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A. ASSIGNMENTS OF ERROR

- 1. The evidence was insufficient to prove that Mr. Baxter or an accomplice was armed with an operable firearm as required by the special verdict.**
- 2. Defense counsel was ineffective for failing to object to testimony about and the admission of Exhibit 25 (a shotgun).**
- 3. The gun enhancement special verdict was flawed because it failed to notify the jury that it could return a special verdict without being unanimous.**
- 4. Defense counsel was not effective counsel when he failed to propose a correct special verdict for the firearm enhancement.**
- 5. Instruction No. 9 permitted conviction as an accomplice without proof of an overt act.**
- 6. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.**
- 7. The trial court erred by sentencing Mr. Baxter with an offender score of six.**
- 8. Mr. Baxter's sentence violates double jeopardy because it included a firearm enhancement in addition to his conviction for first degree robbery based on the use of a firearm.**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Due process requires the State to prove a sentencing enhancement beyond a reasonable doubt. In this case, the State failed to prove that Mr. Baxter or an accomplice was armed with a firearm. Must Mr. Baxter's firearm enhancement be stricken and the case remanded for resentencing? [Assignment of Error 1]**
- 2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to the admission of a shotgun, Exhibit 25, that had no relevance to Mr. Baxter's case. Because the shotgun was admitted into evidence, the State was able to argue that the shotgun was used in the robbery and was an operable firearm. Had the shotgun not been admitted, there would have been no proof of its operability and the jury could not have considered the firearm as evidence to support the firearm special verdict. Did counsel's failure deny Mr. Baxter his Sixth and Fourteenth Amendment right to the effective assistance of counsel? [Assignment of Error 2]**
- 3. A jury can return a special verdict even if it is deadlocked. In Mr. Baxter's case, the jury was not told that it could answer "non-unanimous" on the firearm enhancement verdict. Was this error? [Assignment of Error 3]**
- 4. If, under Issue 3, it was error for the jury not to be told that it could reach a non-unanimous verdict, was Mr. Baxter's counsel ineffective for failing to propose the correct verdict instruction and form? [Assignment of Error 4]**

5. **Accomplice liability requires proof of an overt act. The court's instructions permitted the jury to convict Mr. Baxter even absent proof of an overt act. Did the court's instructions relieve the State of its obligation to prove the elements of accomplice liability? [Assignment of Error 5]**
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C. STATEMENT OF THE CASE

1. Procedural History.

Timothy Baxter was tried to a jury on a fourth amended information. CP 20-21. The information charged Mr. Baxter with four crimes: first degree robbery with a firearm enhancement (count I); attempted first degree burglary with a firearm enhancement (count II); first

degree unlawful possession of a firearm (count III); and second degree vehicle prowling (count IV). CP 20-21. Mr. Baxter was joined at trial with his four co-defendants: Brian Winter, Jason Woods, Rigoberto Conteras, and Toby Anderson. CP 20; 2RP¹; 3RP; 4RP.

In addition to the charged offenses, the jury was instructed that they could also consider guilt on the lesser included offense of unlawful display of a weapon and attempted first degree criminal trespass. CP 50, 56. The jury found Mr. Baxter guilty of first degree robbery with the firearm enhancement and the vehicle prowl and acquitted him on attempted first degree burglary and first degree unlawful possession of a firearm. CP 97, 99, 100, 101, 102, 104.

At sentencing, Mr. Baxter's counsel did not respond to the State's summary of his criminal history. RP Sentencing 27-29. The Court did not give Mr. Baxter his right of allocation. RP Sentencing 29-31. The court adopted the State's assessment of Mr. Baxter's criminal history, assigned him an offender score of four, and imposed the 51-month low of the

¹ The 3 bound volumes for the trial have the volume number on their respective covers. The number before "RP" indicated the volume number where specified page number is found.

standard range plus the 60-month firearm enhancement. RP Sentencing 29-31; CP 117. The court was not asked to consider if the robbery conviction and the firearm enhancement were double jeopardy.

Mr. Baxter appeals each portion of his judgment and sentence. CP 105.

2. Trial testimony.

Around 8 a.m. on the morning of November 18, 2008, a man came to the door of Cary Swofford's trailer and wanted to talk to her about his mom. 3RP 346. She had no idea what the man was talking about or who he was. 3RP 347. She spoke to him through the door but did not want to let him in. 3RP 348. She thought he might be associated with some neighboring "gangbangers." 3RP 348. She also noticed other men getting out of a car parking in the driveway. 3RP 345. There were between 5 and 10 men in the yard and around her trailer. 2RP 219.

Excited, Ms. Swofford woke up her friend, Russel Molnar, who was sleeping on the couch. 2RP 219. Molnar went to the door. 2RP 222. There was a young man there who wanted to talk about his mother. 2RP 223. Molnar had never seen the man before and did not know what he was talking about. 2RP 223. Molnar did not open the door but instead talked to the man through the glass in the door. 2RP 223. Molnar noticed two other men behind the man at the door. 2RP 224. They wanted to

come in but Molnar told them that they could not do so. 2RP 225. When he told the men “no” they got “a little aggressive.” 2RP 225. They went out to the yard and tried to get in a Geo and an unidentified someone did get into a Ford Explorer. 2RP 225.

Swofford had Molnar turn on their surveillance camera. 2RP 222. Through the camera, Molnar saw a few people running around the car and to the back of the house. 2RP 219. Initially, he thought he saw ten people in the yard but after speaking with the prosecutor at a later date, he changed the number of people in the yard to five. 2RP 219, 221.

Molnar decided to go outside. 2RP 226. As he unfastened the locks on the door to open it, a man on the outside tried to open the door. 2RP 226, 249-51. He thought he was the same guy that wanted to talk about his mother. 2RP 226. Swofford relocked the door and told Molnar not to go outside. 2RP 228, 245-46; 3RP 349.

At this point, the man at the door went to a car and returned to the door. 2RP 255. Molnar watched this through the monitor of a security system, and saw a gun. 2RP 228, 235, 241. Molnar said the gun was a rifle, roughly two and a half feet long, and described the cocking action as “slam[ming] it down.” 2RP 275-78. Swofford did not see a gun. 3RP 351-52, 374, 379, 385.

At Swofford's urging, Molnar called 911 and reported the incident. 2RP 231. He told dispatch that all of the ten men looked Mexican, that they all wore beanie caps, and that they all piled into a 1966 or 1967 Impala. 2RP 246, 248, 252-53. Molnar was adamant that there were ten people in the yard. He even counted heads for the 911 operator: "One, two ... ten." 2RP 252.

Responding to the call, Deputy Simper saw a light blue compact car heading in the opposite direction. 2RP 90-93. He stopped the car, which was driven by Rigoberto Contreras. 2RP 94, 98. Jason Woods was in the front passenger seat, and Timothy Baxter, Toby Anderson, and Brian Winter were in the back seat. 2RP 99-101.

Simper found a CD player on the floorboard where Woods had been, but did not find a weapon. 2RP 101, 105. There were two hats in the car, one red and one black. 2RP 155. Simper later searched along the road for a gun, and found a black 12-gauge sawed-off shotgun. 2RP 108. The gun was unloaded and lacked a firing pin, and its trigger housing had been tampered with. 3RP 313-14. Simper did not find a firing pin or ammunition, either in the car or along the road. 3RP 314-16. Nor did Simper find any additional hats along the road. 2RP 156, 164.

A sheriff's deputy drove Swofford and Molnar by the area where the car was stopped; they identified only Woods, who was standing by the police car in handcuffs.² 2RP 110, 162, 192; 3RP 355, 363.

All five occupants of the car were arrested and charged. 2RP 140.

At trial, the State introduced into evidence the gun found at the side of the road. 2RP 115. Molnar testified that the gun -Exhibit 25- was not the gun he had seen. 2RP 283, 287, 294. Swofford testified that she never saw a gun during the incident and thus couldn't identify a gun. 3RP 353. Even so, Mr. Baxter's attorney did not object to the gun's admission, or ask that it and testimony pertaining to it be stricken from the record. No prints were found on the gun. 3RP 310.

The gun could not be test fired, because it lacked a firing pin and because the trigger housing had been tampered with. 3RP 313-14. The State's firearms expert testified that it would take an hour to put in a new firing pin, that the manufacturer likely no longer made firing pins for this gun, and that it would take weeks or months to obtain a used one. 3RP 325, 335. He also said that the trigger was not in place, and that if a bullet was chambered, it would simply fall out. 3RP 326-30. Since he didn't

² There was contradictory testimony as to whether they made any additional identifications. 2RP 110, 156, 192-94, 203, 235; 3RP 355.

attempt to repair the gun, he didn't know if it could be made to fire. 3RP 335.

Deputy Simper testified about a statement made by Woods. 2RP 129-39. Woods told the officer that his mother had been at a party at that home the night before and had been slapped around, so he went to the house to talk with the occupants about it. 2RP 136-37. According to Simper, Woods said that the gun was passed to him from the back seat of the car, and that he threw the gun out the window. 2RP 130. The jury was instructed that it could not consider Woods' statement against Mr. Baxter or the other co-defendants. CP 29, Instruction No. 4.

The court instructed the jury on accomplice liability:

INSTRUCTION 9

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere

presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 34.

The court also instructed the elements of first degree robbery:

INSTRUCTION 16

To convict the defendant, TIMOTHY BAXTER, of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of November, 2008, the defendant, or an accomplice, unlawfully took person property from the person or in the presence of another;

(2) That the defendant or accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of force, violence, or fear of injury to that person or to that person's property or to the person or property of another;

(4) That force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4) and (6), and any of the alternative elements (5)(a), or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative had been proved beyond a reasonable doubt.

CP 42-43.

Mr. Baxter did not object to either of these instruction. Neither did Mr. Baxter object to the court failing to instruct the jury that they could return a verdict of “not unanimous” on the firearm enhancement instruction. CP 95, 96.

D. ARGUMENT

1. THE TRIAL COURT’S IMPOSITION OF A FIREARM ENHANCEMENT VIOLATED MR. BAXTER’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE OR AN ACCOMPLICE WAS ARMED WITH A FIREARM.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing enhancements. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Evidence is insufficient unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether

innocent persons are being condemned. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.³ DeVries, at 849. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); Colquitt, 133 Wn. App. at 796.

A. The state failed to prove beyond a reasonable doubt that Exhibit 25 was a firearm.

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533. Before a firearm enhancement may be imposed, the State must prove “beyond a reasonable doubt [that] the weapon in question falls under the definition of a ‘firearm:’ ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” State v. Recuenco, 163 Wn.2d at 437

³ Although a claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it, DeVries, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); State v. Carlson, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” In re A.V.D., 62 Wn.App. 562, 568, 815 P.2d 277 (1991), citation omitted.

(quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp. 2005) (WPIC)).⁴

The Supreme Court has held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).⁵

In this case, the gun introduced at trial as Exhibit 25 was not operable, and thus did not qualify as a firearm for purpose of the enhancement.⁶ First, it lacked a firing pin. The gun was at least 40 years old, and possibly closer to 75 years old, and the State's expert believed

⁴ This is in contrast to the substantive crime (first degree robbery), which requires only that the "defendant or accomplice displayed what appeared to be a firearm..." Instruction No. 16. CP 42.

⁵ Published cases decided by the Court of Appeals after Pam but prior to Recuenco took the position that Pam allowed the enhancement even in the case of an inoperable gun, as long as it was a "real" gun. *See, e.g., State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284 (1998); State v. Berrier, 110 Wn.App. 639, 41 P.3d 1198 (2002). But Recuenco made clear that Pam prohibited the enhancement unless the state established that the gun was operable. Recuenco, 163 Wn.2d at 437.

⁶ The gun may not have been the weapon allegedly used during the crime, as argued elsewhere in this brief.

that the firing pin for this gun was no longer being manufactured. 3RP at 314, 324-25. Finding a used firing pin could take weeks or months. 3RP at 334-35. Even if a firing pin were available, it would take a firearm expert at least an hour to install it. 3RP at 325.

Second, the trigger housing had been tampered with, in such a way as to make the gun inoperable. 3RP at 314. No evidence was offered on how long it would take to repair the damage, or if repairs were even possible. 3RP 334-35.

Third, the State's expert opined that the gun might have additional problems. 3RP at 335. No effort was made to restore it to working condition and test fire it; thus, any other problems were not known at the time of trial.

Under these circumstances, the State failed to prove that the gun qualified as a firearm. The firearm enhancement must be stricken, and the case remanded to the trial court for resentencing without the enhancement. Pam. 98 Wn.2d 748.

B. The State failed to prove beyond a reasonable doubt that Exhibit 25 was readily available for use.

The firearm enhancement applies whenever a person is "armed" with a deadly weapon during the commission of a crime. RCW 9.94A.533(3). A person is "armed" if the firearm is "easily accessible and

readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Proximity and/or possession are insufficient to establish that a person is “armed” under the statute. For example, evidence that an unloaded gun was found under the defendant’s bed is insufficient to prove that he was “armed” for purpose of an enhancement. Valdobinos, at 282. Whether a gun is loaded or unloaded is not determinative, but is one factor to be considered in determining whether or not a person is “armed” within the meaning of the statute. State v. Simonson, 91 Wn.App. 874, 960 P.2d 955 (1998). Under the same reasoning, a gun’s operability must be considered in determining whether or not a person is armed.

Here, even if the State proved that the gun was easily accessible, the record does not establish that it was “readily available for use, either for offensive or defensive purposes.” Valdobinos, at 282. First, the gun was unloaded, and no ammunition was found. 2RP at 156, 164. Second, the gun was missing its firing pin. If a replacement firing pin was on hand—and there is no indication that one was—the defendants would have needed at least an hour to restore the gun to working condition. 3RP at 325. If a replacement firing pin was not on hand, finding a used part could take weeks or months. 3RP at 334-35. Third, the trigger housing had been tampered with. 3RP at 314-35. The State did not provide any

evidence that the trigger housing could be repaired or how long it could take. 3RP at 314-335. Fourth, the gun may have had additional problems that prevented it from functioning. 3RP at 335. Whether or not these additional problems could have been fixed is an open question.

Under these circumstances, the gun was not readily available for offensive or defensive use. Accordingly, the defendants were not “armed” with a firearm for purposes of the enhancement. The enhancement must be stricken, and the case remanded for resentencing. Valdobinos, 122 Wn.2d 270.

2. MR. BAXTER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE COUNSEL BY HIS COUNSEL’S FAILURE TO OBJECT TO THE ADMISSION OF EXHIBIT 25.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective

assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” United States v. Salerno, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland); see also, State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” Reichenbach, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...”

In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the State’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

In this case, Swofford did not see a gun during the incident (although she believed one of the men was armed because of the way he was standing). 3RP at 352, 379, 381. Molnar saw a gun; however, the gun he saw was *not* Exhibit 25. 2RP at 294-95. Accordingly, Exhibit 25 (and the associated testimony) was irrelevant to Mr. Baxter’s case.⁷ Despite this, defense counsel did not object to Exhibit 25, or to any of the testimony about Exhibit 25. This failure fell below an objective standard of reasonableness, and prejudiced Mr. Baxter. There was no conceivable strategic reason to allow the prosecutor to introduce Exhibit 25 as *the* gun used during the incident. Without Exhibit 25, the prosecutor would have been forced to rely solely on Molnar’s testimony to establish that there

⁷ Although Mr. Woods’ statement to the police arguably provided some evidence linking Exhibit 25 to the alleged incident, this statement was not admissible against Mr. Baxter, and the jury was instructed not to consider it against Mr. Baxter. See Instruction 4, Instruction No. 4 at CP 29. “You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.” CP 29.

really was a gun. But Molnar did not have a clear view, and could not definitively confirm that anyone had a real working firearm. A jury could still have convicted Mr. Baxter of first degree robbery on the theory that an accomplice had what *appeared to be* a firearm, but as argued above, something that only *appears to be* a firearm does not satisfy the requirements for a firearm enhancement. Thus, there is a reasonable possibility that the outcome of the proceeding would have been different if defense counsel had objected to the admission of Exhibit 25. Accordingly, Mr. Baxter's firearm enhancement must be reversed and the case remanded for resentencing.

3. IT WAS ERROR TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE FIREARM ENHANCEMENT.

As instructed, the jury was told that they had to be unanimous to return a verdict on the firearm enhancement. CP 95, 104. But that instruction is not correct. As explained in Goldberg, unanimity is not required for a special verdict to be final. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). Unanimity is required if a jury is to answer "yes" or "no" to a special verdict. Id. Because there is a third possible answer to a special verdict, that of "not unanimous," it was error to not instruct the jury as such under the facts of this case.

The jury was told that they did not need to be unanimous on elements 5(a) and 5(b) of the robbery to-convict instruction. Alternative 5(a) allows a jury to convict if they find the principal or an accomplice was armed with a deadly weapon during the commission of the crime or in flight therefrom. Alternative 5(b) allows a jury to convict if a principal or accomplice displayed what appeared to be a firearm or other deadly weapon during the commission of the crime or in flight therefrom. CP 42. In this case, there was evidence of both alternatives. Molnar testified that he had seen a gun. Swofford testified that she had not seen a gun but saw what could have been a gun. Because unanimity was not required on this element, we do not know if the jury was unanimous or split on elements 5(a) and (b).

The State will no doubt respond to this argument by saying that of course the jury unanimously found element 5(a) because they returned with unanimously “yes” to the special verdict. CP 104. But the question remains if the jury would have been unanimous if they knew that they did not have to be to put an end to their deliberations. First, there was inconsistent testimony between Molnar and Swofford. Second, Molnar testified that the shotgun admitted into evidence (Exhibit 25) was not the gun that he’d seen. And third, there was certainly a question about the shotgun’s operability as outlined above in Issue 2. Certainly, there could

have been at least one juror among the twelve with a reasonable doubt given all of the issues in the case. One reasonable doubt equals a “not unanimous” verdict. This jury should have been told it had “not unanimous” as an option.

4. MR. BAXTER’S COUNSEL FAILED TO BE EFFECTIVE COUNSEL WHEN HE DID NOT PROPOSE AN ACCURATE JURY UNANIMITY INSTRUCTION ON THE FIREARM ENHANCEMENT.

The standard for ineffective assistance of counsel has already been argued above. See Issue 2. If this court finds merit in the above issue regarding the firearm enhancement unanimity instruction, but determines that the issue was not preserved by defense counsel, defense counsel’s failure should be considered ineffective assistance of counsel under the same arguments made in Issue 2.

5. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. BAXTER COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. See, e.g., State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, he must say or do

something that carries the crime forward. State v. Peasley, 80 Wn. 99, 100, 141 P. 316 (1914). In Peasley, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

Peasley, 80 Wn. at 100. See also State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (“Physical presence and assent alone are insufficient” for conviction as an accomplice.)

Similarly, in Renneberg, the State Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” State v. Renneberg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974), (emphasis added). The Court noted that an instruction is proper if it requires “*some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.*” Renneberg, at 739-740, emphasis added, quoting State v. Redden, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

In Mr. Baxter’s case, the court instructed the jury on accomplice liability through Instruction 9:

INSTRUCTION 9

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 34.

Instruction No. 9 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Baxter was present and assented to his co-defendants' crimes, even if he committed no overt act. Because of this, the instruction violates the "overt act" requirement of Peasley, 80 Wn. 99, and Renneberg, 83 Wn.2d 735.

The last two sentences of Instruction No. 9 do not correct this problem. The penultimate sentence ("A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of

the crime”) does not exclude other situations. CP 34. Thus a person who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. CP 34. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. Peasley, 80 Wn. 99; Renneberg, 83 Wn.2d 735.

6. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCE.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This

includes a constitutional right to remain silent pending sentencing. In re Detention of Post, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing Mitchell v. United States, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and Estelle v. Smith, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. Mitchell, 526 U.S. at 328-329. Thus, for example, it is improper to imply lack of remorse from an accused person's pre-sentencing silence. Post, 145 Wn.App at 758.

The State has the burden of proving an offender's criminal history, and does not meet its burden through "bare assertions, unsupported by evidence." State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." Ford, at 482. This rule is constitutionally based, and thus cannot be altered by statute. As the Supreme Court pointed out in Ford, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." Ford, 137 Wn.2d at 482.

In 2008, the legislature amended RCW 9.94A500 and RCW 9.94A.530. See Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the

existence and validity of the convictions listed therein.” RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is “acknowledged in a trial or at the time of sentencing,” and “[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁸

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” Ford, 137 Wn.2d at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. Ford, supra.

Mr. Baxter should have been sentenced with an offender score of (at most) one, because he stipulated (at trial) that he had a prior felony conviction. 3RP at 396-97. Instead of sentencing him with an offender score of one, the trial judge adopted the prosecutor’s statement of criminal history and sentenced Mr. Baxter with an offender score of four. CP 117 By accepting the prosecutor’s statement, the court relied on “bare assertions” of criminal history in violation of Ford. Because the prosecutor failed to prove Mr. Baxter’s criminal history, the judgment and

⁸ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).

sentence must be vacated and the case remanded to the trial court for resentencing. Ford, supra.

7. THE FIREARM ENHANCEMENT FOR ROBBERY COMMITTED WITH A FIREARM VIOLATES DOUBLE JEOPARDY.

Mr. Baxter was convicted of first degree robbery based on the use of a firearm and his sentence was enhanced because of the firearm. Thus, Mr. Baxter was punished for the robbery with a firearm and his sentence was increased by 60 months because of the firearm enhancement. CP 110. Mr. Baxter was thereby twice convicted and punished for using a firearm in violation of the prohibition against double jeopardy found in the federal and state constitutions. His firearm enhancements must be vacated.

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

The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life and 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; Wash. Const. Art 1 § 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). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

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. Freeman, 153 Wn.2d at 770-71.

b. The legislative intent must be reexamined after Blakely.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. Freeman, 153 Wn.2d at 771; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, the first step in deciding if punishment violates the double jeopardy clause is to determine what punishment is authorized by the Legislature. Freeman, 153 Wn.2d at 771. Courts assume the punishment intended by the Legislature does not violate double jeopardy. Id; Albernaz v. United States, 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately body of lawyers and presumed to know the law). Contra, Albernaz, 450 U.S. at 345 (Stewart, J. concurring) (Legislative intent is first step in determining if punishments violate double jeopardy, not controlling determination). Thus, to determine if the Legislature intended multiple punishment for the violation of separate statutes, courts begin with the language of the statutes. Freeman, 153 Wn.2d at 771-72.

RCW 9.94A.533 provides for additional time to be added to an offender's standard range if the offender 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 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. . . .

(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. . . .

(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.

RCW 9.94A.533.

The statute, part of the Hard Time for Armed Crime Act of 1995 (Initiative 195), was designated to provide increased penalties for criminals using or carrying guns, to “stigmatize” the use of weapons, and to hold individual judges accountable for their sentencing on serious crimes. Laws of 1995, ch. 129 § 1 (Findings and Intent). It provides that all firearm enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.533(3)(e); State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates that voters intended a longer standard sentencing range, and therefore greater punishment, for

those who participate in crimes where a principal or an accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possession or use of 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.533(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm enhancement is added to a crime and using a firearm is the way the offense was committed.

Significantly, the Hard Time for Armed Crime Act was passed before Blakely, and other United States Supreme Court cases made it clear that the fact that exposes a person to increased punishment is an element of an offense. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476-77, n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 243, 119 S.Ct. 1215, 153 L.Ed.2d 311 (1999) (Stevens, J., concurring). Those cases have made it clear that the relevant determination is not what label the fact has been given by the Legislature or its placement in the criminal or sentencing code, but rather the effect it

has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. The concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

536 U.S. at 605.

This concept was reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

Justice Scalia⁹ explained the holding of Ring and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” That is to say, for purposes of the Sixth Amendment’s jury trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

⁹ Justice Scalia wrote the opinion for the five-member majority. Justice O’Conner, given her resolute opposition to the rule articulated in Apprendi, dissented from Part III of Justice Scalia’s opinion. 537 U.S. at 117. Four justices dissented because they believed that the State was barred from seeking the death penalty at the second trial. *Id.* at 118-19. The dissenters specifically relied on Ring for the proposition that aggravating factors in death penalty cases are the equivalent of elements. *Id.* at 126 n.6 (Ginsburg, J., dissenting). Thus, a majority of the justices agree with Part III of Scalia’s opinion.

537 U.S. at 111 (internal citations omitted.) The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. *Id.*

The need to reexamine the court’s deferral to the Legislature in double jeopardy jurisprudence in light of Blakely has already been noted by legal scholars. Timothy Crone, “Double Jeopardy, Post Blakely,” 41 Am. Crim. L. Rev. 1373 (2004). The problems of “redundant” counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, “Damned Under Many Headings: The Problem of Multiple Punishment,” 29 Am. J. Crim. L. 245, 318-326 (2002).

The voters and the Legislature were unaware that the firearm enhancements it created were an element of a higher offense because it increased the offender’s maximum sentence. See Blakely, 124 S.Ct. at 2537-38; State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)¹⁰ (violation of Sixth Amendment rights to due process and jury trial to

¹⁰ The Supreme Court overruled Recuenco’s holding that Blakely errors cannot be harmless error, but not the application of Apprendi and Blakely to firearm enhancements. Washington v. Recuenco, 548 U.S. 212, 126, S.Ct. 2546, 165 L.Ed.2d 466 (2006).

sentence defendant to firearm enhancement when jury verdict supported only deadly weapon enhancement). Because a firearm enhancement acts like an element of a higher crime, the initiative simply adds a redundant element of use of a firearm for crimes where use of a firearm was already an element, a result that voters would not have intended. See RCW 9.94A.533(3)(f).

c. Mr. Baxter's robbery conviction is the same in fact and in law as the accompanying firearm enhancement.

When it is not clear if double punishments are 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.Ed2d 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 a 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, 25 Wn.2d at 777. The test requires the court to look to the statutory offenses to determine if each crime, as charged, has elements that differ

from the other. State v. Gohl, 109 Wn.App. 817, 821, 37 P.3d 293 (2001), review denied, 146 Wn.2d 1012 (2002).

Mr. Baxter's robbery conviction was the same in fact and in law as his accompanying firearm enhancement. Factually, each involves the same criminal act as well as the same victims.

The jury found Mr. Baxter was armed with a firearm during the commission of the offense and RCW 9.94A.533(3) requires the sentencing court to add additional time to an offender's standard range score "if the offender ... was armed with a firearm as defined in RCW 9.41.010." But the robbery could not have been committed as alleged without Mr. Baxter being armed with a firearm.

Mr. Baxter was given an additional 5 years in prison for the firearm enhancement. The effect was to essentially sentence him for robbing another with a firearm while armed with a firearm, and was thus convicted and punished twice for the use of a weapon. The addition of a firearm enhancement to Mr. Baxter's convictions placed him twice in jeopardy for use of a gun and violated the state and federal constitutions.

- d. **Conviction for both robbery and the firearm enhancement violate Mr. Baxter's constitutional right to be free from double jeopardy and the firearm enhancement must be vacated.**

Mr. Baxter was punished twice – once for the robbery committed with a firearm and again for being armed with a firearm while committing the same robbery. Because both punishments are based upon the same facts and law, they violate the double jeopardy provisions of the federal and state constitutions. The firearm enhancement must be vacated and this case remanded for resentencing. Gohl, 109 Wn.App. at 824.¹¹

E. CONCLUSION

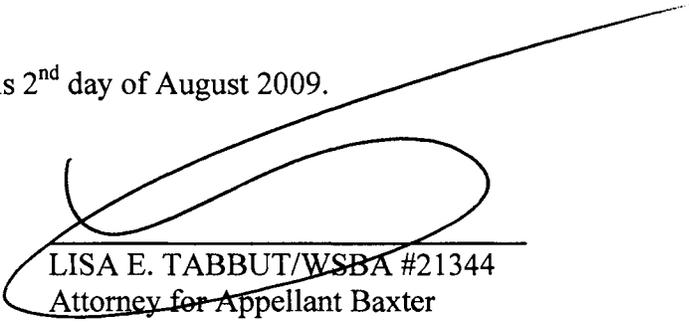
For the foregoing reasons, the firearm enhancement must be vacated and the firearm enhancement dismissed with prejudice. Mr. Baxter's convictions must be reversed and the case remanded for a new trial.

In the alternative, if the convictions are not reversed, Mr. Baxter's case must be remanded for sentencing without the firearm enhancement and with a new determination of his offender score.

¹¹ Both Division I and Division II of this court have previously rejected this challenge to the deadly weapon enhancements. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008) (Divisions I); State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008) (Division II). However, the state Supreme Court has accepted review in Kelley on this issue (see 82111-9.) Oral argument on Kelley is scheduled for October 29, 2009.

.....

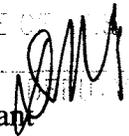
Respectfully submitted this 2nd day of August 2009.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant Baxter

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

CERTIFICATE OF MAILING

State of Washington, Respondent, v. Timothy Baxter, Appellant
Court of Appeals No. 38902-9-II (consolidated)

I certify that I mailed copy of Appellant's Brief to:

Timothy Baxter/DOC#326073
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

and to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

And that I sent an original and one copy to the Court of Appeals, Division II, for filing:

All postage prepaid, on August 3, 2009.

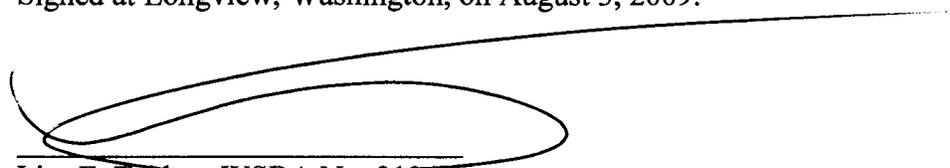
Further, I delivered an electronic copy of the brief to:

Patricia Pethink, counsel for codefendant Rigoberto Contreras
Jodi Backlund and Manek Mistry, codefendant for Brian Winter
Anne Crusier, counsel for codefendant Toby Anderson
Thomas Doyle, counsel for codefendant Jason Woods

on August 3, 2009

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on August 3, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant