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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet his burden of showing the prosecutor engaged in improper argument, much less that it was flagrant and ill-intentioned, which is necessary to succeed in his claim of prosecutorial misconduct?
2. Did the State adduce sufficient evidence to support the jury's finding that defendant was guilty of manslaughter in the first degree?
3. Did the trial court have the authority to submit a special verdict form to the jury regarding a firearm enhancement?

B. STATEMENT OF THE CASE.

1. Procedure

On June 10, 2005, the Pierce County Prosecutor's office filed an information charging appellant, MARIO ELIAS SANCHEZ (defendant), with manslaughter in the first degree in Pierce County Cause No. 05-1-02848-5. CP 1-4. The State also alleged a firearm enhancement. Id.

On February 27, 2006, the matter came on for trial before the Honorable Kathryn J. Nelson. RP 1-4. After presentation of the evidence the court submitted the matter to the jury. The court instructed the jury on the charged offense, the lesser degree offense of manslaughter in the second degree and on the defense of accident. CP 114-140. There were

no exceptions taken to the court's instructions. RP 243. The jury convicted defendant as charged, including the firearm enhancement. CP 141, 143.

The court imposed a low-end standard range sentence of 78 months plus an additional 60 months for the enhancement for total confinement time of 138 months in addition to legal financial obligations and a community custody term of 24-48 months. CP 148-158.

Defendant filed a timely notice of appeal from entry of this judgment. CP 159.

2. Facts

The victim, Adino Sanchez, would have been 24 years old at the time of trial. RP 99. He and the defendant were cousins. RP 99. His mother described Adino's relationship with the defendant as friendly, but not close – "they weren't like brothers." RP 100. Adino was a gun owner and had a gun permit. RP 100. He kept his gun in a locked box when he wasn't carrying it. RP 100-101.

On May 6, 2005, at approximately 11:22 p.m., police and paramedics with the Tacoma Police and Fire departments were called to the defendant's home at 3202 Maplewood Circle in Tacoma, in response to a dispatch for a gunshot wound. RP 126-127, 130, 137-138. Police arrived before the paramedics. RP 128, 138. Officers went to the room

where the victim lay; one officer lifted the towel covering the victims face to check on his condition, then lowered it. RP 138, 141-142. The officers secured the room and waited for paramedics. RP 138-139. Upon arrival, the paramedics were directed to the bedroom where they found the victim on the couch with a towel over his face; after determining that there was no breath or pulse, the paramedics replaced the towel and left. RP 128. The victim was obviously deceased. RP 130. The victim's body felt cool to the touch. RP 129. Police officers maintained the room until forensic specialists arrived to process the scene. RP 139.

After viewing the deceased, Officer Larson asked the other occupants of the house who had been holding the rifle when it discharged; the defendant raised his hand and said that it was he. RP 142. Officer Larson took defendant to the covered front porch and read him his Miranda rights; defendant agreed to speak with the officer. RP 142-143. Defendant explained that the deceased was his cousin, Adino, and that he had just purchased the rifle less than two weeks prior. RP 144. Defendant told Officer Larson that he was not very familiar with the rifle and had not fired it prior to that night. RP 148. He did tell the officer that he had fired a similar rifle at the Bull's Eye Shooter Supply on a previous occasion. RP 148. Defendant told Officer Larson that he and Adino were in his bedroom looking at the new rifle. RP 144. Defendant said that he was

sitting on his bed and Adino was sitting across from him on a couch. RP 144-145. Defendant described that they could pass the gun back and forth just by leaning forward. RP 145. Defendant told the officer that at the time of the shooting only he and the victim were in the room, but that his father came in quickly after the shot. RP 145.

Officer Larson testified that defendant told him that after the victim passed the rifle back to him, that he took the magazine out of the gun and dropped it on the floor. Defendant said he then turned to put the gun back in its case, which was on the bed, when the gun went off. RP 145. Defendant said that the magazine that had been in the gun had been fully loaded with 30 rounds. RP 145. Defendant denied loading a round into the chamber before he passed the gun to Adino and guessed that Adino must have chambered a round when he had the gun. RP 146. Defendant reasserted that the magazine was out of the gun when it fired. RP 146.

Detective Larson had been on patrol in the neighborhood just prior to receiving the dispatch to this call. RP 146. He recalled seeing a white minivan leaving Maplewood Circle and speeding through the neighborhood. RP 146. He had shone a spotlight on the minivan to get it to slow down, getting a good look at the driver. RP 147. Detective Larson asked defendant if anyone had left the residence, and defendant

said no. RP 147. Detective Larson mentioned the white minivan that he had seen; defendant acknowledged that Jesus Torres had been in the house at the time of the shooting, but maintained that Torres had not been in the room at the time of the shooting. RP 147-148. Officer Larson had had prior contacts with Torres and realized that he had been the driver of the white minivan. RP 147. Defendant denied that there had been any argument or disagreement with Adino prior to the shooting. RP 145. Officer Larson directed other officers to transport defendant to the downtown offices for a taped interview. RP 148-149.

Detective Webb testified that he took a taped statement from the defendant on the night the incident occurred. RP 190. He also did a follow-up taped interview with the defendant on the 10th of May. RP 192. The jury heard both taped interviews. RP 191, 193-194.

In the first interview, defendant stated that he had bought the AR-15 on April 28th for \$850. EX 10. On the night of the shooting defendant said that he had the gun out so that his cousin, Adino, could look at it. Id. The gun had a loaded clip in it that could hold thirty rounds. Id. Defendant did not recall his father coming into the room or telling him to put the gun away. Id. Defendant stated that he does not keep round in the chamber and to get a round chambered you must pull back a bolt which makes a noise. Id. Defendant said that he did not see Adino chamber a

round , but that he was “messaging” with his phone while Adino held the gun. Id. Defendant did not think it possible that a round had been chambered and left in the gun from the previous time he had looked at the gun. Id. Defendant stated that Adino passed the gun back to him by holding onto the barrel and holding the gun out with the pistol grip butt toward defendant. Id. Defendant stated that he got the gun, took out the clip, dropped the clip on the floor, then turned to put the gun in its case, when the gun went off. Id. Defendant did not recall pulling the trigger or hitting it. Id. Defendant told the detectives that Jesus Torres was not in the room when the gun discharged. Defendant said that Adino had handled the gun on one prior occasion before that night. Id. He said that neither he nor Adino had been drinking that night. Id.

In the second interview, defendant acknowledged that he lied when he told them earlier that Jesus Torres was not in the room at the time of the shooting. EX 9. In this interview, defendant told the detectives that he turned the safety on before handing the gun to Adino. Id. Defendant still denied knowing that a round was in the chamber, but when asked whether he had chambered a round that night defendant stated “I think so. Yeah.” Id. Defendant acknowledged that he was 19 years old, had little history or background with rifles in general and no experience with assault rifles. Id. He did not receive any instruction on gun safety from the store where he

bought the gun. Id. He was not instructed on how to put the clip in or how to turn the safety on. Id. He had been to the Bull's Eye 3 or 4 times to shoot guns. Id. He had to go with someone who was over 21 and always went with Adino. Id. It was Adino that got him interested in guns and shooting. Id. Defendant had fired a AR-15 once or twice at the Bull's Eye. Id. Defendant estimated that he had the gun out 5 or 6 times during the week he owned the gun. Id. He did not read the manual that came with the gun. Id. Defendant also acknowledged that he lied about when he took out the clip; the clip was in the gun at the time it discharged. Id. Defendant also acknowledged the possibility that he put his finger on the trigger when the gun was handed back to him. Id. Defendant acknowledged that for the gun to fire there: 1) had to be a round in the chamber; 2) the safety had to be off; and, 3) the trigger had to be pulled. Id.

Detective Webb later confirmed that defendant had purchased the AR-15 rifle on April 28, 2005. RP 196. He learned that Bull's Eye uses modified ammunition when someone is shooting a AR-15 at its shooting range; it is modified to make it less powerful than the ammunition that would normally be fired in a AR rifle. RP 196-197. Detective Webb testified that he tried to locate Jesus Torres for trial, including contacting

Torres's mother and probation officer, but his efforts were unsuccessful.

RP 197.

Defendant's father, Ruban Sanchez, testified that prior to the shooting he stood in the doorway of his son's room and told his son to put the rifle away. RP 171. At that time, Adino was holding the rifle. RP 171. He testified that as he turned to leave, Adino was passing the gun back to his son. RP 172. Within a matter of seconds, he heard a gunshot. RP 172. Ruban yelled out for someone to call 911 and went back to the room. RP 173. He entered the bedroom, saw his nephew had been shot, and saw his son was still sitting on his bed. RP 173-176. Ruban testified that his son was turning purple so he grabbed him; defendant dropped the rifle. RP 176. Jesus Torres had been in the room, but left within a minute of the gun firing. RP 176, 181. Ruban described defendant's relationship with Adino as "very close." RP 177. At trial, Ruban testified that Adino had used his right hand to pass the gun back to his son with the stock end toward the defendant and the barrel facing him. RP 179, 184-185. Ruban acknowledged that did not tell the detectives that he had seen Adino pass the rifle back to his son when he was interviewed the night of the incident. RP 172-173.

Detectives Webb and Davis testified that they took a taped statement from Ruban Sanchez in the early morning hours following the

incident. RP 188, 230-231. During that interview, Ruban said that he had just told his son to put the gun away and not to play with it, then turned and walked a few steps away when he heard the shot. RP 188-189. In the interview, he told the detectives that he did not see the gunfire. RP 189, 231. The detectives specifically asked if Ruban had seen Adino handle the rifle and Ruban told him that he did not personally see Adino with the weapon at any time and that he had only seen his son handling the weapon. RP 189, 231.

Defendant's step mother, Clarissa Bruce-Sanchez, testified that she was in the room directly above the defendant's bedroom when she heard a gunshot. RP 132. She ran downstairs to defendant's room passing a man named Jesus as he left the room. RP 133. When she entered she saw the defendant standing at the head of his bed and his father trying to calm him down. RP 133. She then noticed Adino and put her hand over his wound just below his chin to see if she could stop the bleeding. RP 133. She grabbed a nearby towel to try to stop the flow but could not stop the bleeding. RP 133. She then told everyone to leave the room and put the towel over the victim's face. RP 133, 135-136. Her daughter called 911. RP 136.

Forensic specialists processed the crime scene including taking photographs, video, measurements for diagrams and collecting evidence.

RP 103-118. The bed was in the south west corner of the room; a rifle case was sitting on the bed. RP 113-114. The victim was on the couch in the northeast corner of the room; his head was leaning against the wall; his face covered by a towel. RP 114-117. The victim had a cell phone in his right hand and nothing in his left. RP 115-116. The blood spatter indicated that his hands were in the same position at the time he was shot as they were when the police took their photographs. RP 115-116. The rifle was found on the floor near the door on the south side of the room. RP 114. The rifle, a gun magazine, and a spent casing were found in close proximity on the floor. RP 110, 114. The rifle had a live round in the chamber. RP 109, 122-123. The magazine on the carpet near the rifle was loaded. RP 107. Another loaded magazine was found under the foam of the rifle case. RP 109, 117. No fingerprints were found on the weapon or the two magazines found at the scene, which is not unusual. RP 105-106.

Matt Noedel, a firearms expert formerly with the Washington State Patrol, testified that he examined the rifle, the fired cartridge case, a group of unfired rounds of ammunition and the magazine that held those rounds, all of which were recovered at the scene. RP 201-208. Mr. Noedel described that the AR-15 rifle was a semi-automatic weapon. RP 208. This means that each shot requires a independent, unique pull of the trigger. RP 208. He test fired the rifle. RP 211. He then compared the cartridge casings from his test fires against the spent cartridge case found

at the scene. RP 211. From this examination he could conclude that the spent cartridge had been fired in the AR-15 rifle. RP 211. Mr. Noedel explained how the gun functioned, including how it would eject a spent cartridge then pull another round into the chamber from the magazine. RP 213-217. For the rifle to have a live round in the chamber, either the magazine would have had to have been in the gun at the time the gun was last fired or someone would have had to manually load the round after the gun had been fired. RP 123, 221-222. The gun had a safety mechanism; when employed, the gun would not fire. RP 215-216. It took six and a half pounds of pressure to pull the trigger on this rifle. RP 220. Mr. Noedel put the gun through several tests to see if he could get it to discharge accidentally; he could not get it to discharge accidentally. RP 217-219. Based upon his examination, Mr. Noedel concluded that the weapon was functioning properly. RP 228. Mr. Noedel also demonstrated for the jury the sound the gun makes when the bolt is pulled back to chamber a round. RP 222-223.

Dr. John Howard, the Pierce County Medical Examiner, testified that Adino Sanchez died from a gunshot wound to the face and neck. RP 158. The bullet entered just below the victim's lower lip, causing fractures to the bone. RP 158-159. There was no gunpowder stippling present which means that the muzzle of the weapon was probably more that three feet

away at the time it discharged. RP 165-166. The bullet broke into several pieces, which then caused damage to the cervical spine and fractured the bones in the neck. RP 159. One bullet piece lacerated the carotid artery, which is the main artery providing blood to the face, head, and brain. RP 159. The wounds caused both internal and external bleeding; the victim aspirated some blood into his lungs. RP 159. Death was not instantaneous, typically someone with these types of injuries would survive two to three minutes, but generally less than five. RP 160. No alcohol or drugs were found in the victim's system. RP 162-163.

The defendant did not testify or present the testimony of any witness. RP 237.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET HIS BURDEN IN SHOWING THAT THE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT, MUCH LESS THAT IT WAS FLAGRANT AND ILL-INTENTIONED, AND THEREFORE FAILS ON HIS CLAIM OF PROSECUTORIAL MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015

(1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

Defendant asserts that the prosecutor engaged in improper argument during the first closing. There were no objections made to any of the prosecutor's arguments. RP 263-278. Therefore, defendant must show that the remarks were "so flagrant and ill-intentioned" that they evinced "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Binkin, supra. Defendant cannot show that the remarks were improper much less flagrant and ill-intentioned.

Defendant contends that the prosecutor's argument misstated the law by arguing that "any injury with a gun is per se recklessness because any mishandling of a gun creates a substantial risk of harm." Brief of appellant at pp. 8-9. In the argument section of his brief, defendant does not cite to specific arguments but generally contends the improper argument occurred at RP 273, 275-276. Id. The State counters that this is not a fair interpretation of the challenged argument. The State submits that the following argument was reasonable based upon the evidence at trial, the instructions and the issues in the trial.

Prosecutor: We can reasonably infer the shooting was reckless based on what we do know. We know there was a magazine in the weapon at the time of the shooting. Even if the defendant didn't finally admit that, we would know it by the circumstantial evidence, which was there was a live round in the chamber after the gun fired. Live round was in the chamber. We know that. We know the trigger was pulled to discharge the weapon. We know the weapon must have been pointed at the victim when the trigger pulled, and we don't need to know whether or not

it was intentional. You know, was it a joke, ha-ha, or was it just an oops and he points it up. But we do know, one way or the other, this assault rifle ends up pointed at the victim. The victim was shot through the chin.

We know from the defendant's own admission that he never even read the weapon manual. And when you add up all the evidence, it shows recklessness, which is the key issue in this case.

How is Adino's death avoided? Don't play with an assault rifle. Don't play with a loaded assault rifle. Don't point an assault rifle at a human. Don't pull the trigger unless you want to shoot. Don't ever assume a weapon is unloaded. On the contrary, as we talked about, you always have to assume a weapon is loaded. Don't assume the safety is on. Read the weapon manual. Any one of those things, and we could have avoided Adino's death. He would not be dead if not for the defendant's reckless conduct, and it was sort of a deadly combination of reckless acts that led up to this.

The defendant never made the gun safe before handling it. He is playing with a loaded assault rifle, points the gun at the victim's face for reasons we don't know, and pulls the trigger, again for reasons we don't know. Any one of those things by themselves is reckless. Taken together, its extremely reckless. It's off-the-board recklessness.

RP 271-273. Defendant does not, indeed cannot, argue that the prosecutor was misstating the evidence or the logical inferences flowing from the evidence. The prosecutor was suggesting that assault rifles are inherently dangerous and must be handled with care and caution. That is a far cry from defendant's characterization that he was arguing "any injury with a gun is per se recklessness." The prosecutor was arguing that a number of

defendant's acts and omissions constituted recklessness under the instructions given by the court. This is proper argument.

Defendant argues that the prosecutor's argument "created what was in effect a mandatory presumption" and then cites several cases where jury instructions created mandatory presumptions that appellate courts later found to be unconstitutional. Here, the jury was instructed that the law was contained in the court's instructions and the jury was to disregard any argument "not supported by the evidence or the law in my instructions." Instruction No 1, CP 114-140. Defendant does not challenge any of the court's instructions as creating a mandatory presumption or for any other reason. Therefore, the jury was properly instructed on the law. If the jury somehow interpreted the prosecutor's argument as a "mandatory presumption" this would be inconsistent with the court's instructions. The jury would disregard any argument not supported by the instructions. Moreover, as the jury was constantly reminded in arguments by both counsel that *the* issue it had to decide was whether the defendant's actions were reckless, negligent, or accidental, in the legal sense, it is unlikely that it perceived the argument as a mandatory presumption. RP 273-276, 282-285, 296-298,304-307.

Defendant has failed to meet his burden of showing improper argument necessary to succeed on his claim of prosecutorial misconduct.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT DEFENDANT COMMITTED MANSLAUGHTER IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of

fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of first degree manslaughter if he “recklessly causes the death of another person.” RCW 9A.32.060(1)(a). A person acts recklessly “when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” RCW 9A.08.010(1)(c).

In this case defendant challenges the evidence supporting the jury’s finding that he acted recklessly. The evidence in this case showed

that defendant was a 19 year old that had limited experience with guns and very limited experience with assault rifles. His experience was acquired at the Bull's Eye shooting range where you had to be 21 years old or with someone 21 in order to rent a gun to shoot. Defendant, in the company of his older cousin, had shot a semi automatic assault rifle, like the one he purchased, a couple of times at this shooting range. From this, the jury could reasonably infer that defendant understood that use of a gun was an adult activity and that defendant had a basic understanding that a person could be killed by a bullet coming out of an assault rifle. The jury could further infer that defendant knew that he had to be careful in the manner in which he handled his new assault rifle at all times or that someone could be seriously hurt.

The evidence is beyond dispute that at the time the gun discharged:

- 1) a round was in the chamber;
- 2) a loaded magazine clip was in the gun;
- 3) the safety mechanism was off;
- 4) the gun was pointed at the victim's face a few feet away; and
- 5) the trigger had to be pulled for the gun to fire.

The jury could also find from the evidence that the discharge occurred while the defendant was holding the gun and that it occurred in a fairly small area, occupied by three people, and that several other people were in nearby rooms. The jury could reasonably conclude that these facts presented an extremely dangerous situation which created a substantial risk that someone might be killed. The jury could also conclude that for this combination of dangerous facts to exist that the defendant had to be

acting irresponsibly and disregarding a substantial risk that a wrongful act might occur. That disregard was shown by his failure: 1) to check the chamber to ensure that it was empty, 2) take the magazine out of the gun to ensure that a round could not be chambered; 3) ensure the safety was on and that it remained on by instructing others in the room not to take it off; 4) ensuring that, at no time, did he point the muzzle of the gun at a person in the room or in the direction of a nearby occupied room; and/or, 5) ensuring that his hand stayed clear of the trigger so that it would not be pulled. As engaging in almost any *one* of these precautions would have prevented the death of the victim, the fact that he did not employ *any* of these safety measures shows a disregard of the safety of others that is appalling. At a secondary level, the disregard could also be inferred from the defendant's failure to take a gun safety course or his failure to read the manual that came with the gun to ensure that he understood how it functioned. Looking at the evidence in the light most favorable to the State, there was more than enough evidence to find that the defendant acted recklessly in the manner he handled his AR-15 assault rifle.

Defendant suggests that the evidence was insufficient because the State never introduced any evidence of animosity between defendant and the victim. The elements of manslaughter do not require any showing of ill will or bad intent, just reckless conduct. It is quite possible and just as likely to kill a good friend with reckless conduct as it is an enemy. Defendant contends that because defendant told the detectives that he was

not aware that a round was in the chamber or that the safety was off that the evidence on these points is uncontested. That is not true. Mario made the statements about being unaware that a round was in the chamber in the same statement where he lied about the clip being in the gun and Torres being absent from the room. Clearly, defendant's statements to the detective were not completely trustworthy. Additionally, defendant did not tell the detectives in the first interview that he put the safety on the gun before he handed it to the victim. He did not raise this contention until the second interview, which was after he had a chance to think about his initial statement and decide whether to make adjustments to his version of the events. As the prosecutor pointed out in closing, there was considerable evidence to cast doubt on defendant's claim that the victim was ever holding the gun that night or, at least that he was not holding it shortly before he was shot. RP 264-267. Thus, to argue that the defendant's statements were uncontested is to misstate the record.

The State agrees with defendant that this case is a tragedy for Adino Sanchez and his family, and that "it should never have happened." See, Brief of Appellant at p. 13. The State would also agree that the evidence indicates that the defendant had no desire or intention to kill his cousin. But defendant was not convicted of murder but of manslaughter. The State does not have to prove either intent or ill-will. The State did present sufficient evidence to prove to a jury that defendant recklessly caused the death of another person. The jury's verdict should be upheld.

3. THE TRIAL COURT HAD THE AUTHORITY TO SUBMIT A SPECIAL VERDICT TO THE JURY ASKING IT TO DETERMINE WHETHER DEFENDANT WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE MANSLAUGHTER.

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. State v. Recuenco, 154 Wn.2d 156, 161, 110 P.3d 188 (2005), reversed sub nom, Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006), citing, Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). If a defendant is armed with a firearm when committing a felony, a mandatory sentencing enhancement must be imposed consecutive to any other sentencing provision, including other firearm or deadly weapon enhancements. See RCW 9.94A.533(3). All deadly weapon enhancements under this section are mandatory. RCW 9.94A.533(4)(e). The deadly weapon enhancements in this section apply to all felonies except possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony. RCW 9.94A.533(4)(f). Because the excluded felonies are crimes where having the weapon is the offense, the Legislature has clearly expressed its intent that a person who commits a felony while armed with a firearm will receive an enhanced sentence.

The Washington Supreme Court has never questioned the constitutionality or propriety of submitting special verdicts to a jury regarding a defendant's possession of a firearm. See State v. Wingate, 155 Wn.2d 817, 122 P.3d 908 (2005) (the jury returned a special verdict on the three convictions, finding that the defendant was armed with a firearm); State v. Louis, 155 Wn.2d 563, 102 P.3d 936 (2005) (the jury returned a special verdict that defendant was armed with a firearm); State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005) (by special verdict, the jury found that the defendant was armed with a firearm at the time of the commission of his crimes).

A court is not without authority to devise procedures to carry out the tasks assigned to it. RCW 2.28.150 provides that:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

In conjunction with this statutory authority, the court rules provide guidance to the superior court on how to instruct a jury regarding special findings or verdicts. First, the criminal rules require the court to provide "a jury" when the defendant has a right to a jury trial. CrR 6.1(a) ("Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court."). The criminal

court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances or other necessary factual determinations:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b).

In State v. Davis, 133 Wn. App 415, 138 P.3d 132 (2006), defendant was convicted of harassment, unlawful imprisonment and several misdemeanors. Id. At trial, the court submitted a special interrogatory to the jury asking whether Davis knew or should have known the victim was particularly vulnerable. Id. at 420. The jury found this aggravating factor existed and the sentencing court imposed an exceptional sentence based on this aggravating factor. Id.

On appeal, Davis claimed this procedure violated defendant's Sixth Amendment right under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). Id. at 426. Division Three of the Court of Appeals disagreed, concluding that the trial court fashioned a process that conformed to RCW 2.28.150, RCW 9.94A.535, and CrR 6.1(b). Id. at 428. The appellate court reasoned that because: 1) the trial court had authority to submit the special interrogatory; 2) a jury found the

aggravating factor; and, 3) the court properly exercised its discretion to impose an exceptional sentence based on that factor, that there was no Blakely error. Id.

Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). See also, United States v. Ameline, 376 F.3d 967, (9th Cir. 2004) (post-Blakely holding that federal district courts can impanel juries to decide facts concerning sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Moreover, Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, Washington's habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant's habitual offender status. Despite this deletion of the statutory authority, trial courts regularly impaneled juries to make such determinations for over seventy years. See, State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92

P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). In 1940, the Washington Supreme Court held that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), overruled by, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Even though the statute was not amended to conform to the holding in Furth, Washington courts continued to recognize that it had the power to impanel juries for habitual offender proceedings. See, State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997). In Hawkins v. Rhay, the Supreme Court found the improper exclusion of jurors for cause due to their opinions on the death penalty, mandated a new sentencing hearing, but not a new guilt phase. 78 Wn.2d 389, 399, 474 P.2d 557 (1970). The court observed that while there was no statutory framework to order a new trial on only the penalty phase, doing so would satisfy the intent of the legislature. Id. at 399-400, citing State v. Davis, 6 Wn.2d 696, 108 P.2d 641 (1940); State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970).

In the present case, the court instructed the jury:

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

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes. The State must prove beyond a reasonable doubt that there was a connection between the firearm and defendant. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm and the circumstances under which the firearm was found.

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

Instruction 20, CP 114-140. The jury found, by special verdict, that the defendant had been armed with a firearm at the commission of the crime of manslaughter. CP 143.

Defendant relies on the Court’s ruling in Recuenco in arguing that the Legislature has enacted no procedure for imposing a firearm enhancement. Appellant’s Brief at 26. Defendant’s characterization of the holding in Recuenco is erroneous. In Recuenco, the Court vacated the defendant’s firearm sentencing enhancement because the jury, by special verdict, found he had been armed with a deadly weapon at the time he had committed a crime. 154 Wn.2d at 164. Firearm sentencing enhancements impose greater punishment than deadly weapon enhancements do.

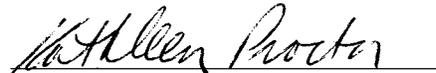
Compare RCW 9.94A.533(3)(b), (4)(b), and RCW 9.94A.602. Because that jury had found that Recuenco was armed with a deadly weapon, and not specifically a firearm, the judge could not impose the higher firearm enhancement. Recuenco, 154 Wn.2d at 162. Further, the Court held that the State was limited to Recuenco's deadly weapon enhancement on remand, because there is no procedure by which a jury can find sentencing enhancements on remand. Id. at 164. The Court did not hold that there is no general procedure for imposing a firearm enhancement at trial. Defendant cites no other authority to support his assertion that there is no procedure for imposing a firearm enhancement. Defendant's argument is without merit.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence entered below.

DATED: NOVEMBER 2, 2006.

GERALD A. HORNE
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Prosecuting Attorney


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/2/06
Date Signature

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