. Pam*, 98 Wn.2d 748, 755, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Whether an object is a “firearm” involves a question of statutory interpretation that is reviewed de novo. *Nakatani v. State*, 109 Wn. App. 622, 625, 36

P.3d 1116 (2001); *see also State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998).

In *Pam*, the court found that the failure to instruct the jury on the reasonable doubt standard for the firearm enhancement was not harmless error because the jury could have had a reasonable doubt as to the "operability of the weapon." *Pam*, 98 Wn.2d at 755. This analysis has been applied consistently in other cases analyzing the obligation to prove operability. *State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010); *see also State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm": "a weapon or device from which a projectile may be fired by an explosive such as gunpowder").

b. The conviction for possession of a firearm should be reversed.

Had the jury credited Mr. Jones testimony and found Mr. Ross guilty of assault in the first degree, there would be no argument that the evidence of firearm possession was sufficient. By rejecting this testimony, the jury's finding discredits the subsequent finding that Mr. Ross possessed a firearm at any point during the night of this incident.

By ignoring the clear factual finding the jury made, the court must contort itself in order to reach a different conclusion.

The court made findings with regard to the operability of the firearm, specifically that

> Based upon Jones' observations of the gun, and the manner in which the defendant handled it, taking it with him when leaving the vehicle, and refusing to let Jones' handled [sic] it, the court finds the gun was a firearm, capable of being fired.

CP 72. The court also made the specific finding that it did "not make a finding one way or the other that the firearm was the one used to shoot [Mr. Jones]."[3] *Id.*

These findings are insufficient to find that Mr. Ross was in possession of an operable firearm on the night in question. CP 60. No firearm was ever recovered, there was no evidence that a "second firearm" was ever discharged, and there was no testimony presented that would indicate a "second firearm" was capable of being discharged, let alone existed at all. *Id.* at 60-61.

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[3] Counsel has substituted "Mr. Jones" for the words "the defendant" in the findings of fact, which is clearly a scrivener's error. There is no evidence to suggest Mr. Ross was ever shot.

c. <u>This court should find insufficient evidence of operability and reject the trial court's finding that more than one firearm may have been present.</u>

In order to find sufficient evidence of possession and operability, the court must reject the clear findings of the jury that Mr. Ross did not assault Mr. Jones and did not possess a firearm in the commission of the assault. CP 50-51. Even when this evidence is ignored, insufficient evidence exists to establish the operability of the firearm the State alleged Mr. Ross possessed. Because of this insufficiency, this court should dismiss count 2.

F. CONCLUSION

The court was collaterally estopped from issuing the verdict that it did, which was inconsistent with the findings of the jury. Given the jury's unanimous determination that Mr. Ross was not guilty of assault and did not commit the crime with a firearm, there was insufficient evidence to prove beyond a reasonable doubt that Mr. Ross was in possession of a firearm. This Court should dismiss the unlawful possession of a firearm charge.

DATED this 10th day of September 2015.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

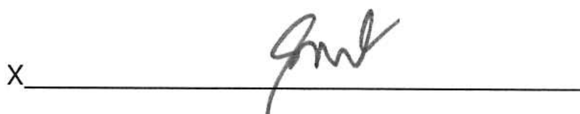
STATE OF WASHINGTON, Respondent, v. HOWARD ROSS, Appellant.	)))))))))	NO. 72251-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] HOWARD ROSS 747017 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY ________________

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF SEPTEMBER, 2015.



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