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DIVISION II

NO. 37928-7-II

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STATE OF WASHINGTON
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK EDDIES MCGREW, III,

Appellant.

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

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred by entering a judgment of conviction.

No. 2: Mr. McGrew's conviction was obtained as a result of significant, improper opinion testimony concerning the "normal" conduct of drug transactions, especially the unscientific opinion that drug dealers are almost always armed, where there was scant non-opinion evidence that a gun found in the car was related to the crime.

No. 3: The sentencing court erred by finding a standard range reserved for drug crimes with *deadly weapon* enhancements where McGrew was convicted of a *firearm* enhancement.

No. 4: The trial court erred when it doubled the "class of crime" maximum for McGrew's drug conviction from 10 to 20 years as a result of a prior drug possession conviction because:

- a. the jury failed to find the fact of a prior conviction;
- b. prior simple possession convictions do not double the maximum;
- c. the trial court failed to recognize and thereby exercise its discretion not to double the maximum.

No. 5: The sentencing court erred by failing to find that VUCSA with a *firearm enhancement* constitutes the same criminal conduct as unlawful possession of a firearm.

Issues Related to Assignments of Error

1. Whether this Court should reverse McGrew's conviction where there was extensive, improper opinion evidence regarding the usual conduct of drug offenses?
2. Whether the trial court erroneously increased McGrew's seriousness level range by finding that he was convicted of a VUCSA with a deadly weapon enhancement where he was charged with and his jury returned a firearm enhancement.
3. Whether this Court should reverse and remand for resentencing either because the sentencing court improperly doubled McGrew's maximum sentence *or* because the Court failed to recognize that it possessed the discretion not to do so?
4. Whether a firearm enhancement and a unlawful possession of a firearm conviction constitute the same criminal conduct?

II. STATEMENT OF THE CASE

Procedural History

Mr. McGrew (McGrew) was charged in Pierce County Superior Court with one count of Delivery of a Controlled Substance While Armed with a Firearm; one count of Unlawful Possession of a Firearm 2^o; and one count of Bail Jumping. CP 15-16. On June 13, 2008, McGrew was convicted by a jury as charged. CP 49-52. He was originally sentenced to 136 months on the delivery count (100 months, plus 36 for the firearm); and 16 months on each of the two remaining counts. CP 65-78. The State sought a resentencing hearing arguing that because the Court had “doubled” the statutory maximum from 10 to 20 years, the firearm enhancement was 20 years. CP 149-52. McGrew argued that the sentencing court had not addressed the “doubler” statute at the original sentencing. In addition, McGrew argued that the original standard range was miscalculated. CP 141-48. On October 24, 2008, the sentencing court imposed a sentence of 160 months, increasing the firearm enhancement. CP 153-58. McGrew filed a timely notice of appeal. CP 79; 167-68.

Facts

Jacqueline Niemi was arrested for prostitution and agreed to participate in a “controlled buy” with members of the Lakewood Police. Eventually, she purchased cocaine in a car occupied by Mr. McGrew and another person. When the police arrested McGrew, they found a gun in the car.

However, Ms. Niemi’s testimony was inconsistent from her earlier statements, resulting in both parties impeaching her. RP 89-98. Ms. Niemi testified that McGrew was in the passenger seat (RP 87), and that he sold her cocaine for \$100. RP 88. She did not testify about the presence or use of a gun.

Officer Conlon found a handgun under the front passenger seat of the car occupied by McGrew and others at the time of his arrest. RP 170. According to Officer Ryan Hamilton, McGrew admitted the gun was his and that people had been trying to harm him. RP 189. McGrew later admitted that he had previously been convicted of a felony and could not legally possess a firearm. RP 190-93.

III. SUMMARY OF ARGUMENT

The State successfully convicted Mr. McGrew of delivery of cocaine with a firearm after introducing improper opinion testimony that drug dealers like McGrew always carry guns. Thus, the State improperly bolstered their case with inadmissible and unscientific opinion evidence.

After conviction, numerous sentencing errors occurred. Most significantly, McGrew's sentence range was increased based on the trial court's finding that he delivered drugs with a deadly weapon. However, McGrew was charged and convicted of delivery with a firearm enhancement. Although the firearm enhancement adds more time to the sentence than a deadly weapon enhancement, it does not raise the seriousness level of the underlying crime. The trial court erred by increasing McGrew's sentence based on an uncharged allegation and facts not found by McGrew's jury.

IV. ARGUMENT

A. Mr. McGrew's Convictions, Especially the Firearm Conviction and Enhancement, Were Obtained Through the Wrongful Introduction of Improper Opinion Evidence.

Because of the flaws in its case—an inherently unreliable informant witness, minimal observations by police, and the presence, but lack of use of a gun—the State relied extensively on opinion evidence. While the opinion evidence did not directly embrace the ultimate issues that McGrew's jury was assigned to decide, it certainly did so inferentially. This is especially true with regard to the firearm. Indeed, the primary evidence against McGrew on the issues of whether he possessed the firearm and whether it had a nexus to the drug crime came from improper and unscientific opinion evidence. Because it is legally settled that such speculative evidence is inadmissible and prejudicial to a defendant's right to a fair trial, this Court should reverse despite the lack of an objection.

For example, the following opinion evidence was permitted:

Much of Officer David Crommes' testimony was opinion:

It's normally not in plain view. Sometimes it is. But it's more common to be – people that deal narcotics don't want to be seen. They don't want people to see them. So even if they are in open area, they will go into a house, they will go into a car, they will go behind a building, or they will go into an alley. What's typical is, you have the purchaser meeting the person that's selling it, they converse, and then a transaction occurs, and then they part separate ways.

RP 103.

It's very quick normally. More often than not, it's within a matter of under ten minutes, if I could use a rule of thumb. More often than not, it's pretty quick.

RP 103.

Most of the time, a drug user will have a pipe. Drug dealers normally don't carry pipes because they are only selling drugs. They are not the ones using. The drug dealers will have cell phones. A lot of the people we come in contact with that are informants that purchase narcotics for us don't have cell phones.

The dealers, more often than not, will have a car. They will have a scale. They have to package the narcotics they are selling, so they will have baggies. They will have something to put the container in, whether it's a baggie or an outside wrapper to a box of cigarettes. They will use that. They have to have a way to hold the narcotic if they are selling to other people. The users typically just have a pipe on them. They don't generally have of that stuff.

RP 106.

More often than not, the dealers, some will have firearms, some won't. We do the drug raid for Lakewood. More often than not, there is a firearm inside. It's a business, but it's also

a dangerous business, and incidents occur between drug dealers where they will be get shorted or they have a dispute and they will pull out a gun. Also a drug dealer is not immune from getting robber, and a lot of them will keep a weapon for their protection, because that's their business and they want to protect themselves and protect their business.

RP 106-107.

Officer Todd Jordan testified:

Q: In your experience, does it ever occur in a vehicle?

A: Yes, ma'am.

Q: How long, in your experience does it usually take?

A: It depends on the amount of drugs that are purchased. Usually just a couple of minutes.

RP 145.

Officer Sean Conlon:

Q: In your experience, how long do they usually take?

A: Transactions usually are very fact, very quick.

Q: Do they ever occur in vehicles, in your experience?

A: Yes, they do.

RP 167.

Bolstered by all of this opinion testimony, clearly intended to infer McGrew's guilt, the prosecutor argued that drug dealing was a dangerous crime, mandating the use of a gun.

Thus, this case raises the frequently arising issue of how far

the State's witnesses (especially police officers who are permitted to testify to their opinions by comparing the current case to others in their experience) may go in expressing opinions. *See, e.g., State v. Yates*, 161 Wash.2d 714, 763, 168 P.3d 359 (2007); *State v. Mason*, 160 Wash.2d 910, 932, 162 P.3d 396 (2007); *State v. Kronich*, 160 Wash.2d 893, 903-04, 161 P.3d 982 (2007); *State v. Kirkman*, 159 Wash.2d 918, 937, 155 P.3d 125 (2007); *State v. Read*, 147 Wash.2d 238, 244, 53 P.3d 26 (2002); *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001).

The role of the jury is to be held “inviolable” under Washington's constitution. U.S. CONST. amend. VII; WASH. CONST. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711 (1989). To the jury is consigned under the constitution “the ultimate power to weigh the evidence and determine the facts.” *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971). In virtually every jury trial, the jury itself is instructed that “[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court.”

11 WASHINGTON PRACTICE: WASHINGTON PATTERN
JURY INSTRUCTIONS: CRIMINAL 1.02, at 9 (2d ed. 1994)
(WPIC).

Before opinion testimony is offered, the trial court must determine its admissibility. In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’ ” *Demery*, 144 Wash.2d at 759, 30 P.3d 1278 (quoting *Heatley*, 70 Wash.App. at 579, 854 P.2d 658); *Kirkman*, 159 Wash.2d at 928, 155 P.3d 125.

However, Washington courts have held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery*, 144 Wash.2d at 759, 30 P.3d 1278; *Kirkman*, 159 Wash.2d at 927, 155 P.3d 125; *State v. Farr-Lenzini*, 93 Wash.App. 453, 463, 970 P.2d 313 (1999).

Finally, it is well-recognized that a police officers' testimony carries an "aura of reliability." *Demery*, 144 Wash.2d at 765, 30 P.3d 1278. *See also United States v. Allerheiligen*, 221 F.3d 1353 (10th Cir. 2000) (Court excluded author of books on marijuana and two police officers who sought to testify that the defendant's possession was inconsistent with an intention to sell.).

United States v. Williams, 212 F.3d 1305 (D.C. Cir. 2000), is both on-point and instructive. In that case, the defendant fled after a routine traffic stop. After he was apprehended, the police found a gun along the route of the chase. The gun had no fingerprints on it. In its case in chief, the prosecutor asked the officer whether, in his experience, "as a patrol officer, is it common for people who use drugs or sell drugs to carry weapons for protection." *Id.* at 1308. The witness answered "yes." The D.C. Circuit held that the officer's experience was not sufficient to allow him to form such an opinion: "The foundation of [the officer's] opinion linking drug users and possession of weapons is anything but firm. Fewer than one dozen arrests involving possession of a firearm is not sufficient grounding to qualify him as an expert under Rule 702 of the Federal Rules of

Evidence (FRE), particularly without evidence establishing that any of those arrests involved a drug user.” *Id.* at 1309.

In this case, the opinion testimony embraced and buttressed both the State’s contention that McGrew sold drugs to Ms. Niemi *and* that he possessed a gun as part of that crime. The State’s other evidence connecting the gun to the crime was essentially non-existent. Thus, the prejudice on that issue is especially high.

This Court should reverse and remand for a new trial.

B. The Trial Court Erred When It Sentenced McGrew Using a Standard Range for VUCSA with a Deadly Weapon Enhancement When He was Convicted of VUCSA with a Firearm Enhancement.

Delivery of Cocaine is seriousness level II offense. Delivery of Cocaine with a *Firearm Enhancement* is also a Level II offense. On the other hand, Delivery of Cocaine with a *Deadly Weapon Enhancement* is a Level III offense. *See* RCW 9.94A.518 (raising any felony under RCW chapter 9A.02 “with a deadly weapon special verdict under RCW 9.94A.602” to a level III offense).

Here, the State did not charge, nor convict Mr. McGrew with a deadly weapon enhancement. Instead, the *Refiled Information* alleges that McGrew was armed with a “firearm;” never uses the

words “deadly weapon;” and makes no reference to RCW 9.94A.602, the deadly weapon special verdict. In addition, the instructions and special verdict given to McGrew’s jury dealt only with a “firearm” enhancement. Thus, there can be no question that McGrew was charged and convicted only of a “firearm” enhancement.

Nevertheless, the sentencing court found that Mr. McGrew’s sentence range level was increased as a result of a deadly weapon enhancement. Just how the sentencing court came to that conclusion is a mystery. Thus, McGrew explores the alternatives—showing how each is improper.

The State has the authority and responsibility for bringing charges against a person. In that regard, the State possesses wide discretion to choose the charges it wants to pursue, if any. Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. *In re Pers. Restraint of Bush*, 95 Wash.2d 551, 554, 627 P.2d 953 (1981). When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent

of an “element” of a greater offense than the one covered by the jury's guilty verdict. *Apprendi v. New Jersey*, 530 U.S. 466, 494, n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “We conclude it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply.” *State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008).

In this case, the State did not and could not ask the Court to make a deadly weapon finding in place of the jury’s firearm finding because to do so increased McGrew’s sentence range. In a drug case, an offender’s sentence range and thus, his maximum sentence is raised where a jury makes a “deadly weapon” finding. Thus, under *Apprendi* and *Blakely*, the right to a jury trial is implicated by the “deadly weapon” finding increasing certain VUCSA convictions from a Level II to Level III offense. The United States Supreme Court in *Apprendi*, held that other than a prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530

U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Blakely*, the Court clarified “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Recently, in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), a case where the State successfully sought the increased time that follows a “firearm,” rather than “deadly weapon” enhancement, the Washington Supreme Court held that a sentencing court could not make findings and impose an increased sentence based on an allegation not included in the information and not submitted to a jury.

The Washington Supreme Court’s opinion in that case began by noting that a firearm and deadly weapon enhancement were different and distinct. *Recuenco* was charged with assault with a deadly weapon enhancement, and he was convicted of assault with a deadly weapon enhancement, but he was erroneously sentenced with a firearm enhancement. 163 Wn.2d at 442.

As originally enacted, the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, did not establish a discrete firearm enhancement. Instead, “firearm” was included in the definition of a “deadly weapon.” Former RCW 9.94A.125; former RCW 9.94A.310. The deadly weapon enhancement provision mandated that specific additional times ““be added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon.”” *State v. Silva-Baltazar*, 125 Wash.2d 472, 481, 886 P.2d 138 (1994) (emphasis omitted) (quoting former RCW 9.94A.310(3) (1994)).

This Court has recently addressed the situation where a jury is instructed and returns a verdict on one type of enhancement, but the court imposes a sentence on the other type of enhancement. This Court has repeatedly condemned such action by a sentencing court. For example, in *State v. Pharr*, 131 Wash.App. 119, 124-25, 126 P.3d 66 (2006), *review denied*, 160 Wash.2d 1022, 163 P.3d 794 (2007), this Court considered the issue of a “mislabeled” weapon special verdict form that did not match the jury instructions. In *Pharr*, the jury was instructed that, “[f]or the

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.” 131 Wash.App. at 124, 126 P.3d 66 (emphasis added). The jury was also instructed on the definition of “firearm” for sentencing enhancement purposes. *Pharr*, 131 Wash.App. at 124, 126 P.3d 66. Thus, the special verdict in *Pharr*, although labeled “deadly weapon,” necessarily reflected the jury's finding that the defendant was armed with a firearm. 131 Wn.App. at 124-25. However, more recently this Court held in *Personal Restraint of Delgado*, ___ Wn. App. ___, ___ P.3d ___ (March 10, 2009), that a jury's finding on a special verdict form that defendants were “armed with a firearm” did not support imposition of firearm sentence enhancement, where jury was instructed that it must find the defendants were armed with a “deadly weapon” in order to return the special verdicts, and the jury was not instructed on the definition of “firearm” for sentencing enhancement purposes, although “deadly weapon” was defined. These opinions make it clear that one size does not fit all when it comes to firearm and deadly weapon enhancements. Instead, the

State is bound by its choice. Here, the State unambiguously sought and obtained a firearm enhancement. The trial court erred when it imposed an increased sentence that required a deadly weapon jury finding.

A firearm enhancement is certainly not a lesser included portion of a deadly weapon verdict. The Hard Time Act “split the previous deadly weapon enhancement into separate enhancements for firearms and for other deadly weapons.” *State v. Brown*, 139 Wash.2d 20, 25, 983 P.2d 608 (1999) (quoting STATE OF WASHINGTON SENTENCING GUIDELINES COMM’N, ADULT SENTENCING GUIDELINES MANUAL cmt. at II-67 (1997)); *see also* former RCW 9.94A.310(3)(b), (4)(b).

Here, the State chose (mistakenly or otherwise—it makes no difference) to charge McGrew with a firearm enhancement. The State did not charge or convict him of a crime enhanced with a deadly weapon enhancement. In fact, the State admits this fact in its original sentencing memorandum. Of course, the State may argue that such an outcome is counter-intuitive. However, that

argument has no force in a court—it must be made to the Legislature.

In any event, the sentencing court's error is both preserved and plain. This Court should remand for resentencing on the VUCSA with a seriousness level of II.

C. The Trial Court Erred by Doubling McGrew's Maximum Sentence.

1. NO JURY FINDING OF PRIOR CONVICTION

Mr. McGrew's jury convicted him of delivery of cocaine. The sentencing court found—for the first time—that McGrew had a prior drug conviction. As a result, his maximum possible sentence was increased from 10 to 20 years. This makes a difference because McGrew was sentenced to 15 years.

Because McGrew's maximum sentence was increased based on a fact (his prior drug conviction) not found by his jury, McGrew contends his sentence violates the Sixth Amendment.

The State will almost certainly argue that McGrew has no Sixth Amendment guarantee of a jury trial on this issue because the legal inquiry involves the fact of a prior conviction, a previously recognized exception to the *Apprendi/Blakely* rule. Defendant

concedes that current constitutional caselaw exempts the fact of a prior conviction from the right to a jury trial, even where that prior conviction increases the maximum sentence. However, because that rule hangs perilously by a slender thread of precedent, McGrew raises his objection today in order to preserve it for what he hopes is a different tomorrow. He will not, however, belabor the point.

2. THE “DOUBLER” DOES NOT APPLY TO PRIOR POSSESSION CONVICTIONS

“Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” RCW 69.50.408. However, the statute further provides in section c: “This section does not apply to offenses under RCW 69.50.4013 [possession offenses].”

The question then is how to read the section above together with the following section: “For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States

or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.”

The more precise question is whether the limitation in section (c) applies only to current offenses, not prior convictions. If, on the other hand, the statute is ambiguous, the rule of lenity requires the statute to be interpreted most favorably to the defendant. *State v. Lively*, 130 Wash.2d 1, 14, 921 P.2d 1035 (1996); *State v. Gore*, 101 Wash.2d 481, 486, 681 P.2d 227, 39 A.L.R.4th 975 (1984); *State v. Bernard*, 78 Wash.App. 764, 768, 899 P.2d 21 (1995). This Court has previously held that the statute is unambiguous: “Subsection (c) applies only to current offenses, not to prior convictions.” *State v. McCollum*, 88 Wash.App. 977, 947 P.2d 1235 (1997).

McGrew disagrees. Recognizing that this Court is bound by its prior precedent, he seeks to preserve this issue for possible further review.

3. THE SENTENCING COURT FAILED TO RECOGNIZE AND APPLY ITS DISCRETION

The so-called drug “doubler” statute, even when legally applicable, is discretionary. In other words even when a sentencing

court legally concludes that the current offense is a second VUCSA offense, it can still choose *not* to double the maximum punishment. The statute is entirely discretionary.

That is not the position taken by the State at McGrew's resentencing. The State argued that the sentencing court was bound to double the maximum. The trial court apparently agreed. Because the sentencing court mistakenly failed to recognize that it could choose to double the maximum penalty or not, this Court should remand for resentencing. *See e.g., State v. McGill*; 112 Wn.App. 95, 100, 47 P.3d 173 (2002) (court's refusal to exercise discretion out of belief that it lacked authority to do so was reviewable and required remand).

D. The Firearm Enhancement and McGrew's Unlawful Possession of a Firearm Conviction Constitute "Same Criminal Conduct."

Mr. McGrew was convicted of an offense (VUCSA) with a firearm enhancement. That enhancement added 60 months to his sentence. Mr. McGrew was also convicted of Unlawful Possession of Firearm, adding a point to McGrew's offender score. Both the firearm enhancement and the gun charge were the result of

McGrew's constructive possession of one gun; at one time; in one place. The sentencing court should have found that the enhancement and the gun conviction constituted the same criminal conduct.

For separate offenses to constitute the "same criminal conduct," three elements must be present: (1) the same criminal intent; (2) the same time and place; and (3) the same victim. "Same criminal conduct" is not established unless all three elements are present. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The phrase "same criminal conduct" is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn.App. 174, 180, 883 P.2d 341 (1994). However, even under the narrowest of constructions—the gun enhancement and the gun charge constitute "same criminal conduct."

In deciding whether different crimes encompass the same criminal conduct, a focus is on whether the criminal intent, as objectively viewed, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This objective test considers how closely related the crimes are, whether

the nature of the criminal objective changed between crimes, and whether one crime furthered the other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

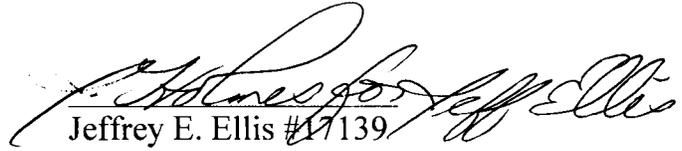
Here, the State is likely to focus on the underlying drug charge, arguing that it requires a different intent than the gun charge. However, McGrew's focus is not on the underlying conduct, but on the separate firearm enhancement. When that comparison is made, it is overwhelmingly clear that the gun enhancement and the gun conviction share the same intent—the unlawful possession of a gun.

Because the sentencing court erred by not finding “same criminal conduct, it sentenced McGrew using an incorrect offender score. This Court should reverse and remand for resentencing.

E. CONCLUSION

Based on the above, this Court should reverse and remand this case to Pierce County Superior Court for a either a new trial or a new sentencing hearing.

DATED this 30th day of March, 2009.

A handwritten signature in cursive script, appearing to read "Jeffrey E. Ellis".

Jeffrey E. Ellis #17139
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CERTIFICATE OF SERVICE

I, Vance G. Bartley certify that on March 30, 2009 I served the party listed below with a copy of the attached *Appellant's Opening Brief* by placing a copy in the mail, postage pre-paid, addressed to:

Clerk of the Court
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950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Deputy Prosecuting Attorney
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Vance G. Bartley

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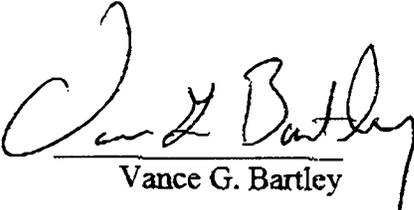
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