

COUNTY OF THURSTON
APPELLANT

NO. 37996-1-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY *cm*
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEE HARKCOM,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Chris Wickham, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The convictions for first degree robbery (Count II) and drive-by shooting (Count V) for the same act violated the state and federal prohibitions against double jeopardy.

2. The trial court erred in sentencing appellant where Counts II and Count V encompassed the same criminal conduct.

3. The firearm enhancement imposed in Count II violated appellant's constitutional right to be free from double jeopardy where use of a gun was an element of the substantive offense.

4. Ineffective assistance of counsel deprived appellant of his right to a fair trial.

5. The trial court failed to instruct the reconstituted jury on the record to disregard all previous deliberations and begin deliberations anew after excusing a deliberating juror.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The appellant was convicted of first degree robbery with a firearm enhancement and drive-by shooting for the same incident. Was double jeopardy violated by the multiple convictions for the same act? Assignment of Error No. 1.

2. Whether the trial court erred in sentencing appellant where

Count II and Count V constituted the same criminal conduct? Assignment of Error No. 2.

3. The double jeopardy clauses of the federal and state constitutions protect against multiple punishments for the same offenses. Where appellant received punishment for first degree robbery based on his use of a firearm, and also received a 5 year firearm enhancement for use of a firearm, was he punished twice for the same conduct? Assignment of Error No. 3.

4. Whether reversal is required because counsel was ineffective in (1) failing to object to improper admission of ER 404(b) evidence that appellant's name was contained in a "police database," and (2) failing to properly argue at sentencing that his offender score was miscalculated regarding his current offenses? Assignment of Error No. 4.

5. Where the trial court fails on the record to instruct a reconstituted jury "to disregard all previous deliberations and begin deliberations anew," and where the judge instructed his bailiff to "call in the alternate" and "ask the jury to begin deliberating from scratch[.]" should the convictions be reversed? 2Report of Proceedings at 222. Assignment of Error No. 5.

C. STATEMENT OF THE CASE

1. Procedural history:

Jessie Harkcom was charged by amended information filed in Thurston County Superior Court with first degree kidnapping (Count I), first degree robbery¹ (Count II), first degree extortion (Count III), second degree assault² (Count IV), drive-by shooting³ (Count V), and first degree unlawful possession of firearm⁴ (Count VI). Clerk's Papers [CP] at 13-14. The State alleged that Counts I, II, III, and IV were committed while armed with a deadly weapon. CP at 13-14.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

Harkcom was tried by a jury, the Honorable Chris Wickham presiding.

Defense counsel stipulated to an instruction to the jury propounded by the State that Harkcom was previously "convicted of a serious offense that precluded him from owning or possessing firearms on April 7, 1998." IRP at 116. Exhibit 4.

After the State rested its case-in-chief, defense counsel moved to

¹RCW 9A.56.200(1).

²RCW 9A.36.021(1)(c).

³RCW 9A.36.045(1).

dismiss the charges of first degree kidnapping (Count I) and first degree extortion (Count III). 1Report of Proceedings [RP] at 118.⁵

Judge Wickham granted the motion to dismiss Count III based on *Seattle v. Allen*⁶. 1RP at 132. The court denied the motion to dismiss Count I. 1RP at 132.

Defense counsel asked that court grant an instruction for the inferior degrees of second degree kidnapping and second degree robbery in Counts I and II, respectively. 1RP at 133-35; CP at 31, 32, 33, 39, 40, 41. Defendant's Proposed Instructions No. 12, 13, 14, 19, 20, 21. The State argued that the defense did not present a theory that the incident involved second degree kidnapping or second degree robbery, and that "[e]verything about the case argues that there was a firearm involved." 1RP at 136. Judge Wickham declined to give the defense's requested inferior degree instructions, stating although the question was "a close decision[,]" he agreed with the State "that the defense has not argued a theory of the case that would support the lesser-included instruction." 1RP at 137. Judge Wickham stated

⁴RCW 9.41.040(1)(a).

⁵The record consists of four volumes.

May 28, 2008, status conference hearing.

1RP June 3, 4, 2008, jury trial.

2RP June 5, 2008, jury trial.

3RP July 10, 2008, sentencing.

⁶ 80 Wn.App. 824, 911 P.2d 1354 (1996).

that the defense theory is that the State's witnesses are not credible, and "therefore, it's not just a question of whether a firearm was used or not, it's whether any of this ever happened." 1RP at 137. The State did not note exceptions to requested instructions not given or object to instructions given. 1RP at 139. The defense noted its exception to the court's refusal to grant the required instructions for inferior degrees of first degree robbery and first degree kidnapping. 1RP at 139.

The jury received the case on June 4, 2008. On June 5, the judge notified counsel that Juror No. 12 told a bailiff that she thought she recognized Harkcom from a previous jury panel. 2RP at 213. After inquiry by the court and counsel, the juror said that she thought she recognized Harkcom from a rape "trial she was summoned for." 2RP at 217. She was not selected as a juror in that case. 2RP at 217. The prosecutor noted that he did not believe that Harkcom had been the subject of a rape prosecution. 2RP at 221. Defense counsel agreed, stating the Harkcom had not been through the jury trial procedure before and that he had never been charged with rape. 2RP at 222. The State concurred that Harkcom has never had a prosecution for rape. 2RP at 221. Judge Wickham excluded the juror. 2RP at 221, 222. Judge Wickham did not instruct the jury on the record to begin deliberations anew. 2RP at 224. Judge Wickham stated:

I have had previous alternates come in, and I have not given special instructions to the jury, maybe in part not to make the event assume greater significance than it does.

And as long as I think the bailiff knows to instruct them to begin from the beginning, I'm comfortable with that, but if counsel are concerned that bailiff might not adequately instruct the jury in that way, as I say, I'm willing to bring them into the courtroom.

2RP at 224.

Defense counsel agreed to the court's proposal that the bailiff instruct the jury. 3RP at 224. The court then stated:

I will just ensure the bailiff, I have already told him that, but I will tell him again outside the courtroom to make sure to tell the jury that once the alternate gets here that the jury is to begin deliberations again anew.

2RP at 224.

The jury found Harkcom guilty of first degree robbery, second degree assault, drive-by shooting, and first degree unlawful possession of a firearm. 2RP at 225-26. CP at 125, 126, 126 and 127. The jury found that Harkcom was armed with a firearm during the commission of the robbery and assault. CP at 130 and 131. The jury acquitted Harkcom of first degree kidnapping as charged in Count I. CP at 124.

At sentencing on July 10, 2008, counsel argued that the convictions for first degree robbery, assault in the second degree, and drive-by shooting should merge, and that the convictions for assault and drive-by shooting

should be vacated. 3RP at 5-6. The State argued that units of prosecution for the three offenses are separate and distinct, and that the elements of each charge are different. 3RP at 9-10. The State argued that the discharge of the firearm constituted a separate crime “and by then he was able to force the victim to give him his property while he was armed with the firearm, the other two crimes had already been committed,” and that the crimes had different intents. 3RP at 10. The court entered a conviction for first degree robbery and found that second degree assault merged with robbery, and vacated the assault conviction. 3RP at 14. The court found that drive-by shooting did not merge with robbery or assault. 3RP at 14.

a. Same criminal conduct for current offenses.

Although defense counsel argued that Counts IV and V should merge into Count II, counsel did not argue that drive-by shooting and robbery constituted the same criminal conduct. 3RP at 15-17.

b. Same criminal conduct for prior convictions.

Defense counsel noted that Harkcom has two convictions for second degree theft from Snohomish County from 2005, and that he had one count of first degree burglary, two counts of unlawful possession of a firearm in the first degree, and two counts of theft of a firearm from Thurston County. 3RP at 15. Counsel argued that the Thurston County charges were the result of a

single transaction and “were considered by the sentencing court to be the same criminal conduct.” CP at 168-69; 3RP at 15-16. Counsel argued that the prior offenses in Thurston County Cause No. 98-1-314-0 were considered the same course of conduct and “did not count as criminal history against each other and therefore should be counted as one offense for the purpose of sentencing.” CP at 171; 3RP at 16. Counsel noted that in the Judgment and Sentence from that cause

[t]he burglary in the first degree in Count 1 has an offender score of one, and that comes from a prior residential burglary that Mr. Harkcom had as a juvenile. All other crimes in that cause number have point totals of zero, and none of the other firearm case or crimes apparently count as criminal history versus the burglary.

3RP at 16.

Counsel noted that in the 2005 Snohomish County Judgment and Sentence pertaining to the convictions for second degree theft, the judge found that Harkcom had an offender score of “2” for each count, and that the judge appeared to have considered the Thurston County charges to constitute the same criminal conduct. 3RP at 18. Counsel stated, however, that Judge Wickham was not bound by the Snohomish County judge’s ruling. 3RP at 19. Defense counsel argued that the prior counts should count as two points, resulting in an offender score of seven for robbery, rather than nine. 3RP at

19. The State argued that the offender score for robbery should be nine points, and that in Thurston County charges “involve counts that are required to run consecutive one to the other.” 3RP at 17.⁷

The trial court ruled that the prior offenses were not same course of criminal conduct and counted them separately. 3RP at 20.

Judge Wickham imposed 150 months in Count II, with a 60 month firearm enhancement, for a total of 210 months. CP at 190; 3RP at 28. Harkcom was sentenced to 116 months for drive-by shooting, and 89 months for first degree unlawful possession of a firearm, to be served concurrently to Count II. CP at 190.

Timely notice of appeal was filed on July 11, 2008. CP at 201-12. This appeal follows.

2. Substantive facts.

Olympia police officer John Tupper went to a parking lot of West Side Lanes bowling alley the afternoon of January 23, 2008 and met Gene Blaney at that location. 1RP at 25, 26, 33. In the parking lot Blaney pointed

⁷ Harkcom submits that the trial court’s ruling is not supported by law and that his Thurston County charges constitute the same criminal conduct, as determined in Snohomish County in 2005. Harkcom specifically does not waive this issue, but has chosen to resubmit the issue to the trial court pursuant to CrR 7.8, and will request leave of this Court to enter an order in the trial court pursuant to RAP 7.2(e). In the event the trial court is unable or unwilling to hear the anticipated CrR 7.8 motion, or if this Court does not grant leave to file an order obtained below pursuant to the motion, Harkcom will

out to Tupper a spent shell casing on the ground in the driveway area of the parking lot. 1RP at 28. The shell casing appeared to have been run over by a vehicle. 1RP at 31. Exhibit 1. Tupper did not find any marks on the sides of buildings in the vicinity. 1RP at 35, 36.

Blaney told Tupper that he had been shot at two times in that area early in the morning. 1RP at 30, 32. On the previous night—January 22, 2008—Blaney had been at the West Side Tavern in Olympia. 1RP at 40. While there, he got a call from Kalin Hollingberry, who is friends with Blaney’s former girlfriend, Natalie Ward. 1RP at 40. Blaney said that Hollingberry wanted to meet with Blaney at the tavern and “sort things out.” 1RP at 40. Hollinger arrived in a car with two other men. 1RP at 40, 41. Blaney got into the car. 1RP at 41. Blaney did not recognize the driver. 1RP at 41. He stated that Jessie Harkcom was in the front passenger seat. 1RP at 41. Blaney sat in the back seat behind the front passenger seat. 1RP at 41. Blaney said the plan was for the four men to have beers at West Side Lanes bowling alley. 1RP at 41. After they drove to the bowling alley, Blaney stated that the driver parked the car and about two minutes later Harkcom got out of the car and Blaney “saw him pulling a gun” from the front of his

move for leave to file a supplemental brief or file an amended opening brief to this Court assigning error to the issue of the calculation of his prior criminal history.

waistband. 1RP at 43, 44. Blaney stated that he was opening the car door, and Harkcom slammed it shut and Blaney opened it again. 1RP at 44. Blaney said that Harkcom then “sucker-punched” him near the top of his forehead while he was in the car. 1RP at 44. While he was in the car, Blaney said he received a call on his cellular phone from Ray Mills, and the phone line was active during the incident. 1RP at 45. Blaney said that he then pushed himself outside the car and that Harkcom pointed the gun at him. 1RP at 45, 46. Blaney said that Harkcom “asked me to empty my pockets,” and Blaney started to walk away from the car. 1RP at 46. Blaney said that Harkcom kept “insisting empty your pockets or I’m going to shoot you.” 1RP at 46. He said that Harkcom pointed the gun at his knees and said that he would shoot his knees if he didn’t empty his pockets. 1RP at 46-47. Blaney said that he didn’t think Harkcom was serious and “so I denied it.” 1RP at 47. He said that Harkcom then “aimed the gun towards an aside and gave me a warning shot.” 1RP at 47. He said that Harkcom then cocked the gun and pointed it at his head and said that “he would kill me if I didn’t empty my pockets,” and then “aimed to side and shot it, shot it to the side of my head.” 1RP at 47. Blaney said that he “didn’t know what to think” and told him that he was not going to give him anything. 1RP at 48. Blaney said that a white car appeared in the parking lot at that time. 1RP at 48. Barney

took off his yellow coat and gave it to Harkcom and told him that that was all he was going to get. 1RP at 48. He said that Harkcom then got into the white car and left. 1RP at 48.

After the incident, Blaney called Hollingberry two times “kind of cussing” at him. 1RP at 56. He said that he thought he was asked to empty his pockets because “they probably figured I had money.” 1RP at 58.

Ray Mills, a friend of Blaney, went to the West Side Tavern on January 22 looking for Blaney. 1RP at 68. Blaney was not there, so Mills called him, and Blaney answered and said that he was at the West Side Lanes. 1RP at 68. He then heard someone saying “give me all your stuff.” 1RP at 68. Mills said that he heard a gunshot, and after a five to ten second pause, heard a second gunshot, and then the phone went dead. 1RP at 69, 72. Mills went to the West Side Lanes and found Blaney in the parking lot, and then they both went to Buzz’s Tavern, located about two miles away. 1RP at 71, 73.

Kalin Hollingberry testified that he was at his apartment late on January 22, 2008, and Harkcom and another man came by and they drank beer. 1RP at 76, 77. Hollingberry said that they wanted to “scare” Blaney “[a]nd/or get money or drugs off of him.” 1RP at 78. They drove to the West Side Tavern to pick up Blaney after calling him. 1RP at 78.

Hollingberry had a handgun that he gave the gun to Harkcom. 1RP at 77. After picking up Blaney, they drove to the bowling alley parking lot and Harkcom and Blaney got out of the car. 1RP at 79, 80. He stated that he saw Harkcom point the gun at Blaney and that he heard the gun discharge one or two times. 1RP at 81. He said that Blaney gave Harkcom his jacket or vest. 1RP at 81.

Sam Costello, a detective with Olympia Police Department, testified that Blaney identified Harkcom as the person who had the gun in the car. 1RP at 113. Det. Costello stated that Harkcom's "name was in a police database" and that they determined that Harkcom had a GMC truck registered to him and to Nicole Teeter. 1RP at 113-14. He stated that Teeter had a car that "was very similar in appearance, at least given appearance, to what the victim told us was used in the crime." 1RP at 114. The car was described as a maroon, four-door vehicle. 1RP at 115.

The defense rested without calling witnesses. 1RP at 140, 141.

D. ARGUMENT

- HARKCOM'S STATE AND FEDERAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED WHEN THE TRIAL COURT FOUND THAT THE CHARGE OF FIRST DEGREE ROBBERY AND DRIVE-BY SHOOTING DID NOT MERGE.**

Both the state and federal constitutions protect citizens from being subjected to double jeopardy. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed. 2d 715 (1980); Fifth Amend.; Art. I, § 9⁸. Both clauses provide the same protection, prohibiting (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

As a result, while the State is free to charge and try to prove multiple charges arising from the same conduct, multiple convictions will offend double jeopardy unless it is clear the Legislature has decided to provide for separate crimes and punishments. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

In this case, reversal is required, because Harkcom suffered multiple punishments for the same offense when he was convicted of drive-by shooting and first degree robbery.

a. Relevant facts

At sentencing, defense counsel argued that there was a double

⁸ The Fifth Amendment double jeopardy clause applies to the state through the Fourteenth Amendment. *See Benton v. Maryland*, 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

jeopardy violation or "merger" problem because the court was finding guilt for first degree burglary, second degree assault, and the drive-by shooting, and that the offenses were based upon the same act. 3RP at 4-8. The trial court found that first degree robbery and second degree assault charges merged, and vacated the assault conviction. 3RP at 14. However, Judge Wickham found that there was no double jeopardy problem regarding drive-by shooting, stating:

my sense is that the Legislature had a separate intent in criminalizing that conduct from criminalizing the robbery and the assault, and as such the State has pointed out, there are other risks to the public and other persons from the offense referred to as drive-by shooting, and, therefore, it is appropriate that it be punished separately from the robbery.

3RP at 14.

b. Harkcom was subjected to double jeopardy by the multiple convictions and sentences.

The separate convictions for robbery and drive-by shooting violated Harkcom's rights to be free from double jeopardy. At the outset, the Supreme Court has made it clear that conviction alone amounts to a double jeopardy "punishment" for an offense, even without a sentence. *Womac*, 160 Wn.2d at 656. Where, as here, not only conviction but also punishment was imposed for both the offenses, there can be no question double jeopardy rights have attached.

In general, in examining a double jeopardy claim, the Court applies the "same evidence" rule unless there is a clear indication that the Legislature did not intend to impose multiple punishments. *Womac*, 160 Wn.2d at 652. Under that rule, offenses "are not constitutionally the same" if each requires proof of an element not required to prove the other, and proof of one would not necessarily prove the other. *Id.*; see *State v. Vladovic*, 99 Wn.2d 413, 422, 622 P.2d 853 (1983).

In making this determination, the Court does not look at the statutory definition of the crimes but rather at the specific "act or transaction" and whether each crime required proof of a fact the other did not. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004).

In this case, the prosecution relied on the same "act or transaction" as proving the second-degree assault—subsequently vacated—the first degree robbery, and the drive-by shooting. Each stemmed from the incident in the bowling alley parking lot, in furtherance of the robbery. As a result, under the facts of this case, the "same elements" test is met. The crimes were thus the same in both fact and law, under the circumstances of this case.

In *Womac*, the prosecution relied on the same act—the killing of a child—for charges of assault of a child in the first degree, murder in the second degree (felony murder including assault as a predicate), and homicide

by abuse. *Womac*, 160 Wn.2d at 647-48. Even though the defendant was only sentenced for one offense, the Court reversed two of the convictions, finding they violated double jeopardy. *Id.* After first noting the general "same elements" rule, the Court then held that a violation of double jeopardy can occur even "despite a determination that the offenses involved clearly contained different legal elements." *Womac*, 160 Wn.2d at 652. Because *Womac* could not have committed felony murder in the second degree without committing assault in the first degree, and because the assault and homicide by abuse involved the same victim and occurred at the same time and place, only once conviction could stand. *Womac*, 160 Wn.2d at 658-663.

Here, there can be no question that the jury relied on the very same conduct in finding liability for all the offenses challenged in this section. The conduct occurred in the same time and place, with the same victim, and the elements creating the criminal liability were exactly the same.

The convictions for robbery and drive-by shooting and their resulting sentences violated Harkcom's constitutional rights to be free from double jeopardy. The remedy for such violations is dismissal of the crimes which result in the lowest standard range. *State v. Weber*, 159 Wn.2d 252, 269, 149 P.3d 646 (2006). In this case, the highest standard range is for the robbery, and the standard range for that offense, calculated without the improper

drive-by shooting conviction, is 108 to 144 months, prior to the 60 month enhancement.⁹ The drive-by shooting conviction violated double jeopardy, and this Court should so hold and should dismiss that count and reverse and remand for re-sentencing.

2. **THIS MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE COUNTS II AND V CONSTITUTE THE SAME CRIMINAL CONDUCT AND THEREFORE HARKCOM'S OFFENDER SCORE WAS MISCALCULATED.**

a. **Crimes arising from the same criminal conduct count as a single offense for purposes of sentencing.**

RCW 9.94A.589(1)(a) provides for score calculation purposes, multiple crimes that have the “same criminal conduct” are not counted separately, but instead count as a single crime. “Same criminal conduct” is defined as crimes that have the same objective criminal intent, are committed at the same time and place, and involved the same victim. Such crimes are not counted separately. RCW 9.94A.589; *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

A sentencing court’s calculation of a defendant’s offender score is a question of law and is reviewed de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score

⁹ The 60 month firearm enhancement is challenged in section 3 of this brief, *infra*.

may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). Here, Harkcom was convicted in Count II of first degree robbery, and in Count V of drive-by shooting based on the allegation that he took a jacket from Blaney and discharged a firearm at that time. These crimes should have been considered the same criminal conduct and counted as one for purposes of calculating Harkcom's offender score.

b. Since the drive-by shooting furthered the crime of robbery in the first degree, the two crimes encompassed the same criminal conduct.

Applying the above three-part test to Harkcom's offenses, it is clear that both convictions encompassed the same criminal conduct. First, it is undisputed the offenses involved the same victim, Gene Blaney. Second, the offenses occurred at the same time and place. Third, the offenses involved the same criminal intent. Even sequentially committed offenses share the same objective intent when one crime furthers the other. *State v. Price*, 103 Wn. App., 845, 857, 14 P.3d 841 (2000).

[I]n construing the "same criminal intent" prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Dunaway*, 109

Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This, in turn, can be measured in part by whether one crime furthered the other. [*State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993);]; *State v. Collicott*, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992); [*State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)]; *Dunaway*, 109 Wn.2d at 217.

State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

As charged and proven, the robbery was established upon proof of assault and the discharge of the handgun. Therefore, the offenses of robbery and drive-by shooting involved the same criminal intent.

c. The proper remedy is reversal.

Where a trial court erroneously finds multiple convictions do not encompass the same criminal conduct for purposes of calculating an offender score, the proper remedy is reversal and remand for resentencing based on a properly calculated offender score. See *State v. Haddock*, 141 Wn.2d 103, 115-16, 3 P.3d 733 (2000). Here, as the drive by-shooting encompassed the same criminal conduct as the robbery, this case must be reversed and remanded for sentencing with a corrected offender score.

3. BY IMPOSING A FIREARM ENHANCEMENT FOR AN OFFENSE THAT REQUIRED THE USE OF A GUN IN MANNER IN WHICH THE OFFENSE WAS CHARGED, HARKCOM WAS PUNISHED MULTIPLE TIMES FOR USING A GUN, IN VIOLATION OF DOUBLE JEOPARDY.

Harkcom was convicted of one count of first degree robbery because he used a firearm in the commission of the offense. His sentence for the crime was enhanced because he was found to have used a gun. Therefore, Harkcom was punished for committing the crime with a gun and again for committing the crime with a gun. Harkcom's multiple conviction and punishment for using a firearm violated the prohibition found in the federal and state constitutions and must be vacated.

a. The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments.

The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. 5; Const. art. 1, sect. 9. The Fifth Amendment's double jeopardy protection is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a

constitutional issue that may be raised for the first time on appeal. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *Gocken*, 127 Wn.2d at 100. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

b. The legislative intent must be reexamined after *Blakely*.

The Legislature has the power to define offenses and set punishment within the boundaries of the constitution. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Therefore the first step in deciding if punishment violated the double jeopardy clause is to determine what punishment is authorized by the Legislature. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Courts assume that the punishment intended by the Legislature does not violate double jeopardy. *Freeman*, 153 Wn.2d at 771;

Albernaz v. United States, 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Therefore, to determine if the Legislature intended multiple punishments for the violation of separate statutes, courts begin with the language of the statutes. *Freeman*, 153 Wn.2d at 771-72. RCW 9.94A.510 provides for additional time to be imposed to an offender's standard range if the offender or an accomplice was armed with a firearm:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for firearm enhancements based on the classification of the completed felony crime

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possession a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

RCW 9.94A510(3) (effective until July 1, 2004).

The statute was designed to provide increased penalties for criminals using or carrying deadly weapons, provide even greater punishment for those using or carrying firearms, "stigmatize" the use of weapons, and hold individual judges accountable of their sentencing for serious crimes. Laws of 1995, ch. 129 § 1 (Findings and Intent). The statute provides that all firearm

enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.510(3)(e); *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates the voters intended a longer standard sentence range, and therefore greater punishment, for those who participate in crimes where a principal or accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm, demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.510(3)(f). The voters apparently did not consider the problem of redundant punishment created when a five-year firearm enhancement is added to a crime and using a firearm is way the offense was committed.

The Hard Time for Armed Crime Act was passed significantly before *Blakely v. Washington* and other United States Supreme Court cases made clear that a fact that exposes a person to increased punishment is an element for an offense. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2003). The voters and the Legislature were unaware that the firearm enhancement they created was an element of a higher offense in that it increased the offender's maximum sentence. See *Blakely*, 542 U.S. at

303-04; *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (firearm enhancement is “element” of greater offense). Because an enhancement is an element of a higher crime, the initiative simply addresses a redundant element of use of a firearm for crimes where use of a firearm for crimes where use of a firearm was already an element, a result the voters would not have intended. *See*, RCW 9.94A.510(3)(f).

c. Harkcom’s conviction for first degree robbery are the same in fact and in law as the accompanying firearm enhancement.

When it is not clear if double punishment is authorized by statute, courts utilize the *Blockburger*, or “same elements” test to determine if two convictions violate double jeopardy. *United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Gocken*, 127 Wn.2d at 101-02. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); *Dixon*, 113 S.Ct. at 2856. This is similar to Washington’s “same elements” test for double jeopardy. *Calle*, 125 Wn.2d at 777. The test requires the

court look to the statutory offenses to determine if each crime, as charged, has elements that differ from one another. *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001).

There is no question Harkcom's first degree robbery conviction is the same as fact and in law as the firearm enhancement. Each involves the same criminal act as well as the same victim. Harkcom was charged and convicted of first degree robbery for allegedly using a gun to rob Blaney. CP at 152. ("to convict" jury instruction, Instruction No. 19). No other weapon or act constituted the firearm enhancement, that required Harkcom commit the crime while armed with a firearm.

Second, Harkcom's first degree robbery conviction is the same in law as the firearm enhancement. The first degree robbery statutes reads in relevant part:

- (1) A person is guilty of robbery in the first degree if:
- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon . . .

RCW 9A.56.200.

The jury was instructed the elements of first degree robbery were that the defendant (1) unlawfully took personal property from the person of

another, (2) against the person's will by the use or threatened use of immediate force, violence, or fear of injury, (3) that such force or fear was used to obtain or retain possession of the property, and (4) that the defendant was armed with a firearm or displayed what appeared to be a firearm or other deadly weapon. CP at 152. The State presented no evidence that Harkcom committed the robbery by any means other than with a firearm.

The jury found Harkcom was armed with a firearm during the commission of the robbery. CP at 130. RCW 9.94A.533 requires the sentencing court to add additional time to an offender's standard range "if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010." But *a priori* Harkcom could not commit the robbery with a firearm as charged without being armed with a firearm. A conviction for first degree robbery by means of being armed with a firearm is the same in law as the firearm enhancement. Harkcom was given an additional five years in prison for the enhancement. CP at 190. He was essentially sentenced for being armed with or using a firearm while armed with a firearm, and he was therefore convicted and punished twice for a single use of a weapon. The addition of the firearm enhancement to Harkcom's first degree robbery conviction placed him twice in jeopardy for the use of a gun and violated state and federal constitutions.

d. The proper remedy is to vacate the firearm enhancement.

Convictions entered in violation of constitutional double jeopardy must be vacated. *Womac*, 160 Wn.2d at 660. The firearm enhancement applied to the substantive offense of robbery while armed with a firearm was imposed in violation of double jeopardy and must be vacated.

4. **DEFENSE COUNSEL'S UNPROFESSIONAL
ERRORS DENIED HARKCOM
CONSTITUTIONALLY EFFECTIVE
COUNSEL.**

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel Const. Art. 1, § 22; *Strickland v. Washington*, 466, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The test for ineffective assistance of counsel has two parts. One, it must be shown that the defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness. Legitimate strategic or tactical reasons of trial counsel do not support ineffective assistance claims. *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995). Two, it must be shown that such conduct prejudiced the defendant, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Ineffective assistance of counsel claims are reviewed de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). There is a presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986).

Here, trial counsel was ineffective by failing to object to the prejudicial impact of ER 404(b) evidence that Harkcom's name was contained in a police database and failing to properly argue that Counts II and V constitute the same criminal conduct after Harkcom's request the Count V merge with Count II was denied.

a. Counsel was ineffective in allowing the jury to consider improper propensity evidence.

Under ER 404(b), evidence of a defendant's prior crimes, wrongs, or prior bad acts will not be admissible if its ultimate effect is to merely encourage the jury to conclude that the defendant's past conduct shows a bad character or propensity to commit acts such as the crime charged. ER 404(b); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). But such evidence may be admissible if it is offered, and is relevant and material, to prove other matters, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

In order to admit prior bad act evidence under ER 404(b), the trial

court must identify the proper non-propensity purpose for which the evidence is offered, and determine if the evidence is relevant to prove an essential element of the crime. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (citing *State v. Tharp*, 96 Wn.2d 591, 596, 637 P.2d 961 (1981)). To avoid error, the trial court must identify the purpose and relevance of the evidence on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

The trial court must then balance the probative value of the evidence against the prejudicial effect, also on the record. *State v. Lough*, 125 Wn.2d at 853. In order to be admissible, even if it is relevant to a non-propensity issue, the evidence must carry probative value that outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-22, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000).

At trial, defense counsel failed to object when Det. Costello testified that Harkcom's name was "in a police database." RP at 113-14. The detective's reference to a police database was not required to support an element of the crime or for any other permissible reason under ER 404(b). Det. Costello's testimony about the database merely offered reference that police had information about Harkcom for an unknown purpose on a computer. In short, it allowed the jury to make an impermissible inference

that because the information was on the computer, Harkcom must have committed bad acts or engaged in criminal behavior in the past, therefore he must have committed the charged offenses. Because there are no ER 404(b) exceptions under which this evidence could have been admitted, this evidence would have been excluded had defense counsel objected.

The record in this case reveals no tactical or strategic reason for counsel's failure to object to Det. Costello's testimony. Where the failure to object is unjustified on ground of trial tactics, it constitutes deficient performance. *See State v. Henrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

b. Counsel failed to argue that robbery and drive-by shooting were part of the same criminal conduct.

Although counsel argued that the charges of robbery and drive-by shooting should merge, counsel did not specifically argue that they were the same criminal conduct. Should this court find that trial counsel waived or invited the error claimed in Section 2 of this brief by failing to properly object to the calculation of Harkcom's offender score or by agreeing to the miscalculation of his current offenses, then both elements of ineffective assistance of counsel have been established.

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial

counsel would have failed to properly object to the calculation of the Harkcom's offender score.

c. Defense counsel's deficient performance prejudiced Harkcom.

Defense counsel's failure to object was not harmless. This case was a credibility contest; as Judge Wickham stated, the defense was that the State's witnesses were incorrect. This improper evidence undermined Harkcom's credibility, and permitted the jury to convict Harkcom based on an improper inference. Regarding the calculation of his offender score, the prejudice is self-evident. Had counsel properly objected to the calculation of Harkcom's offender score, the trial court would not have found an improper offender score and would have imposed a lawful sentence. Therefore, defense counsel's deficient performance prejudiced Harkcom, and his convictions should be reversed.

5. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE RECORD TO BEGIN DELIBERATIONS ANEW AFTER A JUROR WAS EXCLUDED.

a. Where an alternate juror is seated, the court has an obligation to properly instruct the reconstituted jury on the record.

In pertinent part, CrR 6.5 provides:

If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

This rule seeks to protect the accused's constitutional right to a fair trial and a unanimous verdict. *State v. Ashcraft*, 71 Wn.App. 444, 463, 859 P.2d 60 (1993). As noted by the *Ashcraft* Court:

The purpose of CrR 6.5's requirement that the reconstituted jury be instructed to begin deliberations anew is to assure jury unanimity - to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them.

Id. at 466 (Emphasis added).

In *Ashcraft*, a juror was excused and replaced with an alternate juror in an *ex parte* proceeding. *Id.* at 450, 463. The *Ashcraft* Court found:

It was reversible error of constitutional magnitude to fail to instruct the reconstituted jury *on the record* that it must disregard all prior deliberations and begin deliberations anew.

Id. at 464 (Emphasis in original).

Since the court's failure to comply with CrR 6.5 implicated the defendant's constitutional right, the burden was on the State to prove the error was harmless beyond a reasonable doubt. *Id.* at 466 (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d (1967)). As noted in

Ashcraft:

Because here the trial court proceeded *ex parte*, neither the State nor the appellant had an opportunity to insure *for the record* that the instruction to disregard prior deliberations and to commence deliberations anew be given.

Id. at 466 (Emphasis in original).

The *Ashcraft* Court found the State unable to meet its heavy burden to show the error was harmless beyond a reasonable doubt. *Id.* at 466. The record did not demonstrate the "mandatory" instruction was given to the reconstituted jury and the Court could not find under the facts of the case that the failure to do so was harmless beyond a reasonable doubt. *Id.*

It is not beyond the realm of reasonable possibility that, since the reconstituted jury was not properly reinstructed, the alternate and the remaining 11 initial jurors could have concluded, in all good faith but erroneously, that they need not deliberate anew as to any counts or issues upon which the initial 12 jurors may have reached agreement.

Id. at 466-67. The *Ashcraft* Court reversed the guilty verdicts finding the "trial court's failure to reinstruct the reconstituted jury *on the record* that it must disregard the previous deliberations and begin deliberations anew" was manifest constitutional error which was not shown to be harmless beyond a reasonable doubt. *Id.* at 467 (Emphasis in original).

b. Judge Wickham failed to properly reinstruct the reconstituted jury.

No evidence in this case demonstrates that Judge Wickham properly instructed the reconstituted jury. As set forth above, CrR 6.5 plainly requires that a judge instruct a reconstituted jury to: (1) disregard prior deliberations and (2) begin deliberations anew. The rule does not say that a court need only instruct the bailiff to tell the jurors both of those issues. The rule plainly provides that when a jury has begun deliberations and replacing a seated juror with an alternate becomes necessary, "the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." CrR 6.5.

Harkcom's reconstituted jury was never properly instructed. The judge's instruction for the bailiff to instruct the jury off the record does not meet the requirements of CrR 6.5. The convictions should be reversed pursuant to *Ashcroft*.

E. CONCLUSION

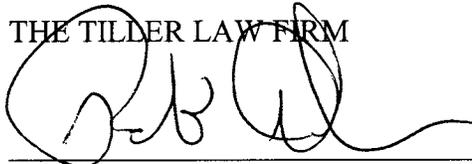
For the foregoing reasons, Jesse Harkcom respectfully requests this court to vacate his conviction for drive-by shooting, vacate the firearm enhancement and remand for resentencing. In the alternative, Harkcom requests that this Court vacate his convictions and remand this matter for a new, fair trial due to ineffective assistance of counsel and the failure of the judge to reinstruct the jury after Juror No. 12 was replaced with an alternate.

In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: December 20, 2008.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER - WSBA 20835
Of Attorneys for Jesse Harkcom

APPENDIX OF STATUTES

RCW 9.41.040

Unlawful possession of firearms — Ownership, possession by certain persons — Penalties.

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first 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 or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, *71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has

been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(a) Under RCW 9.41.047; and/or

(b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a

firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.045

Drive-by shooting.

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

(3) Drive-by shooting is a class B felony.

RCW 9A.56.200

Robbery in the first degree.

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

RCW 9.94A.533

Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. 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. If the offender or an accomplice was armed with a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9A.72A.028(4);

(f) The firearm 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;

(g) If the standard sentence range under this section exceeds the statutory maximum

sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9A.94A.728(4);

(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;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added

to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

- (i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;
 - (ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;
 - (iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;
 - (iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;
- (b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);
- (c) The sexual motivation enhancements in this subsection apply to all felony crimes;
- (d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;
- (e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;
- (f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *cm* _____
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JESSE LEE HARKCOM,

Appellant.

COURT OF APPEALS NO.
37996-1-II

THURSTON COUNTY NO.
08-1-00224-5

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Jesse L. Harkcom, Appellant, and Carol La Verne, County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on December 20, 2008, at the Centralia, Washington post office addressed as follows:

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Clerk of the Court
Court of Appeals
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CERTIFICATE OF
MAILING

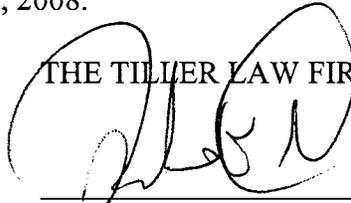
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