

No. 65699-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS GUSWALTER PARKER,

Appellant.

---

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

The Honorable Theresa Doyle

---

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Parker's double jeopardy rights by failing to strike the second degree felony murder conviction.

2. Mr. Parker's constitutionally protected rights to due process and a fair trial were violated by prosecutorial misconduct.

3. The trial court materially violated RCW 2.36 by dismissing a juror who was otherwise eligible.

4. The trial court erred in imposing a firearm sentence enhancement which was based upon an invalid special verdict.

5. The trial court erred in calculating Mr. Parker's offender score as a "10" instead of a "9."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Double Jeopardy Clauses of the United States and Washington Constitutions prohibit a defendant from being twice placed in jeopardy. Multiple punishments for the same offense where the Legislature has not authorized such multiple punishment violates double jeopardy. Here, the State conceded the second degree intentional murder and felony murder were the same offense but the court refused to vacate either count. Did the trial

court err in failing to strike the felony murder conviction as it violated double jeopardy?

2. The Sixth and Fourteenth Amendments guarantee an accused person a fair trial before an impartial jury. Where a prosecutor engages in misconduct during closing argument which prejudices the defendant, the defendant is denied a fair trial. The prosecutor here argued that the term "verdict" meant "to tell the truth," which was an improper argument. Is Mr. Parker entitled to a new trial where he was denied a fair trial based upon prosecutorial misconduct?

3. Under Washington law, a person who has suffered a prior felony conviction is disqualified to act as a juror, unless the person has had his or her civil rights restored. The trial court dismissed a juror who had a prior Wisconsin felony conviction without determining whether the juror's civil rights had been restored under Wisconsin law, which they had. Is Mr. Parker entitled to a new trial based upon the court's erroneous dismissal of the juror without determining the juror's eligibility?

4. A jury instruction that requires the jury be unanimous to find the State had not proven the special verdict beyond a reasonable doubt is erroneous and the imposition of the resulting

sentence is based upon an invalid special verdict and itself must be stricken. Here, the court instructed the jury using an instruction that misstated the standard for unanimity on the special verdict, then imposed the sentence enhancement based upon the invalid special verdict finding. Must this Court strike the sentence enhancement for use of a firearm where it was improperly obtained?

5. In calculating the offender score for murder in the second degree, the court doubles any prior convictions that are classified as a "violent" offense. Mr. Parker suffered a prior conviction for attempted second degree robbery, which the trial court doubled in determining his offender score to be a "10." *Attempted second degree robbery is not defined as a "violent" offense. Is Mr. Parker entitled to reversal of his sentence and remand for resentencing with an offender score of "9?"*

C. STATEMENT OF THE CASE

Louis Parker and Markasha Monroe began dating in 2008, and were together approximately one year in what friends and relatives described as a stormy relationship punctuated by jealousy and instances of domestic violence. 6/2/2010RP 34-36; 6/3/2010RP 59-65. On August 4, 2009, Ms. Monroe, Mr. Parker, and several others attended a candle light vigil in a nearby park.

Mr. Parker and Ms. Monroe spent the night in Ms. Monroe's room.  
6/3/2010RP 14-18.

The next morning, others in the house heard Ms. Monroe tell Mr. Parker to stop, then heard a single gunshot. 6/3/2010RP 27-33. Once they entered Ms. Monroe's room, they discovered her mortally wounded from a gunshot wound to the head. 6/14/2010RP 13.

Mr. Parker was subsequently charged with second degree murder under the alternative means of intentional murder and felony murder. CP 84-86. Mr. Parker was also charged with being armed with a firearm in the commission of the two offenses and unlawful possession of a firearm in the first degree. CP 84-86. Following a jury trial, Mr. Parker was convicted as charged. CP 199-203.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO STRIKE  
THE FELONY MURDER CONVICTION  
VIOLATED DOUBLE JEOPARDY

At sentencing, the court imposed sentences on Count I, the second degree murder count, and Count III, the unlawful possession of a firearm count: the court imposed no sentence for Count II, the felony murder count. 7/2/2010RP 16-17. Mr. Parker pointed this discrepancy out to the trial court:

Your Honor, I take it from the Court's silence as to Count II [felony murder] that the Court is acquiescing in the State's view of Count II as a verdict unreduced to judgment that is just going to hang out there in the ether some place. And I object to that. I think Count II – the verdict in Count II should be vacated along with the special verdict for the firearm enhancement on that count.

7/2/2010RP 17-18.<sup>1</sup>

Despite Mr. Parker's objection, the court refused to dismiss the count: "To the extent that there has been an objection for the record, it is noted." 7/2/2010RP 19.<sup>2</sup>

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<sup>1</sup> Counsel for Mr. Parker advised the trial court that the Court of Appeals' decision in *Turner, infra*, was pending before the Supreme Court. 7/2/2010RP 18-19. The court refused to strike the felony murder conviction, offering:

If those cases do come down in favor of your position, feel free to set it on for hearing.

7/2/2010RP 19.

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intends to impose

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<sup>2</sup> The trial court also refused Mr. Parker’s request to find the two offenses to be the same criminal conduct. 7/2/2010RP 22 (“[i]t will be noted for the record that you made this request. So, if there’s any error in not making a finding pursuant to that, it can be raised on appeal.”).

multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.*; see *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent*. *Hunter*, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.*; *State v. Kier*, 164 Wn.2d 798, 804,

194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* “same evidence” test to determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

b. Imposition of convictions for second degree murder and felony murder violated double jeopardy. In *State v. Turner*, the Supreme Court held that imposition of separate convictions for second degree murder and felony murder for the same act violates double jeopardy. 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010). Further, the Court held that the trial court may not conditionally strike the lesser conviction, but must unconditionally vacate that conviction. *Id.* at 466.

The decision in *Turner* compels the conclusion that the two convictions here violate double jeopardy. The two counts were based upon the same act; Mr. Parker’s shooting of Ms. Monroe. The trial court erred in failing to vacate Count II as requested by Mr. Parker.

c. The remedy for a double jeopardy violation where two or more offenses arise from the same conduct is to unconditionally vacate the felony murder conviction. In *State v. Womac*, the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007). *Accord State v. League*, 167 Wn.2d 671, 223 P.3d 93 (2009) (“When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.”). In *Womac*, the convictions involved were homicide by abuse, second degree felony murder, and first degree assault, all based upon the same act. The trial court ruled the convictions violated double jeopardy but conditionally dismissed them, allowing for reinstatement if the greater verdict and sentence were later set aside. The Supreme Court ruled that only the homicide by abuse conviction could stand and the other two convictions *must* be dismissed. *Id.*

Imposition of a sentence for the two offenses violated double jeopardy and the felony murder conviction should have been

dismissed. This Court should order that the felony murder conviction be stricken. *Turner*, 169 Wn.2d at 466.

2. THE PROSECUTOR'S INTENTIONAL MISSTATEMENT OF THE PRESUMPTION OF INNOCENCE VIOLATED MR. PARKER'S RIGHT TO DUE PROCESS

The prosecutor in summing up her closing arguments stated:

You are asked today to render a decision. It's a decision that we ask people to render in this courthouse and in courthouses throughout our country on a daily basis. We live in a nation of laws and we hold people accountable for their behavior.

*The word verdict means to speak the truth. What we ask is that you hold Mr. Parker accountable for his behavior and find him guilty of Murder in the Second Degree.*

7/2/2010RP 45 (emphasis added).

a. Mr. Parker had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because

“the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence,” appellate courts must exercise care to insure that prosecutorial comments have not unfairly “exploited the Government's prestige in the eyes of the jury.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. “The touchstone of due process analysis is the fairness of the trial, i.e.,

did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?” *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant’s due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). “Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury’s verdict.” *Id.*

Where defense counsel fails to object to prosecutorial misconduct at trial, the issue may be raised on appeal where the prosecutor’s misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” and was incurable by a jury instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d

937 (2009) (internal quotation marks omitted), *quoting State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

b. The presumption of innocence lasts until the jury finds the State has proven the offenses beyond a reasonable doubt. Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” (citation omitted)); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“It [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”), *quoting Leland v. Oregon*, 343 U.S. 790, 802-03, 72 S. Ct. 1002, 96 L. Ed. 1302

(1952) (Frankfurter, J., dissenting); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006).<sup>3</sup>

“[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.” *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). The State may not undermine the presumption of innocence by telling the jury that the reasonable doubt standard “doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.” *Id.* at 27.

The prosecutor's repeated requests that the jury “declare the truth,” however, were improper. A jury's job is not to “solve” a case. It is not, as the State claims, to “declare what happened on the day in question.” Rather, the jury's duty is to determine

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<sup>3</sup> See also *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (“We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” (citations omitted)); *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (“The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

whether the State has proved its allegations against a defendant beyond a reasonable doubt.

*State v. Anderson*, 153 Wn.App. 417, 429, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010) (internal citation omitted).

Telling the jury, as the prosecutor did here, that the word “verdict” means “to tell the truth” implies that “the truth” and “reasonable doubt” are contrary to each other. As stated in *Anderson*, it is not the jury’s duty to declare the truth, it is to determine if the State has proved the allegations beyond a reasonable doubt. *Id.* The prosecutor’s argument was improper.

c. The prosecutor’s argument warrants reversal.

Prosecutorial misconduct requires reversal where the appellate courts are convinced beyond a reasonable doubt that the error contributed to the jury verdict. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995). The State cannot meet this standard by speculating that a hypothetical juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

“[A] misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.” *State v. Johnson*, 158 Wn.App. 677, 685, 243 P.3d 936 (2010), *citing State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *Anderson*, 153 Wn.App. at 432.

The question presented to the jury was not whether Mr. Parker shot Ms. Monroe: the question presented was whether the State proved the shooting was intentional or an accident. By pointing the jury's focus to determining what “the truth” was, the prosecutor was shifting the jury from its proper focus, which was whether the elements had been proven. This argument ultimately undermined the presumption of innocence because it suggested reasonable doubt and the truth were contrary to each other. This was error.

Further, the error was flagrant and ill-intentioned. Division Two of this Court has held that where the prosecutor has made a similar argument and been reversed, the prosecutor is on notice that any similar arguments from thence forward would result in reversal:

Further, the error was flagrant and ill-intentioned. In *Anderson*, 153 Wn.App. at 429, this Court found a similar argument to be error, but not flagrant and ill-intentioned. *Since the prosecutor was on notice that this type of argument was erroneous, the prosecutor's use of a similar argument cannot be seen as merely ignorance, but must be seen as a flagrant attempt to mislead the jury.*

*Johnson*, 158 Wn.App. at 685 (emphasis added).<sup>4</sup> Given the pronouncement in *Anderson, supra, Johnson, supra*, and *State v. Venegas*, 155 Wn.App. 507, 523 n. 16, 525, 228 P.3d 813 (2010), the prosecutor was on notice that this argument was erroneous. The argument here cannot now be seen as mere ignorance but seen as a flagrant attempt to mislead the jury.

Finally, a curative instruction would not have remedied the error. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not

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<sup>4</sup>The Court disagreed with this Court's decision in *Fleming* that the notice must be in a *published* decision:

We note that, in *State v. Fleming*, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996), Division One of this court held that improper prosecutorial arguments were flagrant and ill-intentioned where that court had previously recognized those same arguments as improper in a published opinion. Here, the prosecutor made these arguments on May 14, 2009. We published *Anderson* on December 8, 2009. 153 Wn.App. at 417. But we decline to follow Division One's holding in *Fleming*, suggesting that it is necessary to have a published opinion holding that certain prosecutorial conduct is flagrant and ill-intentioned before such conduct warrants reversal of a conviction.

*Johnson*, 158 Wn.App. at 685.

request.” *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994),  
*cert. denied*, 514 U.S. 1129 (1995). This claim regarding the use of  
curative instructions ignores the behavior of jurors and can lead to  
absurd results:

If juries could honestly be counted upon to literally  
construe and obey an instruction that closing  
arguments are “not evidence,” and that their verdict is  
to be based solely on the evidence, it would make no  
sense for the jury to do anything but disregard closing  
arguments altogether. If that were the case it would  
be impossible to justify the Supreme Court's holding  
that a criminal defendant has a constitutional right to  
give a closing argument. Nor could one possibly  
justify the rule that it may be reversible error to grant a  
jury's request to read back portions of the  
prosecutor's closing. It would also be absurd for  
attorneys to object at all to improper closings,  
although we insist that they do so, and redundant for  
judges to strike improper closing remarks. It would  
always be pointless for the prosecution to exercise its  
right to give a rebuttal argument because it would  
merely be responding to an argument that the jury  
had been told to disregard. And as one court of  
appeals has correctly noted, that logic, if taken  
seriously, “would permit any closing argument, no  
matter how egregious.”

James Joseph Duane, *What Message Are We Sending To Criminal  
Jurors When We Ask Them To Send A Message With Their  
Verdict?* 22 Am. J. Crim. L. 565, 653-55 (1995) (internal footnotes  
omitted).

Finally, the prosecutor's argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction or an objection. "[A] bell once rung cannot be unring." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Parker's convictions and remand for a new and fair trial which comports with due process.

3. THE TRIAL COURT'S EXCLUSION OF  
JUROR NO. 12 VIOLATED MR. PARKER'S  
SIXTH AMENDMENT AND ARTICLE I, § 22  
RIGHT TO A FAIR AND IMPARTIAL JURY

During *voir dire*, it came to light that Juror 12 had a 1966 Wisconsin robbery conviction. 5/27/2010RP 52, 6/1/2010RP 2-4. The trial court noted that pursuant to RCW 2.36.070, the juror was not eligible to be a juror. 6/1/2010RP 5. Mr. Parker noted that the statute refers to one convicted of a felony and has not had his civil rights restored. 6/1/2010RP 5. Mr. Parker submitted that it would be premature to dismiss the juror without first determining whether his civil rights were restored in Wisconsin: whether it required some affirmative act by the juror or whether his rights were automatically restored after a period of time of good behavior. *Id.* The court rejected these arguments and dismissed the juror:

THE COURT: Based on the record before me, I can find, by a preponderance of the evidence, that this

juror's civil rights were not restored. He testified he made no effort to restore his rights. We don't know what the law in Wisconsin is; however, he did state that he didn't vote for many years because he assumed his rights weren't restored. So, he certainly has taken no affirmative steps to restore his rights.

...  
I'm going to excuse him based on the record before me, which is exclusively from the juror that he doesn't know whether his rights have been restored. He hasn't taken any steps himself, and he has not been voting. The Court finds that he is not qualified, under RCW 2.36.070, so I will excuse him, and [defense] objection noted for the record.

MR. STIMMEL: I think the record also ought to note that he is the only African American in the room.

6/1/2010RP 7-8.

a. The trial court may excuse a juror for cause only where there is evidence of actual bias by the juror or the juror is otherwise not qualified to serve. The Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 3 and 22 of the Washington Constitution, guarantee a defendant the right to a trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).

Pursuant to RCW 2.36.070(5) a person is not competent to serve as a juror in Washington if he or she has a felony conviction. RCW 2.36.100(1) provides that absent undue hardship or other extreme circumstances, no person may be excused from jury service unless that person is “not qualified” under RCW 2.36.070. All “qualified citizens” under RCW 2.36.080(1) are guaranteed the opportunity to be considered for jury service. *State v. Marsh*, 106 Wn.App. 801, 806, 24 P.3d 1127 (2001).

When statutory jury selection procedures are materially violated, the claimant need not show actual prejudice; rather, prejudice is presumed. *State v. Tingdale*, 117 Wn.2d 595, 600-02, 817 P.2d 850 (1991); *Roche Fruit Co. v. Northern Pac. Ry.*, 18 Wn.2d 484, 487, 139 P.2d 714 (1943).

b. The court’s dismissal was a material violation of RCW 2.36 since the juror was eligible to serve as his civil rights had been restored by statute. The court dismissed Juror 12 because of his prior Wisconsin felony conviction, ignoring Mr. Parker’s objection that the dismissal was premature in light of the fact the parties and the court were ignorant of Wisconsin law, and the juror very well could have had his civil rights restored.

In fact, Mr. Parker’s objection was well taken:

Under the laws of this state, criminal convictions do not automatically disqualify prospective jurors. In 1996, Wis. Stat. § 756.01 provided that a prospective juror had to be an elector of the state. Wis. Stat. § 6.03(1)(b) provides that persons convicted of treason, felony, or bribery cannot be electors unless their civil rights are restored. A person's civil rights are restored, and the person is therefore an elector eligible to be a prospective juror, *by serving out his or her term of imprisonment or otherwise satisfying his or her sentence.* Wis. Stat. § 304.078.

*State v. Mendoza*, 227 Wis.2d 838, 851-52, 596 N.W.2d 736, 743 (Wis., 1999) (footnotes omitted).<sup>5</sup>

In light of the fact Juror 12 was eligible to serve as a juror in Wisconsin and Washington, the trial court was at worst, simply wrong when it dismissed the juror, or at best, premature because the court took no steps to determine whether the juror's civil rights had been restored. In either situation, the court materially violated RCW 2.36.070. Further, the record before the court was incomplete: there was no evidence before the court concerning the

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<sup>5</sup> Wisconsin's statute concerning restoration of civil rights of convicted felons states in relevant part:

(2) Except as provided in sub (3), every person who is convicted of a crime obtains restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or her sentence . . .

(3) If a person is disqualified from voting under s. 6.03(1)(b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification . . .

Wis. Stat. Ann. § 304.078(2), (3).

restoration of the juror's civil rights, thus the court's reliance on "the record before" it was erroneous.

Alternatively, the court's erroneous dismissal of Juror 12 was an abuse of discretion. Instructive on this issue is the decision in *Tingdale*, supra. In *Tingdale*, a Jefferson County deputy court clerk, following county procedures and a judge's approval, excused three potential jurors because she believed they were acquainted with the defendant. The "court did not ask the clerk to identify the persons nor did it attempt to question them regarding their acquaintanceship ... [but] relying on the clerk's judgment alone, the court told the clerk to excuse these individuals." *Tingdale*, 117 Wn.2d at 598. One was a high school classmate of the defendant, but had seen her only once in the past 20 years. Another was the brother of the defendant's friend. And the third was the landlord of the defendant's building, which was also the location of the crime. *Tingdale*, 117 Wn.2d at 597.

The Supreme Court reversed, holding the trial court's procedure constituted an abuse of discretion because it "had no factual basis on which to base a finding of actual or imputed bias" of at least two of the jurors. *Tingdale*, 117 Wn.2d at 601-02 ("There is nothing in the record to establish these jurors could not try the

case impartially and without prejudice.”). The Court also found the trial court’s actions to be a material departure from RCW 2.36 and noted that as a result, prejudice was presumed. *Id.* at 603.

Here, the court did not have enough of a factual basis to dismiss Juror 12 in light of the pending question about the procedure for the restoration of a person’s civil rights in Wisconsin following a felony conviction.

4. THE IMPOSITION OF AN ILLEGAL SENTENCE ENHANCEMENT FOR BEING ARMED WITH A FIREARM RENDERS THE SUBSEQUENT SENTENCE ILLEGAL AND IT MUST BE STRICKEN

Regarding the murder counts and the lesser included manslaughter counts, the jury was instructed to consider a special allegation that Mr. Parker was armed with a firearm.

The jury was instructed concerning the special allegation:

You will also be given special verdict forms for the crimes charged in Count I and Count II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes of Murder in the Second Degree or Manslaughter in either degree, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.* In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If*

*you unanimously have a reasonable doubt as to this question, you must answer “no.”*

CP 198 (emphasis added). The jury subsequently found the special allegation to be true. CP 200-02. The court imposed an additional 60 months for the firearm enhancement. CP 250.

a. The jury need not be unanimous to answer “no” to a special verdict. The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 213 (1994). The jury was thus required to unanimously find the State had proved Mr. Parker had used a deadly weapon in order to answer “yes” to either of the special verdict forms.

Unanimity, however, was not required for a “no” answer. *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003).

In *Goldberg*, upon discovering that jurors were not unanimous in answering “no” to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw*, the trial court instructed the jury in precisely the same manner regarding the special verdict: “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

*Bashaw*, 169 Wn.2d at 147 (emphasis added).

The same instruction at issue in *Bashaw* was used in Mr. Parker's trial. CP 198. Further, as in *Bashaw*, the jury here was polled and affirmed their verdict. 6/22/2010RP 2-5. Nevertheless, as in *Bashaw*, the simple use of this improper instruction by the trial court was error.

b. The issue may be raised despite an objection at trial. It may be argued that the error cannot be raised for the first time on appeal. But, this error can be raised for the first time on appeal. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94. "[I]llegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The error here occurred not in the use of the invalid instruction, but when the trial court imposed the sentence enhancement based upon an invalid special verdict.

A sentence enhancement must be authorized by a valid jury special verdict. *Williams-Walker*, 167 Wn.2d at 900. Error occurs when the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *State v. Recuenco*, 163

Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt).

Thus, Mr. Parker can raise this issue despite the lack of an objection.

c. The error in imposing an illegal sentence based upon the invalid special verdict instruction is never harmless. It may be argued that the error was nevertheless harmless. The Supreme Court's decision in *Bashaw* specifically precludes such an analysis.

In *Bashaw*, the same instruction at issue here was used.

The Supreme Court refused to apply harmless error:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

. . .

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

*Id.* at 147-48 (emphasis added).

The same analysis applies here. The same instruction was used here as was utilized in *Bashaw*, thus this Court is foreclosed from applying a harmless error analysis.

More to the point though, this Court must reject any argument that it can nevertheless have confidence in the jury's finding on the special verdict because the jury found Mr. Parker had committed the murder with a firearm. This argument runs afoul of the Supreme Court's decision in *Williams-Walker*.

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.

167 Wn.2d at 899. As a consequence, the Supreme Court has already rejected this precise argument and this Court should do likewise. The error is not susceptible to a harmless error analysis.

d. The remedy is to strike the special verdict and remand for resentencing without the firearm enhancement. A firearm enhancement is not an element of the offense but a sentencing factor, and the remedy for an improper firearm

enhancement finding by the jury is to reverse the sentence and strike the enhancement. *Williams-Walker*, 167 Wn.2d at 889-902.

Here, the trial court's error in imposing the firearm enhancement without a *valid* special verdict to support it occurred when the trial court imposed the sentence for the enhancement. *Recuenco*, 163 Wn.2d at 440. Thus, the remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker*, 167 Wn.2d at 899-900; *Recuenco*, 163 Wn.2d at 441-42.

5. THE TRIAL COURT ERRED WHEN IT DETERMINED MR. PARKER'S PRIOR ATTEMPTED SECOND DEGREE ROBBERY CONVICTION CONSTITUTED A "VIOLENT" OFFENSE

To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his prior convictions and level of seriousness of the current offense. *Ross*, 152 Wn.2d at 229. The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *Ford*, 137 Wn.2d at 479. "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

An erroneous or miscalculated offender score may be raised for the first time on appeal. *Ford*, 137 Wn.2d at 454. “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *In re Personal Restraint of Goodwin*, 146 Wash.2d 861, 867-68, 50 P.3d 618 (2002). “[T]he remedy for a miscalculated offender score is resentencing using the correct offender score.” *Ross*, 152 Wn.2d at 228, *citing Ford*, 137 Wn.2d at 485.

Where the current offense is a serious violent offense, each prior juvenile or adult conviction counts for two points. RCW 9.94A.525(a). Murder in the second degree is a serious violent offense. RCW 9.94A.030(44)(iii).

“Violent” offenses are defined in RCW 9.94A.030(53). Second degree robbery is defined as a “violent” offense. RCW 9.94A.525(53)(xi).

Here, the trial court doubled Mr. Parker’s 2005 prior *attempted* second degree robbery conviction, considering it a “violent” offense (04-8-05014-8). CP 229, 253. RCW 9.94A.030(53) does not define *attempted* second degree robbery as a “violent” offense. Only attempted class A felonies are defined as “violent” offenses. RCW 9.94A.030(53)(i). Second degree

robbery is a Class B felony. RCW 9A.56.210(b). *Attempted* second degree robbery is a Class C felony. RCW 9A.28.020(3)(c).

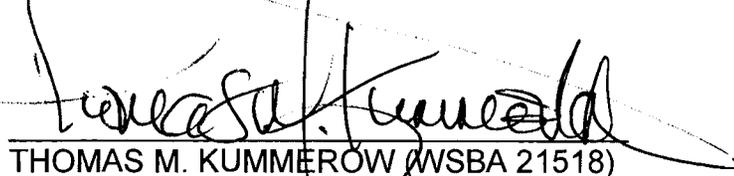
The trial court improperly doubled the attempted second degree robbery conviction after incorrectly determining it to be a “violent” offense. Mr. Parker is entitled to remand for resentencing with a correct offender score of “9.”

E. CONCLUSION

For the reasons stated, Mr. Parker requests this Court reverse his convictions and remand for a new trial for prosecutorial misconduct or the erroneous exclusion of the juror. Alternatively, the felony murder count should be stricken, and/or the firearm sentence enhancement should be stricken.

DATED this 23rd day of March 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65699-6-I
v.	)	
	)	
LOUIS PARKER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF MARCH, 2011, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> LOUIS PARKER BKG. #209028376 KING COUNTY JAIL 500 5 <sup>TH</sup> AVE. SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF MARCH, 2011.

X \_\_\_\_\_ 

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