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A. STATUS OF PETITIONER

Petitioner was convicted after a jury trial in Thurston County, Washington. He is presently in custody serving a sentence of 288 months in prison. CP 124-23.¹ His trial attorney was Ms. Ann Stenberg, WSBA #22596 . He appealed. His appellate attorney was Ms. Patricia Pethick, WSBA #22314. The Court of Appeals affirmed his conviction and sentence in an unpublished decision. Appendix 1, Ruling Affirming Judgments and Sentences. Mr. Delgado petitioned for review in the Washington State Supreme Court. That petition was denied on September 7, 2005.

B. STATEMENT OF THE CASE

Delgado was convicted of first-degree assault, kidnapping in the first degree and rendering criminal assistance. The State also alleged that each offense was committed while he was “armed with a deadly weapon.” CP 23-24. At trial, the evidence indicated that Delgado’s brother, Ernest Meza, had only one gun throughout the incident, giving rise to the charges.

¹ Delgado has simultaneously filed a motion to transfer the transcript and clerk’s papers from his appeal, *State v. Delgado and Meza*, 30662-0-II, to this file. The CP citations in this petition indicate the transferred clerk’s papers.

At the close of trial, the judge gave Instruction 32 stating:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of each of the crimes charged in this case.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

At sentencing, the trial judge imposed a separate “firearm enhancement” on all three counts.

Also at sentencing, the trial judge imposed consecutive sentences for count one, the assault, and count two, the kidnapping charge. The prosecutor stated that because the first two counts are serious violent offenses the court was required to run the two sentences consecutively to each other. 7/17/03 RP at 7.

C. GROUND FOR RELIEF

The availability of personal restraint relief is required by the Const. Art. I § 13; Const. Art. IV § 4. “Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner’s current detention.” *Tolliver v. Olsen*, 109 Wn.2d 607, 609-610, 746 P.2d 809 (1987), quoting *Walker v. Wainwright*, 390 U.S. 335, 336, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968).

In the appellate courts, the proceeding is now denominated a “personal restraint petition” and the procedures are covered by the personal restraint petition rules, RAP 16.3-16.15; *Tolliver v. Olsen*, 109 Wn.2d at 613.

In addition, RCW 10.73.090 and .100 set forth statutory time limits for the filing of a personal restraint petition. Generally speaking, a personal restraint petition must be filed no later than one year after the underlying convictions are final. Delgado’s personal restraint petition is timely. At the earliest, his conviction became final on September 7, 2005, the date the Mandate was issued in *State v. Delgado and Meza*, 30662-0-II. In addition, as set forth below, his petition raises state and federal constitutional issues. Moreover, any new case, decided before the mandate issued in Delgado’s case, applies to all cases not yet final under RAP 12.7. *State v. Hanson*, 151 Wn.2d 783, 91 P.3rd 888 (2004) affirming *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992).

1. *Did the trial judge violate Delgado’s Sixth Amendment right to a jury trial when he sentenced Delgado for “firearms” violations when he was only charged with “deadly weapons” enhancements?*

The Sixth Amendment guarantees a criminal defendant the right to a jury trial. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which

he is charged, beyond a reasonable doubt.” *Id.*, quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The Sixth Amendment does not allow a defendant to be “expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” (Emphasis in original). *Apprendi*, 503 U.S. at 483, *see also Ring v. Arizona*, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Additionally, the Due Process Clause of the Fourteenth Amendment compels any fact which increases a sentence to a term beyond the maximum be formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. *See Specht v. Patterson*, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). The United States Supreme Court has noted:

[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (opinion of Stevens, J.)).

A sentencing court’s ability to impose a sentence is limited to the maximum for that offense reflected in the jury verdict alone. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004).

Blakely held that:

the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to punishment.”

Id. (emphasis in original), citing, 1 J. Bishop, Criminal Procedure, § 87, p.55 (2d ed. 1872).

In *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188, *rev. on other grounds*, – U.S. – 126 S. Ct. 2546, – L.Ed.2d – (2006), our Supreme Court held that where the jury did not explicitly find that the defendant was armed with a firearm, the court's imposition of a firearm sentence enhancement violates a defendant’s jury trial right as defined by *Apprendi* and *Blakely* because the sentence is greater than that allowed solely based on the facts found by the jury. The Court also found that previous Washington cases that held otherwise were no longer good law in light of *Blakely*.

The Washington Supreme Court also found that such constitutional violations can never be harmless using a federal constitutional analysis. In *Washington v. Recuenco*, – U.S. – 126 S. Ct. 2546, – L.Ed.2d – (2006), the United States Supreme Court reversed that conclusion. But the Supreme Court's decision did not completely resolve the matter. That Court did not (and could not) determine issues of state law. Thus, the question of

whether our state Supreme Court will adhere to its finding that *Recuenco* errors are not subject to a harmless error analysis on independent state law grounds is still unanswered. *Id.* at 126 U.S. at n.1250.

The Washington Supreme Court has not yet reconsidered *Recuenco* on remand. It is clear, however, that under the state constitution, a *Blakely* error can never be harmless.

The most fundamental concepts of criminal procedure require that the State prove to a jury every essential element of a crime beyond a reasonable doubt. *State v. Cronin*, 143 Wn.2d, 568, 580, 14 P.3d 752, 758 (2000) (citing *inter alia In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I § 3 of the Washington Constitution.² *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); *Sandstrom v. Montana*, 442 U.S. 510, 520, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

The more specific and detailed guarantees of the right to jury trial and due process of law in the Washington Constitution are the origin of our Supreme Court's traditional requirement of automatic reversal where

² Art. I § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

the jury is instructed in a manner which relieves the prosecution of its burden of proving all the elements of the crime.

The Washington Constitution provides “The right to trial by jury shall remain inviolate . . .” Const. Art. I § 21. This includes the right to jury trial in criminal cases. *State ex rel. Dep’t of Ecology v. Anderson*, 94 Wn.2d 727, 728, 620 P.2d 76 (1980). In construing this provision the Washington Supreme Court has held that it preserves the right as it existed at common law in the territory at the time of its adoption. *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The Court has further determined that the right to trial by jury which was kept “inviolable” under the state constitution was more extensive than that protected under the federal constitution when it was adopted in 1789. *Id.* at 99.

Having already determined that the right to jury trial guaranteed by the Washington Constitution is broader than that guaranteed by the federal constitution, the full analysis developed in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. *See e.g. State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). Nevertheless, the *Gunwall* factors

provide a useful tool for evaluating the application of the specific state constitutional provisions to the circumstances presented.³

This Court recognized almost 100 years ago that the unique language providing the “right to trial by jury shall remain inviolate” results in a broader guarantee than that in the federal constitution. *State v. Strasburg*, 60 Wn. 106, 110 P. 1020 (1910). The differences are significant because the state constitution sought to preserve the right to jury trial as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution one hundred years later. *Strasburg*, 60 Wn. at 118; *Mace*, 98 Wn.2d at 99.

The jury trial guarantees of the state constitution, operating in conjunction with the due process provisions, give the accused the right to have the jury decide upon every substantive fact going to the question of his guilt or innocence. *Strasburg*, 60 Wn. at 118 (defendant had right to present insanity defense to the jury which could not be legislatively abolished). The Court’s discussion in *Strasburg* of how the entire criminal process is grounded in the right to have all questions of fact going to the

³ The six factors are (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state and constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

guilt or innocence of the accused submitted to the jury has carried from *Strasburg* to decisions such as *Cronin*. The absolute nature of these rights was addressed by the Court in the context of the removal of any element from the jury's consideration.

Now, this right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.

Strasburg, 60 Wn. at 116. The interrelationship between the state due process clause and the right to jury trial guaranteed by the state constitution was specifically worthy of comment.

The due process of law provision of our constitution above quoted probably does not, of itself, mean right of trial by jury; but it does mean, in connection with the provision "The right of trial by jury shall remain inviolate", that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our constitution.

Id., 60 Wn. at 117. The state constitutional jury right which the constitution preserves "inviolate" plainly encompassed the right to have every element submitted to the jury.

With regard to the third and fourth *Gunwall* factors, *Strasburg* makes clear that the state constitutional and common law history of the

right to jury trial in Washington extends to every significant fact upon which guilt is determined. *Id.* at 117-18. *Strasburg* noted:

The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise this provision of our constitution, found, also, in varying language in all the constitutions of the Union, state and Federal-treasured by a free people for generations as one of the principal safeguards of their liberties-would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

Id. at 118. Because preexisting state law required these issues be presented to the jury, removing from the consideration of the jury any fact or element necessary to determining guilt, “has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and is therefore unconstitutional.” *Id.* at 123-24.

The structure of the state constitution as a limitation on the otherwise plenary power of the state to do anything not expressly forbidden supports the rigorous enforcement of the jury trial guarantee against encroachment by the legislature or appellate courts on review of trial court proceedings. *Gunwall*, 106 Wn.2d at 66. Furthermore, because the state constitution, unlike the federal constitution, guarantees these fundamental rights rather than restricting them, the structural differences

point toward the broader independent state constitutional protections. *Id.* at 62.

Finally, the conduct of criminal trials in state courts are matters of particular state or local concern which do not warrant adherence to a national standard. *Gunwall*, 106 Wn.2d at 62; *Young*, 123 Wn.2d at 180; *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The long and independent history of the state constitutional right to jury trial provided by Article I § 21, which is broader in scope and application than the federal provision, guarantees the right to a jury determination on every element. This guarantee ultimately supports the rigid requirements this Court has traditionally imposed where the instructions fail to ensure the jury renders a verdict encompassing every substantive fact going to the question of guilt or innocence.

Article I § 22 (Amend. 10) of the Washington Constitution contains a separate provision guaranteeing the right to jury in a criminal trial and does so in conjunction with the provisions of rights of the accused including the right “to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . .” When read in conjunction with the guarantee that the accused “shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof . . .”, this provision of the Washington

Constitution creates a very specific right to jury verdict on the elements of the crime charged. *City of Seattle v. Norby*, 88 Wn. App. 545, 561, 945 P.2d 269 (1997) (failure to give unanimity instruction results in a violation of the right to a unanimous jury verdict under Article I, § 22).

Because of the several ways in which the right to a proper determination by the jury on each element arises from the state constitution, the right warrants rigorous enforcement. The integrity of the process and the reliability of the result are both cast into doubt when the jury is erroneously instructed in a way which does not hold it to the constitutional burden. For that reason, failure to obtain a jury finding beyond a reasonable doubt on every element of a crime requires reversal of the conviction.

Instructing the jury in a manner which relieves the State of its burden to establish every element of guilt requires automatic reversal because the omission or misstatement is so fundamental that the verdicts upon which they are based are inherently unreliable. *State v. Jackson*, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), *affirmed* 137 Wn.2d 712, 976 P.2d 1229 (1999) (citing *Sullivan*, 508 U.S. 275). Again *Sullivan* held:

there being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

Id. at 280. Harmless error analysis is, therefore, incompatible with the absence of an actual verdict based on properly defined elements found beyond a reasonable doubt. Lacking a proper verdict, the appellate court would be infringing the right to a jury trial by holding that no reasonable jury would have found otherwise. *Carella v. California*, 491 U.S. 263, 269, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring); *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 339-40, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring).

The Washington Constitution requires a per se rule of reversal for the denial of a jury trial. Because the jury was never asked to find Mr. Delgado guilty of crimes involving the use of a firearm the sentencing enhancements cannot stand.

2. *Did the trial judge violate Delgado's Sixth Amendment right to a jury trial when he, rather than the jury, found that Delgado's two convictions were separate and distinct criminal conduct?*

The Supreme Court in *Blakely* and *Apprendi* did not limit its holdings to specific types of statutes; *Blakely* and *Apprendi* apply to any situation in which the jury verdict authorizes one sentence and the trial court imposes a longer based on additional findings, not submitted to a jury. The legal principle underlying both decisions is that it violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury. Essentially, the

Supreme Court has held unconstitutional statutes, whether enhancements statutes, exceptional sentences statutes, or death penalty statutes, in which judicial fact finding is as critical to the sentence imposed as the charged crime, or more critical. In those cases the defendant is denied his right to a jury trial.

The significant inquiry under *Blakely* is what sentence does the jury's verdict or the defendant's plea authorize the court to impose? If the court seeks to impose a greater sentence, then the factual basis for going beyond what the jury's verdict authorized must also be submitted to the jury.

In this case the jury did not make any finding that the first-degree assault count and the kidnapping count were "separate and distinct." Thus, in imposing a sentence consecutive to an existing sentence, the Court went beyond what was authorized by the jury's verdict. The court concluded that RCW 9.94A.589(3) provided authorization for its decision to impose a consecutive sentence. RCW 9.94A.589(1)(b) instead authorizes a sentence to be concurrent, absent some additional finding by the court to sentence otherwise.

Under *Blakely*, the defendant has a right to have any fact finding essential to the sentence made by a jury. Because the jury's finding of guilt as to Counts 1 and 2 authorized only a presumptively concurrent

sentence, the trial court could not go beyond the concurrent sentence authorized by his plea. Any exercise of discretion by the trial court would be based on inferences from facts which were not presented to a jury or proven beyond a reasonable doubt.

Undersigned counsel is aware that the Washington State Supreme Court has decided this issue against Mr. Delgado in *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005). However, the United States Supreme Court has accepted review in *Burton v. Waddington*, #05-9222. In that case the Supreme Court appears to be presented with two issues: 1) does *Blakely* apply retroactively to sentences that were final prior to that decision and 2) if *Blakely* applies retroactively, did the trial court's determination that Burton's sentences should be run "consecutively" violate his Sixth Amendment right to a jury trial. Mr. Delgado seeks to preserve this issue should the Supreme Court decide Burton in a manner favorable to his claims.

3. *The trial judge abused his discretion in running the crimes consecutively without finding that the crimes were "separate and distinct."*

While the trial court has discretion under the statute to impose consecutive terms, this discretion must not be based on untenable grounds or exercised for untenable reasons. *State v. Klump*, 80 Wn. App. 391, 909 P.2d 317 (1996); *State ex rel. Carrol v. Junker*, 79 Wn.2d 12, 482 P.2d

775 (1971). Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As noted by the appellate court in *State v. LeFever*, 102 Wn.2d 777, 690 P.2d 574 (1984), “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.” In other words, judicial discretion requires a conclusion that a decision is the proper decision based on the facts relevant to the decision.

The sentencing court imposed consecutive sentences for Delgado’s convictions on counts 1 and 2. The Sentencing Reform Act, however, mandates consecutive sentences only when two crimes arise from “separate and distinct criminal conduct.” RCW 9.94A.589(1)(b).

The sentencing court found counts 1 and 2 were not the “same criminal conduct.” RCW 9.94A.589(1)(b), however, requires the court to determine if the crimes were “separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). While the definition of “same criminal conduct” is helpful in discerning the meaning of “separate and distinct criminal conduct,” it is not determinative. *State v. Tili*, 139 Wn.2d 107, 122, 985

P.2d 365 (1999). Thus, the use of the term “separate and distinct criminal conduct” in RCW 9.94A.589(1)(b) means something different than acts that are the “same criminal conduct” defined in RCW 9.94A.589(1)(a).

Assuming that the trial judge has the authority to make this factual determination in this case, the judge did not do so. He seems to have ruled that if the crimes were not the “same criminal conduct” the SRA required him to run the sentences consecutively. This was an abuse of discretion.

4. *Did the trial judge violate Delgado’s right to be free from double jeopardy when he imposed multiple firearm enhancements when the evidence demonstrated that only one weapon was use?*

In *State v. Husted*, 118 Wn. App. 92, 95-96, 74 P.3d 672 (2003), the appellate court held that imposition of two deadly-weapon sentence enhancements, one for committing first-degree burglary while armed with a knife and one for committing first-degree rape while armed with a knife, did not violate the defendant's protection against double jeopardy, even though possession of the weapon was a single act. The court in *Husted* acknowledged that the prior decisions holding weapon enhancements do not violate double jeopardy were predicated on the conception that “the enhancement statutes [do] not themselves create criminal offenses.” *Husted*, 118 Wn. App. at 95 (discussing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)).

But again, *Apprendi* and *Blakely* change the analysis. In *State v. Recuenco*, supra., the Washington Supreme Court applied the rule of *Blakely* and *Apprendi* to hold a firearm enhancement must be found by a jury beyond a reasonable doubt. 154 Wn.2d at 162-63. These additional findings increase the punishment faced by the defendant and so operates as the functional equivalent of an element of a greater offense. *Recuenco* makes it clear that because the enhancement statutes increase a defendant's maximum punishment, the weapon enhancements act as the functional equivalent of elements of a greater offense. The imposition of multiple punishments based on the "single act" of being armed with a deadly weapon therefore violate double jeopardy. The Court should reverse all but one of the weapon enhancements.

D. CONCLUSION

This Court should grant the petition on all of the grounds stated above.

Respectfully submitted this 29 day of August, 2006.


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on August 29, 2006, I served one copy of the foregoing document by United States Mail, postage prepaid, to the Thurston County Prosecuting Attorney, Bldg. 2, 2000 Lakeridge Drive SW Olympia, Washington 98502-6045.

Angonne Lu Elliott

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APPENDIX 1

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DIVISION II

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STATE OF WASHINGTON
BY **AM**
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DELGADO and
ERNESTO MEZA,

Appellants.

Consol. Nos. 30662-0-II
31710-3-II

RULING AFFIRMING
JUDGMENTS AND
SENTENCES

A jury convicted Christopher Delgado of assault in the first degree and of kidnapping in the first degree, both with firearm enhancements, and convicted Ernesto Meza of attempted murder in the first degree, kidnapping in the first degree and two counts of intimidating a witness, all with firearm enhancements. Delgado appeals, arguing that: (1) the amendment of his information violated his right to a speedy trial; (2) his convictions for both assault and kidnapping violate his right against double jeopardy; (3) the firearm enhancement jury instructions were deficient; and (4) he was denied effective assistance of counsel. Meza appeals, arguing that: (1) the evidence was insufficient to prove he committed kidnapping; (2) his attempted murder and kidnapping convictions should have

been treated as parts of the same criminal conduct; (3) the firearm enhancement jury instructions were deficient; (4) the court erred in allowing testimony about his prior threats; and (5) the court erred in allowing amendments of his information. Meza also filed a statement of additional grounds, claiming that: (1) the evidence was insufficient to prove he committed attempted murder; (2) the State engaged in prosecutorial misconduct; and (3) the consecutive firearm sentencing enhancements violate his right against double jeopardy. The State filed a motion on the merits under RAP 18.14. Concluding that Delgado's and Meza's arguments are clearly without merit, this court grants the motion on the merits and affirms their judgments and sentences.

Ryan Waslawski had been selling drugs for Meza but decided to stop. He did not tell Meza. Instead, he simply stopped speaking with Meza. On January 9, 2003, Meza called him and asked to meet him for lunch. When Meza picked Waslawski up, Delgado and William Kravis were already in the truck. When Waslawski got in the truck, the others were "dead silent." Report of Proceedings (June 30, 2003) at 26. Meza asked him why he had stopped selling drugs for him. Waslawski replied that he had gotten a job. Meza angrily replied, saying that Waslawski had "disrespected him and treated him like he was a bitch and stuff like that." Report of Proceedings (June 30, 2003) at 28.

Meza pulled the truck onto the freeway. Waslawski said that he had to be at work in one half hour. Meza replied "[y]ou're not going to make it to work." Report of Proceedings (June 30, 2003) at 29. Meza exited the freeway and started driving toward Tenino. He and Waslawski argued. He pulled out a semi-

automatic handgun, loaded rounds in the chamber and set it down again. Meza pulled off the Yelm Highway down a gravel road, but returned to the highway when Delgado pointed out the presence of an old man crossing the road. Meza later pulled off the highway and into a vacant lot.

Meza got out of the truck, armed with the handgun, and told everyone to get out of the truck. He told Waslawski to walk down a trail and to stand in an area free of trees and brush. Waslawski refused to stand where Meza wanted him to. Meza fired his handgun into the air, pointed the gun at him and swore. Waslawski then went where Meza wanted him to go. Meza stood about 10 feet from him, complained again that Waslawski had disrespected him, and then shot Waslawski in the shoulder above the armpit.

Bleeding profusely, Waslawski begged for Meza to take him to a hospital. Meza allowed him back in the truck on condition that Waslawski maintain he had been shot in a drive-by shooting. Meza also threatened to kill Waslawski's mother if he told police the truth. Instead of taking Waslawski to a hospital, Meza dropped him off at a service station. Waslawski was eventually transported to Harborview Hospital, where he was treated for a punctured lung, damage to his aorta and nerve damage.

The State initially charged both Delgado and Meza with attempted murder in the first degree and kidnapping in the first degree.¹ The State amended Delgado's information to charge him with attempted murder in the first degree, or

¹ The State also charged Delgado and Meza with unlawful possession of cocaine and of marijuana, and charged Delgado with unlawful possession of a firearm. Those counts were dismissed prior to trial.

in the alternative, assault in the first degree, and to add a charge of rendering criminal assistance. The State amended Meza's information to add counts of intimidating Waslawski and Kravis. The State alleged that Delgado's and Meza's crimes were committed while they were armed with firearms.

Waslawski testified as described above. Kravis, who had cooperated with the police, testified that before they picked up Waslawski, he thought they were going to lunch until Delgado purchased ammunition and Meza loaded his gun with it. He testified that in the truck, Meza told Waslawski that "he hoped his last meal was good" because "[t]hat is the last one he's going to have." Report of Proceedings (June 30, 2003) at 97. He also testified that after they all got out of the truck, Meza shot Waslawski. He testified that Meza threatened to kill him and his family if he told police what had happened.

Police later recovered two shell casings from the vacant lot and a semi-automatic handgun from a residence where Meza and Delgado had stayed. Forensic testing established that the handgun found in Meza and Delgado's residence fired the shells whose casings were found in the vacant lot.

At the end of the State's case, the court dismissed Delgado's charge of rendering criminal assistance. Delgado and Meza rested without testifying or calling witnesses. The jury convicted Delgado of assault in the first degree instead of attempted murder in the first degree. It also convicted Delgado of kidnapping in the first degree and found that Delgado had committed both crimes while armed with a firearm. The jury convicted Meza of attempted murder in the first degree, kidnapping in the first degree and two counts of intimidating a

witness and found that he had committed all four crimes while armed with a firearm. The court sentenced Delgado to consecutive sentences of 111 months for the assault conviction, 51 months for the kidnapping conviction, and 120 months for the two firearm enhancements, for a total of 288 months. The court sentenced Meza to consecutive sentences of 196 months for the attempted murder conviction, 68 months for the kidnapping conviction, and 192 months for the four firearm enhancements, for a total of 456 months.² Both Delgado and Meza timely appeal.

Delgado's Arguments

First, Delgado argues that the State's amendment of his information violated his right to a speedy trial. He notes that the State filed its initial information on January 9, 2003, but did not amend its information until May 21, 2003, 128 days later. He contends that because the State did not amend its information within the 60-day speedy trial period under CrR 3.3, the amendment violated his right to a speedy trial. *State v. Peterson*, 90 Wn.2d 423, 431 (1978). But on March 6, 2003, Delgado signed a waiver of speedy trial which waived his right to speedy trial until June 30, 2003. An amendment to the information filed before the expiration of such a waiver does not violate the defendant's right to a speedy trial. *State v. Pettus*, 89 Wn. App. 688, 701-02, *review denied*, 136

² The court imposed concurrent sentences for the two counts of intimidating a witness.

Wn.2d 1010 (1998). The amendment of his information did not violate Delgado's right to a speedy trial.

Second, Delgado argues that convicting him of both assault in the first degree and kidnapping in the first degree violate his right against double jeopardy. He contends that the kidnapping was incidental to or a part of the assault, such that his conviction for kidnapping constitutes double jeopardy. *State v. Johnson*, 92 Wn.2d 671, 680 (1979), *cert. denied*, 446 U.S. 948 (1980). The *Johnson* court followed the *Blockburger* test, in which convictions for multiple statutory provisions are permissible when "each provision requires proof of a fact which the other does not." *Johnson*, 92 Wn.2d at 679 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

In *Johnson*, a conviction for rape in the first degree required the jury to find that the defendant committed kidnapping or assault in committing the rape. Accordingly, the court held that Johnson could not be convicted of rape and of kidnapping or assault. *Johnson*, 92 Wn.2d at 680. But a conviction for kidnapping in the first degree does not require the jury to find that the defendant committed assault. Nor does a conviction for assault in the first degree require the jury to find that the defendant committed kidnapping. Waslawski's kidnapping was not merely incidental to his assault. Kidnapping in the first degree and assault in the first degree require proof of different elements and different evidence. As Delgado's convictions for kidnapping and assault are not "the same in law and fact," they do not violate his right against double jeopardy.

State v. Calle, 125 Wn.2d 769, 777 (1995) (quoting *State v. Vladovic*, 99 Wn.2d 413, 423 (1983)).

Third, Delgado argues that the superior court erred in instructing the jury because it did not instruct the jury that in order to find that Delgado was armed with a deadly weapon when he committed the kidnapping and the assault, it must find beyond a reasonable doubt that a nexus existed between Delgado, the crimes and the deadly weapon. *State v. Holt*, 119 Wn. App. 712, 728 (2004); *State v. Schelin*, 147 Wn.2d 562, 574 (2002). The State responds that the instructional error is harmless given the uncontroverted evidence of the nexus between Delgado and Meza, the crimes and the deadly weapon. The State is correct. The omission of an element from a jury instruction is harmless error when an omitted element "is supported by uncontroverted evidence." *State v. Brown*, 147 Wn.2d 330, 341 (2002) (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)). The nexus between Delgado and Meza, the crimes and the deadly weapon was uncontroverted. The instructional error is harmless.

Fourth, Delgado argues that he was denied effective assistance of counsel by his counsel's failure to move to dismiss on speedy trial grounds and to object to the erroneous sentencing enhancement jury instructions. In a claim of ineffective assistance of counsel, the defendant must show deficient performance and prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996). This court presumes that the defendant's trial counsel performed properly. *Hendrickson*, 129 Wn.2d at 77. The defendant also has the burden of showing prejudice. *Hendrickson*, 129 Wn.2d at 78.

As to the failure to move to dismiss on speedy trial grounds, Delgado's counsel performed properly because Delgado had waived his speedy trial rights. As to the failure to object to the sentencing enhancement jury instructions, given that the errors in the instructions are harmless, Delgado fails to show that he was prejudiced. Delgado's claims of ineffective assistance of counsel therefore both fail.

Meza's Arguments

First, Meza argues that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he committed kidnapping in the first degree. The State's evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201 (1992); *State v. Green*, 94 Wn.2d 216, 221 (1980); *State v. Delmarter*, 94 Wn.2d 634, 637 (1980). Credibility determinations are for the trier of fact and not subject to review by this court. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992).

Meza contends that the State presented no evidence that he used force to restrain Waslawski except for the force involved in shooting him, which is the crime of attempted murder, not kidnapping. But the State presented evidence that Meza induced Waslawski to get into the truck under false pretenses, told Waslawski he would not be making it to work, displayed and loaded a handgun in Waslawski's presence, order Waslawski out of the truck, and when Waslawski

refused to stand where Meza told him to, fired the handgun in the air and then pointed it at Waslawski. Taken in the light most favorable to the State, this evidence is sufficient for a rational trier of fact to find that Meza committed kidnapping in the first degree.

Second, Meza argues that the superior court erred in imposing consecutive sentences because it should have treated his convictions for attempted murder in the first degree and for kidnapping in the first degree as parts of the "same criminal conduct" under RCW 9.94A.589(1)(a). Crimes are part of the "same criminal conduct" for sentencing purposes if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Meza contends that the kidnapping furthered the attempted murder, that his criminal intent did not change between crimes, that he committed his crimes at the same time and place, and that both crimes involved Waslawski. Thus, he contends his crimes were part of the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 215 (1987). The State responds that Meza's criminal intent changed from scaring Waslawski during the kidnapping to trying to kill him during the attempted murder and that the kidnapping and the attempted murder were not committed at the same time and place. *State v. Lessley*, 118 Wn.2d 773, 778 (1992).

Meza fails to show that his convictions for kidnapping and attempted murder were part of the "same criminal conduct" under RCW 9.94A.589(1)(a). Objectively viewed, the crimes involved different criminal intents. And although

they involved the same victim, the crimes occurred at different times and different places. The superior court did not err in not finding that the crimes were part of the same criminal conduct and so did not err in imposing consecutive sentences under RCW 9.94A.589(1)(b).

Third, Meza argues, as Delgado does, that the superior court erred in instructing the jury because it did not instruct the jury that in order to find that Meza was armed with a deadly weapon when he committed the kidnapping and the assault, it must find beyond a reasonable doubt that a nexus existed between Meza, the crimes and the deadly weapon. But, as addressed above, that error is harmless in light of the uncontroverted evidence of the nexus between Meza, the crimes and the deadly weapon.

Fourth, Meza argues that the superior court erred in allowing Waslawski to testify about prior threats that Meza had made toward him. The court allowed the testimony under ER 404(b) because it was admissible to establish intent, motive and absence of mistake. Meza contends that intent, motive and absence of mistake were not at issue so the court erred in allowing the testimony. *State v. Powell*, 126 Wn.2d 244, 262 (1995); *State v. Ramirez*, 46 Wn. App. 223, 228 (1986).

This court reviews the superior court's ruling to admit evidence under ER 404(b) for an abuse of discretion. *Powell*, 126 Wn.2d at 258; *State v. Dennison*, 115 Wn.2d 609, 628 (1990). Contrary to Meza's contention, the intent behind his shooting of Waslawski is not implicit in his action. The evidence of Meza's prior threats was relevant to whether he was trying to kill Waslawski when he shot

him. That evidence was also relevant to his motive behind taking Waslawski to the field and shooting him. Because the superior court had tenable grounds upon which to admit the evidence under ER 404(b), it did not abuse its discretion. *Powell*, 126 Wn.2d at 258.

Fifth, Meza argues that the superior court erred in allowing the State to amend the information with counts of intimidating Waslawski and Kravis. He contends that the amendments prejudiced his right to effective representation. *State v. DeSantiago*, 108 Wn. App. 855, 874 (2001), *aff'd in part, rev'd in part and remanded*, 149 Wn.2d 402 (2003). But he does not demonstrate such prejudice. Meza's trial did not begin until June 30, 2003, a month after the amendment to add the charge of intimidating Waslawski. The charges of intimidating both Waslawski and Kravis arose out of Meza's conduct during the kidnapping of Waslawski. No further investigation was needed. The amendments did not prejudice Meza's right to effective assistance of counsel.

Meza's Statement of Additional Grounds

First, Meza claims that the evidence was insufficient for the jury to find that he had attempted to murder Waslawski. He contends that because he only shot Waslawski once, forwent the opportunity to shoot him more times to assure his death, and took Waslawski from the scene so he could obtain help, he could not have intended to kill Waslawski. The question of whether Meza attempted to murder Waslawski or to merely assault him is one of credibility for the jury and is one that this court does not review on appeal. *Camarillo*, 115 Wn.2d at 71.

Second, Meza claims that the prosecutor committed misconduct when he argued that Meza had shot Waslawski in the chest, damaging his lung and aorta. He contends that the evidence showed that he shot Waslawski in the shoulder, not the chest. He further contends that no medical evidence established Waslawski's injuries. Meza is mistaken on both counts. Waslawski testified to the injuries he received from Meza's shot. The lung and the aorta are within the chest, not the shoulder. The prosecutor's argument was within the evidence and was not misconduct.

Third, Meza claims that the multiple consecutive sentence enhancements the superior court imposed for being armed with a firearm during his four crimes violate his right against double jeopardy. They do not. In *State v. Husted*, 118 Wn. App. 92, 95-96 (2003), *review denied*, 151 Wn.2d 1014 (2004), the court held that the Legislature had clearly and unambiguously provided for multiple punishments, including multiple consecutive punishments, where a person commits more than one crime while armed with a deadly weapon. Meza's multiple consecutive sentence enhancements, imposed under RCW 9.94A.533(4), do not violate his right against double jeopardy. *Husted*, 118 Wn. App. at 96.³ Meza's attempts to factually distinguish *Husted* fail.

Conclusion

Delgado's and Meza's arguments are clearly without merit. RAP 18.14(e)(1). Accordingly, it is hereby

³ Interpreting former RCW 9.94A.510(4)(e) (2000).

ORDERED that Delgado's and Meza's judgments and sentences are affirmed. They are hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36 (1985).

DATED this 3rd day of December, 2004.

Eric B. Schmidt

Eric B. Schmidt
Court Commissioner

cc: Thomas Edward Doyle
Patricia A. Pethick
Samuel G. Meyer
Steven C. Sherman
Hon. Daniel J. Berschauer
Thurston County Superior Court
Cause numbers: 03-1-00051-9 and 03-1-00052-7
Indeterminate Sentence Review Board
Christopher Delgado
Ernesto Meza