

NO. 37928-7

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FREDRICK EDDIE MCGREW, III, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 06-1-04265-6

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**Brief of Respondent**

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

1. Should this court decline to consider defendant's claim that the trial court committed error in admitting officer's testimony when he failed to object below and failed to show any error, let alone manifest error?

2. Did the trial court correctly sentence defendant to a greater level on the drug sentencing grid where the jury returned a special verdict finding defendant had been armed with a firearm during the delivery of a controlled substance?

3. Did the trial court act within its discretion when it applied the provisions of the doubling statute to defendant's sentence?

4. Should this court decline to review defendant's claim that a firearm enhancement encompasses the same criminal conduct as the crime of unlawful possession of a firearm when the enhancement is not a crime and was alleged as part of the firearm charge?

B. STATEMENT OF THE CASE.

1. Procedure

On September 11, 2006, the State charged FREDERICK EDDIE MCGREW, hereinafter "defendant," with one count of unlawful delivery

of a controlled substance (Count I), and one count of unlawful possession of a firearm in the second degree (Count II). CP<sup>1</sup> 1-2. On June 9, 2008, the State filed an amended information which included one count of bail jumping (Count IV) for defendant's failure to appear in court on May 10, 2007<sup>2</sup>. CP 15-16.

Jury trial commenced June 9, 2008, before the Honorable Rosanne Buckner. RP 1. During a CrR 3.5 hearing, the court ruled that defendant waived his *Miranda*<sup>3</sup> rights and his statements to law enforcement officers were admissible. RP 47.

On June 10, 2008, defendant stipulated to a prior conviction as a basis for the unlawful possession of a firearm charge. CP 53; RP 61. Defendant chose not to testify on his own behalf, but did present testimony from Becky Durkee, a private investigator, and James Oliver, his former attorney on the case. RP 276, 286; 309. Defendant waived attorney-client privilege to allow Mr. Oliver to testify. RP 287-89. Mr. Oliver's testimony related to defendant's general timeliness and was used solely to challenge the bail jump charge. RP 286-306.

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<sup>1</sup> Citations to Clerk's Papers will be to "CP." Citations to the verbatim report of proceedings for pretrial, trial, and the original sentencing will be to "RP." Citations to any post-sentencing hearings will be to "RP," followed by the date of the hearing and the page number, for example RP (09/26/08) 3 references the third page of the transcript for defendant's resentencing hearing held on September 26, 2008.

<sup>2</sup> The State had originally alleged two counts of bail jumping when it filed a refiled information on November 16, 2007. Count III, a bail jumping allegation from February 21, 2007, was ultimately abandoned by the State when it filed the amended information. See CP 11-13, 15-16; RP 6.

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 1694 (1966).

The jury found defendant guilty as charged. CP 49, 50, 51. It also returned a special verdict, finding defendant was armed with a firearm under Count I. CP 52.

As defendant had previously been convicted of a drug charge, the State asked the court to enact the doubling provisions of RCW 69.50.408 for Count I, thereby increasing the statutory maximum from 60 months to 120 months. RP 394-96. The State asked the court to impose a high-end, standard-range sentence of 100 months<sup>4</sup>, plus a 36 month firearm enhancement for Count I, and 16 months for Counts II and IV. RP 397. The State also requested that the court impose 9-12 months of community custody and other crime-related provisions. RP 398-99. Defendant requested a sentence at the low end of the standard range. RP 399. The court followed the State's sentencing recommendation. CP 65-78; RP 401.

Defendant filed a timely notice of appeal on July 1, 2008. CP 79. On July 24, 2008, the State filed a motion for a new sentencing hearing, to correct defendant's sentence. CP 172-177. On September 12, 2008, defendant requested the court set over the resentencing as his recently-retained appellate attorney would be handling the matter. RP (09/12/08) 4-5. The court set over the hearing and, over the State's objection,

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<sup>4</sup> Defendant's standard range sentence was 68+ to 100 months on Count I, and 12+ to 16 months for Counts II and IV. CP 65-78.

allowed defendant to present a presentencing report<sup>5</sup> at the next hearing.  
CP 178-182; RP 09/12/08 7-8.

On September 26, 2008, defendant was resentenced. The State argued that the imposition of the doubling provision of RCW 69.50.408 required an imposition of a 60-month firearm enhancement, rather than a 36-month enhancement. RP 09/26/08 3-4. The State then added that it stood by its original sentencing recommendation, except that the firearm enhancement should be increased per the statute. RP 4-5. Defendant argued that the firearm enhancement was an improper basis to apply the doubling provision and his sentence could not exceed the statutory maximum of 60 months. RP 09/26/08 9-13. In an oral ruling, the court adopted the State's recommendation at the resentencing. RP 09/26/08 17.

On October 16, 2008, Division II permitted the trial court to enter the amended judgment and sentence. *See* CP 167-68. The amended judgment and sentence was filed October 24, 2008. CP 153-166. Defendant was sentenced to 100 months on Count I and 16 months on Counts II and IV, all to run concurrent. CP 153-166; RP (10/24/08) 4. In

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<sup>5</sup> Defendant also filed a memorandum detailing his position on sentencing, including a provision that the firearm enhancement on Count I and the unlawful possession of a firearm conviction under Count II were the same course of conduct. CP 141-148. Defendant did not address this argument at the resentencing hearing.

addition, defendant received a 60-month firearm enhancement for Count I, to run consecutive to all other sentencing provisions for a total confinement period of 160 months. CP 153-166; RP (10/24/08) 4.

Defendant filed a timely supplemental notice of appeal. CP 167-68.

## 2. Facts

On September 8, 2006, Lakewood Police Investigator Crommes arranged to use an informant in order to purchase drugs from defendant. RP 114. Officer Crommes had arrested Jacqueline Niemi for prostitution, and offered to release her if she would participate in a controlled buy with her dealer. RP 114. Ms. Niemi agreed and called defendant, who she knew as “Six,”<sup>6</sup> to set up the purchase. RP 114.

Officer Crommes drove Ms. Niemi to the police station, where she was searched, given one hundred dollars in pre-recorded money, and instructions for the purchase. RP 85, 114-16. Officer Crommes then drove her to the McDonald’s located at the intersection of State Highway 512 and South Tacoma Way. RP 86, 116. Ms. Niemi got out of Officer Crommes’ car and waited in the parking lot for defendant. RP 86.

Several officers were in the area watching Ms. Niemi as part of the operation. RP 117, 147. They observed a small, four-door Kia enter the parking lot. RP 147, 199. Ms. Neimi walked over to the car, and got into

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<sup>6</sup> Ms. Niemi testified that Officer Crommes called defendant using her phone. RP 84.

the rear passenger seat. RP 87, 148, 199. The Kia drove through the parking lot for approximately one minute before stopping just before the exit. RP 148, 199. Ms. Niemi got out and returned to Officer Crommes. RP 88, 118, 148. The car drove away, followed by the other officers. RP 149.

Ms. Niemi gave Officer Crommes one hundred dollars' worth of cocaine and she no longer had the pre-recorded money. RP 88, 118, 136, 160. She told Officer Crommes that defendant gave her the drugs, she gave defendant the money, and that defendant was sitting in the front passenger seat of the car. RP 87, 94, 134. Officer Crommes advised the other officers that the operation was successful, and they stopped the Kia on Highway 512. RP 134, 185-86.

Officer Hamilton was driving the only marked patrol car involved in the operation. RP 183. When he was advised of the successful buy, he caught up to the other, unmarked, cars and proceeded to stop the Kia. RP 185. He activated his lights as soon as he got behind the Kia, but it did not stop. RP 186. From his location directly behind the Kia, he watched as defendant began moving around in the passenger seat. RP 186. At one point, defendant leaned so far over that he appeared to be laying his head on the driver's shoulder. RP 186. The moment defendant lifted his head, the driver pulled over. RP 186.

Officer Jordan contacted defendant where he was sitting in the passenger side of the Kia. RP 150. Officer Jordan read defendant his *Miranda* warnings. RP 151. Defendant responded, "You ain't got shit on me." RP 151. When Officer Jordan advised defendant he was under arrest, defendant stated, "You ain't got no evidence. You got nothing on me." RP 151. When Officer Jordan asked defendant his name, defendant replied, "Fuck you." RP 151. At that point, Officer Jordan placed defendant in the back of Officer Hamilton's marked patrol car and walked away. RP 151-52.

Meanwhile, Officer Conlon assisted with searching the Kia. RP 170. He found a loaded, operational, .380-caliber, semiautomatic pistol underneath the passenger seat where defendant had been sitting and baggies of the type regularly used to package narcotics on the passenger floorboard. RP 170-71, 265. He also found the pre-recorded buy money wedged into the crease in the center of the back seat. RP 171. After Officer Conlon found the money, Officer Hamilton sat down in the passenger seat and discovered he could reach the money from where he was sitting. RP 190-91. Officer Hamilton concluded that his observations of defendant's movements in the passenger seat were consistent with a person leaning over to reach into the back seat. RP 190.

After Officer Conlon found the firearm, Officer Hamilton contacted defendant where he was sitting in the back of the patrol car. RP 189. Defendant denied that he had been involved in a drug sale. RP 189.

When Officer Hamilton asked defendant about the gun, defendant's demeanor changed. RP 189. Defendant eventually told him that he did own the gun and he carried it because people were trying to hurt him. RP 189. He also admitted that he had put the gun under his seat when he saw Officer Hamilton behind the car, and that he was a convicted felon who was not allowed to possess a gun. RP 189-90.

Officer Hamilton transported defendant to the jail. RP 191. During the trip, defendant became very agitated and told Officer Hamilton that it did not matter that he possessed a gun, because the officers had no authority to stop his car. RP 191. Defendant insisted that all evidence was going to be "dumped." RP 191. As defendant was becoming more agitated Officer Hamilton stopped speaking to him. RP 191.

Becky Durkee, a private investigator hired by defendant, testified on defendant's behalf. RP 276-77. Ms. Durkee testified that she had interviewed Ms. Niemi regarding the night of the controlled buy. RP 277. According to Ms. Durkee, Ms. Niemi said she had received the drugs from the driver, not defendant. RP 282. Ms. Durkee also admitted that Ms. Niemi had told her that Ms. Niemi had no memory of the incident at all and that she no intention of testifying in the case. RP 282.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE ADMISSION OF THE OFFICERS' TESTIMONY WAS MANIFEST ERROR AND IS PRECLUDED FROM RAISING THIS ISSUE ON APPEAL.

To raise an error for the first time on appeal, a defendant must show that the error is “manifest” and truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. *Id.* at 926-27. Actual prejudice makes an error “manifest.” *Id.* at 927; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Kirkman*, 159 Wn.2d at 927; *McFarland*, 127 Wn.2d at 333. Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 927; *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Opinion testimony that is otherwise admissible is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. *See* ER 704; *State v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d

658 (1993). In Washington, experts are permitted to testify on subjects that are not within the understanding of the average person. ER 702; *see also State v. Petrich*, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984). Experts are allowed to express opinions concerning their fields of expertise when those opinions will assist the trier of fact. ER 702; ER 701.

It is the jury's responsibility to determine a defendant's guilt or innocence, and witnesses should not tell the jury what result to reach. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Thus, "[t]he general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" *Heatley*, 70 Wn. App. at 577 (*quoting State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Inadmissible inferential testimony is that which "leaves no other conclusion but that a defendant is guilty." *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573 (1995). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, at 578.

"Credibility 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).

Here, defendant alleges that three of the State's witnesses offered improper opinion testimony. *See* Appellant's brief at 6-8. As defendant

failed to object to the testimony below, he must show that any error is manifest to warrant appellate review. The testimony at issue was not a comment on defendant's guilt or the veracity of the witnesses, and it was helpful to the jury.

Officer Crommes<sup>7</sup> testified that, in his experience, drug transactions are generally hidden and of a short duration. RP 103. He testified as to the differences he has observed between drug sellers and drug users. RP 106. He also noted that, during drug raids he has participated in, he has generally found firearms. RP 106-07. He explained that dealing drugs is a dangerous business, leading many drug dealers to possess a gun for protection. RP 106-07.

Officers Jordan<sup>8</sup> and Conlon<sup>9</sup> both testified that, in their experience, drug transactions may occur in a vehicle and that they typically are of short duration. RP 145, 167.

The officers' testimony satisfies all three prongs as set forth in *Heatley*. None of the officers gave an opinion regarding defendant's guilt or the veracity of any witness. The information was helpful to the jury, in that the general public is generally not privy to the details of drug

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<sup>7</sup> Officer David Crommes has been a police officer since 1995 and has participated in hundreds of drug investigations. RP 101-02.

<sup>8</sup> Officer Todd Jordan has been a police officer since 1990 and has participated in over 500 narcotics-related arrests. RP 143-45.

<sup>9</sup> Officer Sean Conlon has been a police officer since 1998 and has participated in a couple thousand drug investigations, including buying and selling narcotics in an undercover capacity. RP 165-67.

transactions, and it helped the jury understand the relationship between the evidence at trial and drug dealing operations. The testimony was entirely based on the officers' observations during their training and prior experiences, and was related only to drug sale transactions in general. The testimony did not constitute either a direct or an inferential comment on defendant's guilt.

Because the officers did not provide the jury with their opinion of defendant's guilt nor did they comment on the veracity of any witness, defendant has failed to show that the admission of such testimony was error. Defendant was not prejudiced by the testimony; therefore there was no manifest error. Without manifest error, defendant's failure to object to the testimony below precludes appellate review.

2. THE TRIAL COURT CORRECTLY SENTENCED DEFENDANT AT A LEVEL III SERIOUSNESS LEVEL ON THE DRUG SENTENCING GRID AS THE JURY HAD RETURNED A SPECIAL VERDICT FINDING A WEAPON ENHANCEMENT.

Unlawful delivery of a controlled substance is a Class B felony. RCW 69.50.401(2)(a). The legislature has designated that a violation of this statute is a Level II offense under the Drug Offense Sentencing Grid. RCW 9.94A.517 and 9.94A.518. RCW 9.94A.518 states that "[a]ny

felony offense under chapter 69.50 RCW with a deadly weapon special verdict under RCW 9.94A.602” is a Level III offense. RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

Defendant argues that the wording of RCW 9.94A.518 does not allow for an increase in seriousness level when the jury returns a firearm special verdict, but only when it returns a deadly weapon special verdict. He argues that, despite the inclusion of firearm in the deadly weapon definition in RCW 9.94A.602, a “firearm” enhancement is distinct from a

“deadly weapon” enhancement per *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Defendant’s argument is a variation of an argument that was actually rejected by the Washington Supreme Court in *Recuenco*, and has been addressed by Division I of the Court of Appeals about whether the legislature authorized a procedure for *submitting* a special verdict to a jury for a firearm enhancement when it is not mentioned in RCW 9.94A.602. See *Recuenco*, 163 Wn.2d 428; *State v. Nguyen*, 134 Wn. App. 863, 869-870, 142 P.3d 1117 (2006), *pet. review denied*, 163 Wn.2d 1053, 187 P.3d 752, *cert. denied, sub. nom, Nguyen v. Washington*, 129 S. Ct. 644, 172 L.Ed.2d 626 (2008).

While there has long been a procedure for adding additional time to a sentence for an offense committed while armed with a deadly weapon, prior to 1995 there was no difference in the time imposed for committing a crime while armed with a firearm, as opposed to a different type of deadly weapon. *In re Charles*, 135 Wn.2d 239, 246, 955 P.2d 798 (1998). In 1995, an initiative entitled “Hard Time for Armed Crime” was enacted with the intent to increase sentences for armed crime. Laws of 1995, ch. 129; *State v. Broadaway*, 133 Wn.2d 118, 128, 942 P.2d 363 (1997). Since 1995, the length of the weapon enhancement varies according to the class of felony committed; whether such an enhancement was imposed after an offender had previously been sentenced for a deadly weapon enhancement; and whether the weapon was a firearm or another deadly

weapon. *Charles*, 135 Wn.2d at 246. Now persons found committing crimes while armed with firearms are sentenced more severely than those who commit crimes while armed with a deadly weapon. RCW 9.94A.533. Despite changes to the length of the enhancement imposed depending on whether a firearm or other deadly weapon was used, the wording of RCW 9.94A.602 was not amended by the Hard Time for Armed Crime initiative. *Recuenco*, 163 Wn.2d at 438-39; *Nguyen*, 134 Wn. App. at 869-870. The lack of amendment to the language of RCW 9.94A.602 led to challenges that the Legislature had not authorized a procedure to submit a firearm special of a special verdict to a jury. Division One of the Court of Appeals rejected this argument holding:

To the extent express authority is required, the deadly weapon special verdict statute supplies it. A firearm is a type of deadly weapon, expressly included in the statutory definition. The procedural statute did not need amendment just because the legislature created differing penalties for different deadly weapons.

*Nguyen*, 134 Wn. App. at 870. The Supreme Court later rejected the same argument in *Recuenco*, holding that former RCW 9.94A.125 (now recodified to 9.94A.604) provides a procedure whereby the jury can be asked to make a firearm finding. 163 Wn.2d at 439.

The same analysis is relevant here. While not all deadly weapons are firearms, by definition, all firearms are deadly weapons. RCW 9.94A.602 (“The following instruments are included in the term deadly

weapon: ... pistol, revolver, or any other firearm”). When a jury returns a special verdict finding a defendant was armed with a firearm during his commission of a crime prohibited by RCW 69.50, it has found that a defendant committed his drug offense while armed with an instrument that meets the definition of a deadly weapon under RCW 9.94A.602. Such a defendant is then properly sentenced under RCW 9.94A.518 at a Level III seriousness level on the Drug Sentencing Grid.

In the present case, the jury found defendant guilty of a drug offense while armed with a firearm. CP 49, 52. As firearms are, by definition, deadly weapons under RCW 9.94A.602, he was properly sentenced at a Level III on the Drug Sentencing Grid.

In addition, in construing a statute, the goal of the court is to ascertain and carry out the intent of the Legislature as determined primarily by the language of the statute itself. *State v. Neher*, 112 Wn.2d 347, 350, 771 P.2d 330 (1989). Courts should avoid reading a statute in a way that leads to absurd results since the legislature presumably did not intend such results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). Defendant invites this court to interpret RCW 9.94A.518 and RCW 9.94A.602 in a way that leads to an absurd result. This court should decline the invitation.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT APPLIED THE DOUBLING STATUTE TO DEFENDANT'S SENTENCE.

Under RCW 69.50.408, a person who is convicted of a second or subsequent drug offense may be imprisoned for a term up to twice the term otherwise authorized; except for prior possession convictions. The trial court has the discretion to utilize the doubling provision of the statute. *State v. O'Neal*, 126 Wn. App. 395, 430, 109 P.3d 429 (2005). A trial court's exercise of discretion will be reversed only if it is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Here, at defendant's first sentencing, the State asked the court to exercise its discretion to apply the doubling provision of RCW 69.50.408:

I would also point out that RCW 69.50.408 allows the court to apply the doubling statute to the defendant statutory maximum so instead of the 10 years for a Class B felony the court can impose up to 20 years in the court's discretion.

RP 396. The court followed the State's recommendation and applied the doubling provision. CP 65-78. When defendant was resentenced, the State again asked the court to exercise its discretion:

Before responding to defense's motion or their response to my motion, I would just like to repeat that the facts of this case haven't changed. The facts that the court heard at trial are the same. The defendant's criminal history has not changed. The arguments the state put forth at sentencing regarding the defendant's threat to society has not changed. Whatever reasons the court had for imposing high end plus

the enhancement and, therefore, utilizing the doubler has not changed. So the state would ask that the court once again, for the same reasons that it did so before, apply the doubler and again sentence the defendant to the high end of the range, 100 months, but apply the correct enhancement of 60 months, five years.

RP (09/26/08) 4-5. In his response, defendant argued that the court's application of the doubling provision is discretionary and that the court should decline to apply it to his case. RP (09/26/08) 9. The court noted that it had utilized its discretion during the first sentencing when it applied the doubling provision, and that it was choosing to do so again at resentencing. CP 153-166; RP (09/26/08) 17.

As defendant had a prior conviction for unlawful possession of a controlled substance at the time he was convicted of the current crime, the provisions of RCW 69.50.408 were in effect. The court did not abuse its discretion when it applied the doubling provisions of the statute.

Defendant makes three claims in his allegation that the court improperly applied the doubling provision of the statute. First he claims that the sentence was in error because the court, not a jury, found the fact of his prior conviction. *See* Appellant's brief at 19. Yet even defendant recognizes that under *State v. Blakely*, a prior conviction need not be presented to a jury. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) (“[W]ith the exception of the fact of a prior conviction, any fact that increases a penalty beyond the statutory maximum must be proved to a jury beyond a reasonable doubt.”).

Next, defendant claims that the doubling provision of the statute does not apply to prior possession convictions. *See* Appellant's brief at 20. Again, defendant recognizes that Washington courts have held that RCW 96.50.408(c) excludes current possession convictions, it does not apply to prior convictions. *See State v. Clark*, 123 Wn. App. 515, 520-21, 94 P.3d 335 (2004), *State v. MCollum*, 88 Wn. App. 977, 989, 947 P.2d 1235 (1997) *review denied*, 137 Wn.2d 1035 (1999).

Finally, defendant claims that the court failed to recognize and apply its discretion when it applied the doubling provision. *See* Appellant's brief at 21. Defendant cannot cite to any portion of the record to support that the trial court abused its discretion to apply the doubling provision. A review of the record reveals that both the State and defendant urged the court to exercise its discretion regarding the doubling provision. The court utilized the doubling provision when it sentenced defendant, thereby exercising its discretion to do so.

The trial court acted within its discretion when it adopted the doubling provisions of RCW 69.50.408.

4. DEFENDANT'S FIREARM ENHANCEMENT DOES NOT ENCOMPASS THE SAME CRIMINAL CONDUCT AS HIS UNLAWFUL POSSESSION OF A FIREARM CONVICTION.

If a sentencing court enters a finding that some or all of a defendant's current offenses encompass the same criminal conduct, those

current offenses shall be counted as one crime. RCW 9.94A.589(1)(a).

“Same criminal conduct,” means two or more *crimes* that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a)(emphasis added). All three prongs must be met for two crimes to encompass the same criminal conduct.

*State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). This statute is construed narrowly so that most crimes are not considered to be the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

- a. Defendant’s convictions for unlawful delivery of a controlled substance and unlawful possession of a firearm do not encompass the same criminal conduct.

Under RCW 69.50.401, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. To convict a defendant of unlawful delivery of a controlled substance, the State must prove that the defendant 1) delivered a controlled substance, and 2) knew that the substance delivered was controlled. *State v. Martinez*, 123 Wn. App. 841, 846, 99 P.3d 418 (2004); *see also* CP 21-48 (Jury instruction no. 5).

A person is guilty of the crime of unlawful possession of a firearm in the second degree if the person owns, has in his or her possession, or has in his or her control, any firearm, after having previously been

convicted of an offense that was not a serious offense. RCW 9.94.040(1)(a), (b). To convict a defendant of unlawful possession of a firearm, the State must prove that the defendant 1) knowingly owned a firearm or had a firearm in his possession or control, and 2) had previously been convicted of a felony that was not a serious offense. *State v. Anderson*, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000); *see also* CP 21-48 (Jury instruction no. 10).

Unlawful delivery of a controlled substance requires the intent to deliver a controlled substance. For unlawful possession of a firearm, a defendant must intend to possess a firearm. There can be no question that these crimes do not require the same criminal intent; therefore they do not encompass the same criminal conduct.

- b. As firearm enhancement is not a crime, it does not meet the definition of same criminal conduct.

RCW 9.94A.533(3) provides in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements . . . . If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

...

(e) Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: 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.

A sentence enhancement is not a separate sentence nor is it a separate substantive crime. *See State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008) (discussion of RCW 9.94A.533(5), which mandates a sentencing enhancement for crimes committed while within the county jail). Rather, it presupposes that the defendant's behavior already constitutes a crime, such as possession of a controlled substance. *Eaton*, 143 Wn. App. at 160.

An enhancement is not even an element of the underlying crime. *See State v. Kelly*, 146 Wn. App. 370, 374-75, 189 P.3d 853 (2008); *see also State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006). Instead, an "enhancement" is "a period of confinement added to a sentence because of particular circumstances of the crime." *In re Charles*, 135 Wn.2d 239, 252, 955 P.2d 798 (1998) *superseded on other grounds by*

*statute as cited in State v. DeSantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003).

Defendant claims the enhancement is the same criminal conduct as his unlawful possession of a firearm conviction. This argument is entirely without merit. The focus of defendant's argument may be on the enhancement, but it is not the enhancement that is the focus of the statute. The underlying conviction is the crime, not the sentence enhancement.

Not only does defendant fail to cite to any authority for his contention that a sentence enhancement is subject to a same criminal conduct analysis, he also fails to articulate how or why the court could consider the enhancement to be the equivalent of a substantive crime. The plain meaning of the statute is clear: in order to conduct a same criminal conduct analysis, the court must have two crimes to analyze. As an enhancement is not a crime, it does not meet even the initial threshold for determination of same criminal conduct.

- c. Even if this Court does chose to review defendant's claim on its merits, a firearm sentencing enhancement does not encompass the same criminal conduct as the crime of unlawful possession of a firearm.

RCW 9.94A.533(3) authorizes an enhanced sentence if the defendant was armed with a firearm during commission of the crime. A person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes, and there is a connection or

nexus between the defendant, the weapon, and the crime. *State v. Easterlin*, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006) (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)).

Even assuming that a firearm sentencing enhancement is subject to a same criminal conduct analysis, defendant's claim still fails. Based on the definition of "armed," for purposes of a sentence enhancement, the defendant must intend to have a weapon readily available for use in connection with the substantive crime. In other words, he must intend for the weapon to aid, even passively, in the commission of the underlying crime. As noted above, the criminal intent for possession is merely to possess the firearm. These acts do not require the same criminal intent; therefore they do not encompass the same criminal conduct.

Under defendant's theory, an act of unlawful possession of a firearm is the same as an act of being armed while committing a different crime. Yet firearm possession is distinct from committing a crime while "armed" with a firearm. A person does not have to illegally possess a firearm in order to be found "armed" for purposes of a sentence enhancement. Also, a person could unlawfully possess a firearm, but not have a sufficient nexus between a different crime and the possession to support a sentence enhancement for the substantive crime. Under defendant's theory, a person would receive punishment for illegal possession of a firearm only if the firearm was not used during the commission of some other crime.

Because the sentence enhancement and unlawful possession of a firearm require different criminal intentions, they do not encompass the same criminal conduct.

- d. The Legislature clearly intended to punish a firearm sentencing enhancement separately from every current offense.

Finally, even if this Court does find that defendant's firearm sentence enhancement is the same criminal conduct as his unlawful possession of a firearm conviction, his argument for a lower offender score would, again, fail. First, only convictions count against a defendant's offender score. *See* RCW 9.94A.525. As a sentence enhancement is not a conviction, it does have any effect on defendant's offender score.

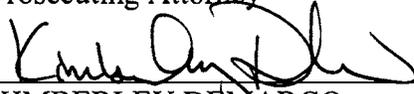
Second, the Legislature has expressly stated that an enhancement on one offense is to be run consecutively to all other offenses. RCW 9.94A.533(3). Clearly the Legislature intended the enhancement to be punished separately.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and sentence.

DATED: August 4, 2009.

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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.

8/4/09 Sheer Kar  
Date Signature

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STATE  
BY  
DEPT. OF JUSTICE  
COUNTY OF PIERCE  
TACOMA, WA