

No. 39027-2-II

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

STATE OF WASHINGTON,
Respondent,

vs.

ANTHONY McCHRISTIAN,
Appellant.

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STATE OF WASHINGTON
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DIVISION II

COURT OF APPEALS
DIVISION II

APPELLANT'S OPENING BRIEF

On Appeal from Pierce County Superior Court No. 08-1-00350-9
The Hon. Kitty-Ann Van Doorninck, Judge

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A. ASSIGNMENTS OF ERROR

1. The prosecutor argued a theory of liability based on the accomplice liability instruction that impermissibly lowered the State's burden of proof—an argument no different than the condemned “in for a dime, in for a dollar” theory.

2. The prosecutor's argument unfairly created an ambiguity in the accomplice liability instruction, as applied to the facts of this case, when she argued that McChristian was guilty first-degree assault with a deadly weapon even if he did not knowingly assist in an assault intended to inflict great bodily harm.

3. Where McChristian was charged and convicted of first-degree assault under the theory that he or an accomplice assaulted another with a deadly weapon, the addition of a deadly weapon enhancement violates double jeopardy by creating two identical elements to one crime.

4. The trial court erred when it imposed a mandatory minimum sentence based on an uncharged allegation and where the State provided no other form of pre-trial or pre-sentencing notice that it would seek such a finding and increased punishment.

5. At sentencing, the trial court imposed a mandatory minimum sentence of five years based on its apparent (but unstated) finding that the offender used force intended or likely to kill. Because the finding increased McChristian's maximum term of punishment by depriving him of the

possibility of earned early release time for the mandatory minimum, the Sixth Amendment requires a jury, rather than a judge, find the requisite facts.

6. The evidence was insufficient to support the trial court's apparent finding resulting in the imposition of the mandatory minimum, where the requisite finding requires proof that the "offender," and not an accomplice, possessed the requisite intent.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether it is improper for a prosecutor to argue that the accomplice liability instruction (No. 12) requires a guilty verdict if the jury finds that the accomplice knowingly participated in any assault, even if the accomplice did not know that the principal intended to inflict great bodily harm with a deadly weapon?

2. Whether the prosecutor's argument violated McChristian's state and federal constitutional rights to a jury trial and to proof of all the elements of a crime when she argued a theory of strict liability, *i.e.*, that the law requires a guilty verdict as long as McChristian assisted in any assaultive behavior, even if he did not knowingly assist in causing great bodily harm?

3. Whether improper argument about an instruction (Instruction No. 12) which impermissibly lowers the State's burden of proof constitutes manifest constitutional error which can be raised on appeal, despite the lack of objection below?

4. Whether the doctrine of constitutional avoidance requires a reviewing court to interpret the accomplice liability statute (and therefore, any instruction) as requiring proof that the accomplice intended to assist in the commission of the crime of conviction and not simply any lesser crime with the same name in order to avoid an equal protection violation?

5. Where a charge of assault in the first degree requires proof that the crime was committed with a deadly weapon, does it violate double jeopardy to impose a deadly weapon enhancement—a factor that is identical to the earlier element?

6. Does due process mandate at least some sort of notice prior to the imposition of the mandatory minimum associated with some, but not all, first-degree assaults?

7. Where an applicable mandatory minimum increases the maximum punishment by removing the possibility of “good time” and where it requires proof of additional facts beyond those necessarily found in a jury verdict, does the Sixth Amendment require a jury, not a judge, to determine whether the requisite facts have been proven?

8. In any event, was the evidence insufficient to support the trial court’s apparent, but unstated, finding where the mandatory minimum only applies to a principal, not an accomplice?

C. FACTS

Procedural History

Anthony McChristian was charged by Information with an Assault in the First Degree with a Deadly Weapon Enhancement stemming from an incident that occurred on January 17, 2008 (an additional charge of Malicious Mischief was dismissed by the trial court based on a lack of proof after the State rested). Mr. McChristian was tried by a jury. He was convicted of the crime charged, but not an aggravating factor, on January 29, 2009.

When Mr. McChristian was sentenced on March 13, 2009, the court imposed a total of 117 months (93 months for the assault and an additional 24 for the deadly weapon). The trial court also imposed a “mandatory minimum” term of 60 months, although the jury did not return a special verdict related to that mandatory sentence.

Mr. McChristian then filed a timely notice of appeal.

Facts

On January 17, 2008, several men, including Mr. McChristian, struck Alexander Williams just after he was walked into a Safeway grocery store. RP 91-96. Eventually, one of those men stabbed Mr. Williams with a knife. RP 98-99. Although Mr. Williams did not know who stabbed him, a defense witness (Daniel Rice) identified the person with the knife as CJ Valliant. RP 144-45.

Mr. Williams identified Mr. McChristian as one of his assailants, but was only able to attribute the assaultive conduct to the group. “I remember...all three of them running up to me. And, I remember trying to get away at first, but I really didn’t have anywhere to go, so we started fighting. And all I know is I fell, and at that time I didn’t know I had been stabbed, but I couldn’t really get up. And they ran out of the store...” RP 97.

During the trial, the State presented evidence of motive—namely, that both the victim and his attackers belonged to separate gangs (RP 63-64; 87-88). Further, Mr. Williams testified that these gangs had gotten into a near altercation at a high school basketball game in the past. RP 90.

The jury was instructed (Instruction No. 12, attached to this brief) that a “person is an accomplice in the commission of a crime” if “with knowledge that it will promote or facilitate” crime, he aids another person committing the crime. The defense did not object to this instruction. The jury was also instructed on the lesser crime of assault in the fourth degree.

During closing argument, DPA Ko started by telling the jury to “imagine” that the victim had died, but that it was impossible to determine who “actually wielded the knife.” RP 193. She then told the jury that, under that scenario, “(e)ach an every assailant can be charged with murder.” *Id.* “To think otherwise would be contrary...to the law.” RP 193.

The prosecutor then admitted that the State could not prove who “wielded the knife” and “stabbed Alexander,” but that it made no difference

because “the law” says that the State only need prove “that the defendant or an accomplice assaulted Alexander with a deadly weapon, with the intent to inflict great bodily harm—the defendant or an accomplice.” RP 194.

The prosecutor then argued that, according to the “eyes of the law,” all that was required under accomplice liability was that the defendants “acted with a “unified intent to assault, to beat, to punch,” and then “each is guilty of a stabbing.” RP 195.

DPA Ko, noting that the defense may argue that McChristian did not intend to personally or for anyone else to cause great bodily harm and that he did not know another person was armed with a knife, but that it did not matter—“the State doesn’t have to prove that he knew.” RP 198-99. Instead, according to DPA Ko, all that was required under the law was “that the defendant knew his actions would promote or facilitate the commission of the crime, the crime of all three attacking and assaulting the victim.” RP 199. In other words, the law requires only proof that “an assault [was] going on.” RP 200. “Since all were accomplices in the crime of assaulting the victim, each is guilty of whatever happened during the assault of the victim.” RP 200. “The knife, when it became introduced by one of the accomplices, it elevated that assault to an assault in the first degree.” RP 201.

Responding directly to the defense evidence that the other assailants did not know that “CJ” had a knife or that he intended to use it, DPA Ko

stated: "...so what? It doesn't matter....Even if it was CJ, the defendant is just as guilty." RP 202.

During defense counsel's closing argument, he argued that the three men did not have a plan, but did not contest the State's arguments concerning the interpretation of the law. Instead, he simply suggested that imposing strict liability for unforeseen acts "doesn't make sense." RP 218.

The prosecutor repeatedly emphasized in both her opening and rebuttal closing arguments that she was simply repeating the legal standard—reminding the jurors they were sworn to uphold the law and urging them not to let logic or sympathy interfere with the legal duty she ascribed to the law. *See e.g.*, RP 194 ("It's the law. The law says.."); RP 201 ("Now, you may say...I don't like the law. I don't think it's really fair....But ladies and gentlemen, your personal beliefs about what the law should be, it doesn't matter.")). In fact, DPA Ko concluded by warning the jurors that they had previously promised to "base your decision only on the law and the facts that were given to you." RP 230. "Each of you promised that you can do that, and I'm going to hold you to your promise, because it's based on the law." RP 231.

D. ARGUMENT

1. THE PROSECUTION’S ARGUMENT THAT ACCOMPLICE LIABILITY IN A FIRST-DEGREE ASSAULT DOES NOT REQUIRE PROOF THAT THE DEFENDANT KNOWINGLY ASSISTED IN AN ASSAULT WITH INTENT TO INFLICT GREAT BODILY HARM WAS IMPROPER BECAUSE IT IMPERMISSIBLY LOWERED THE STATE’S BURDEN OF PROOF.
 2. THE PROSECUTOR’S ARGUMENT CONSTITUTES A MANIFEST ERROR WHICH CAN BE RAISED FOR THE FIRST TIME ON APPEAL BECAUSE IT VIOLATED THE CONSTITUTIONAL RIGHT THAT A JURY FIND EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT.
- ❖ “The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge,’ the *mens rea* of RCW 9A.08.020.” *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2001).
 - ❖ “Since all were accomplices in the crime of assaulting the victim, each is guilty of whatever happened during the assault of the victim.” DPA Kim during closing argument (RP 200).

Introduction

The prosecutor’s closing argument is plainly at odds with the law.

However, she repeatedly insisted it *was* the law.

Accomplice liability is not strict liability. Instead, RCW 9A.08.020(3)(a), requires the accomplice to “have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge* and states, *he will not be liable for conduct that does not fall within this purpose.*” *State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000). For that reason,

knowledge of the particular crime committed is an essential element of accomplice liability. See RCW 9A.08.020 (which requires the defendant to act with “knowledge that it will promote or facilitate the commission of *the* crime.”). “Absent that knowledge, Washington law *does not allow* conviction for crimes committed by coconspirators, whether or not they are foreseeable.” *State v. Stein*, 144 Wn.2d 236, 245-46, 27 P.2d 184 (2001).

Applying this standard, the Washington Supreme Court held that jury instructions were legally defective where those instructions allowed the jury to convict a defendant if he had general knowledge of “a” or “any” crime rather than requiring knowledge of “the crime charged.” *State v. Roberts, supra*; *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Phrased in terms of a common argument made by prosecutors, Washington law does not support an “in for a dime, in for a dollar” theory of accomplice liability. *Id.* See also *State v. Evans*, 154 Wn.2d 438, 452-55, 114 P.3d 647 (2005).

The “in for a dime, in for a dollar” argument strips accomplice liability of the required knowledge element.

The Prosecutor’s Arguments Ran Afoul of the Law

In this case, the prosecutor repeatedly and plainly misstated the law. Without these improper arguments, the instructions were not deficient. However, the prosecutor’s arguments created an ambiguity in the jury instructions, at least as applied to multiple degrees of assault, when she argued, when an accomplice agrees to participate in a crime with another, he

runs the risk that the primary actor will act either beyond the scope of the preplanned activity or in an unforeseeable manner—promoting this theory as a requirement of law that jurors had previously sworn to uphold.

The trial court in this case gave the following vicarious liability instructions, to which the defense made no objection:

Instruction No. 12

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 person 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 a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, 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.....

Considered without the overlay of the prosecutor’s argument, this instruction correctly states the law. (A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime [of first-degree assault], he aids another in committing the crime [of first-degree assault]).

However, the prosecutor repeatedly told the jury that, as applied to the facts of this case, the words “the crime” meant only the generic crime of

assault, *not* the “crime charged.” Thus, according to the prosecutor’s repeated exhortations to the jury on the law, McChristian was guilty of first-degree assault with a deadly weapon, if he aided in any assault, even if he had no knowledge that the assault would escalate to a much more serious degree of assault. This argument misstated the law—promoting a theory firmly rejected by caselaw, but which was consistent with at least one plausible interpretation of the instructions.

A large portion of the prosecutor’s argument is devoted to this incorrect statement of the law. *See e.g.*, RP 199-200, 202. The prosecutor argued that the law requires only proof that “an assault [was] going on,” (RP 200), and “(s)ince all were accomplices in the crime of assaulting the victim, each is guilty of whatever happened during the assault of the victim.” RP 200.

The prosecutor’s arguments were not the law. Instead, her arguments urged a theory of accomplice liability that permitted jurors to convict McChristian based on less proof than was legally required.

The Law of Accomplice Liability

The Washington Supreme Court recently held that the use of the phrase “a crime” in jury instructions instead of “the crime, as used in the statute, impermissibly establishes strict liability for any crime committed by the principal, contrary to legislative intent. *State v. Roberts, supra; State v. Cronin, supra*. Instead, “the crime” means the charged offense. *Id.* In other

words, RCW 9A.08.020(3)(a) requires an accomplice to have the purpose to promote or facilitate the particular conduct that forms the basis for the charge. An accomplice will not be liable for conduct that does not fall within this purpose.

In rejecting the “in for a dime, in for a dollar” theory of accomplice liability, the Washington Supreme Court held in *Roberts*: “The Legislature....intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge.’” *Id.* at 511. Thus, *Roberts* repudiated earlier *dicta* (from *State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984)) that an accomplice who intends to commit a crime runs the risk of his confederate exceeding the scope of the planned crime.

Likewise, in *Cronin*, the Court noted that the fact that a purported accomplice knows that the principal intends to commit “a crime” does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal. “In our judgment, in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.” *Id.* at 758 (emphasis in original).

As the Supreme Court later reflected on the holdings in *Roberts* and *Cronin*:

In those cases, we held the jury instructions to be legally defective because each allowed the jury to convict the defendant if he had general knowledge of *any* crime rather than requiring knowledge of

the crime charged. Clearly then, under this court's holdings in *Roberts* and *Cronin*, the accomplice liability statute, RCW 9A.08.020, requires knowledge of 'the' specific crime, and not merely any foreseeable crime committed as a result of the complicity.

Stein, 144 Wn.2d at 246.

Put another way, under *Roberts* and *Cronin*, it is not enough that the accomplice had knowledge that the principal would engage in some kind of crime. He must have had knowledge that the principal would engage in the crime actually committed. *Roberts*, 14 P.3d at 736; *Cronin*, 14 P.3d at 759. In other words, for a defendant to be convicted of a crime based on accomplice liability, he or she must have shared the same criminal intent to commit the substantive offense as the principal. However, he need not be a lawyer. That is, he does not need to have "specific knowledge of the elements of the participant's crime." *In re Domingo*, 155 Wn.2d 356, 119 P.3d 816, 820 (2005).

Thus, the "in for a dime, in for a dollar" theory of accomplice liability does not accurately describe Washington law because an accomplice must have knowledge of "the crime" that occurs. *Roberts*, 142 Wn.2d at 509-510. Therefore, an accomplice who knows of one crime—the dime—is not guilty of a greater crime—the dollar—if he has no knowledge of that greater crime.

The "crime charged" does not mean the generic class of crime, as argued by the prosecutor in this case. Not only would such an interpretation run afoul of the knowledge requirement of the statute, it would create

arbitrary distinctions. In some cases the name of a crime changes when a new element is added. For example, manslaughter becomes murder, a theft from a person becomes a robbery with the addition of the threat of force. In other cases, like assault, the name of the class of crime remains the same. Premising accomplice liability on this distinction is arbitrary. More importantly, such distinctions are unrelated to the requirements of the statute.

McChristian's focus here is on the prosecutor's improper argument.

The recent United States Supreme Court decision in *Washington v. Sarausad*, ___ U.S. ___, 129 S. Ct. 823, 172 L. Ed.2d 532 (2009), a case where the Court applied the AEDPA's requirement that federal courts sitting in habeas must apply (and not decide) state law, provides a helpful illustration. In *Sarausad*, the issue was whether the prosecutor's incorrect statement of Washington law was harmful by creating an unacceptable risk that the jury convicted after applying a theory of law permitting conviction on less proof than was legally required. Because the state courts had held against Sarausad, the Supreme Court was required to apply a high degree of deference, as mandated by the AEDPA.

However, what is important for present purposes, is that no court or party disputed the conclusion that the prosecutor's "in for a dime, in for a dollar" illustration (where the prosecutor argued the defendant was guilty of murder if facilitated an offense of any kind whatsoever, even a shoving match or fist fight) conveyed an incorrect standard of liability under

Washington law. The majority simply concluded that it was reasonable for the state court to conclude the one, limited “problematic hypothetical” did not “warp” the meaning of instruction. The majority opinion further emphasized that the prosecutor made it “crystal clear” to the jury that the State wanted Sarausad found guilty because he knowingly facilitated the drive-by shooting and for no other reason. *Id.* at 830. However, it is interesting to note, as the United States Supreme Court did, that the jury failed to convict a co-defendant of Sarausad—who also had been charged as an accomplice to murder, but who admitted only knowledge of a possible fight, not a murder. This reinforced the conclusion that it was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad only because it believed that he, unlike Reyes, had knowledge of more than just a fistfight. *Id.* at 833.

Although the dissent disagreed with the majority, both agreed that the starting place was the Washington Supreme Court holding that accomplice liability requires “proof that the accomplice understood that he was aiding in the commission of the very crime he is charged with facilitating.” *Id.* at 836 (Souter, J., dissenting).

In short, under Washington accomplice law, each participant in a crime is guilty only to the degree of his own intent. Put another way, a defendant who knowingly touches another in an offensive manner, but who does not knowingly intend to cause great bodily injury is not guilty of assault

in the first degree. Otherwise, accomplice liability would be strict liability.

The Prosecutor Improperly Lowered the State's Burden of Proof

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990) (recognizing that an instruction, “not concededly erroneous,” can be “subject to an erroneous interpretation” that renders it unconstitutional); cf. *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding states cannot permit a “significant” risk that a jury's misunderstanding deprived a civil defendant of Due Process). The “reasonable likelihood” standard is clearly established to be a likelihood of jury confusion greater than a bare “possibility,” yet *less* than “more likely than not.” *Boyde*, 494 U.S. at 380.

It is “self-evident” that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is “interrelated” with the Sixth Amendment right to a jury trial. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Justice Story described the right to a jury that understands and follows the law as “most sacred”:

Every person accused as a criminal has a right to be tried according to

the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.

... [This] is his privilege and truest shield against oppression and wrong

United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

In *Sandstrom*, the United States Supreme Court established that a conviction may be unconstitutional where a jury instruction is not facially erroneous, but is subject to an erroneous interpretation. 442 U.S. at 517. In such circumstances, this Court undertakes a “realistic assessment” of how a jury likely understood a set of instructions. See *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (holding instructions may have misled jury about constitutional role in sentencing); *Bollenbach v. United States*, 326 U.S. 607, 612-14 (1946) (assessing likely impact on jury of erroneous supplemental instruction); *Bruton v. United States*, 391 U.S. at 135-37 (1968) (assessing jury's ability to follow instruction to disregard evidence); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 410-11 (1947) (assessing likely impact of instructional error relating to corporate defendants on rights of individual defendants). Where it is reasonably likely that a jury was confused about a principle of law important to carrying out its fact-finding role, there is a constitutional violation. See *Penry*, 532 U.S. at 804; *Yates v. Evatt*, 500 U.S. 391, 401-02, 406 & n.6 (1991); *Francis v. Franklin*,

471 U.S. 307, 318 (1985).

It is simple to contrast the argument made in the present case with *Sarausad*. In this case, the prosecutor's arguments were consistently incorrect. Unlike *Sarausad*, where there was one improper hypothetical and several correct statements of the law, here the entire thrust of the prosecutor's closing was aimed at an incorrect theory of law—one permitting conviction on less than sufficient proof. In *Sarausad*, the prosecutor made it crystal clear that Sarausad was guilty of murder because he knowingly assisted in a murder. In the case at bar, the prosecutor consistently urged that McChristian was guilty even if he did not knowingly assist in a serious assault, much less an assault with the intent to commit great bodily harm with a deadly weapon. The final distinction is that Sarausad's argument arose in a post-conviction, where he bore the burden of proof. Here, the issue is raised on direct appeal where the State must prove any constitutional error harmless beyond a reasonable doubt. The State cannot do so on this record.

The Doctrine of Constitutional Avoidance

To the extent that this case turns on an interpretation of the accomplice liability statute (whether the prosecutor's arguments were consistent with or contrary to the law), this Court must apply the doctrine of "constitutional avoidance" when construing the statute. The doctrine of constitutional avoidance requires reviewing courts to construe statutes, if it is fairly possible to do so, in a way that avoids unnecessarily addressing constitutional

questions. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (“ ‘[I]t is a cardinal principle’ of statutory interpretation, however, that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’ ”) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”).

Construing the statute in the manner that DPA KO insisted was the law not only creates strict liability for accomplices, it creates an equal protection problem. In order to convict a principal of the crime of assault in the first degree, the State must prove intent to cause great bodily harm beyond a reasonable doubt. But, in order to convict an accomplice, the State need only prove the accomplice intended an unlawful touching. There can be no rational basis for such a distinction.

However, McChristian’s more basic claim is that such a distinction is not consistent with the law of accomplice liability in this state.

The Error is Manifest

The remaining question presented is a procedural one, *i.e.*, whether the prosecutor’s argument concerning the trial court’s instructions to the jury constituted a manifest error affecting a constitutional right, allowing the

defendant to challenge the instructions on appeal without having objected at trial. *See State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992); RAP 2.5(a)(3).

An error is “manifest” when it has practical and identifiable consequences in the trial of the case. *State v. Green*, 80 Wash. App. 692, 694, 906 P.2d 990 (1995) (citing *State v. Lynn*, 67 Wash. App. 339, 345, 835 P.2d 251 (1992)). If the prosecutor’s argument permitted McChristian’s jury to convict without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial. A defendant cannot be said to have a fair trial “if the jury might assume that an essential element need not be proved.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)).

Thus, if this Court accepts McChristian’s argument regarding the impropriety of the prosecutor’s argument and concludes there is a reasonable likelihood that jury was misled as a result, he has established manifest error.

Conclusion

Based on the above, this Court should reverse and remand for a new trial.

3. MR. MCCHRISTIAN’S CONVICTION FOR “ASSAULT WITH A DEADLY WEAPON *WITH* A DEADLY WEAPON” VIOLATES DOUBLE JEOPARDY.

The State charged Mr. McChristian with assault with a deadly weapon *with* a deadly weapon. Thus, the “deadly weapon” enhancement was identical to an element of the core crime. This duplication of elements violates double jeopardy.

In the past, the Washington courts have rejected double jeopardy challenges to the charging of both a substantive crime having use of a deadly weapon as an element, as well as a deadly weapon enhancement. *State v. Caldwell*, 47 Wn. App. 317, 320, 734 P.2d 542, *review denied*, 108 Wn.2d 1018 (1987) (robbery); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *review denied*, 106 Wn.2d 1016 (1986) (rape).

Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, but the deadly weapon enhancement statute was only a matter in enhancement of penalty – not an element. *See, e.g., State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), *review denied*, 151 Wn.2d 1014 (2004) (same).

That logic does not survive *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Recuenco*, 163 Wn.2d 428, 435, 180 P.3d 1276 (2008). In those cases, the courts made

clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. The aggravating factor now acts as the *functional equivalent of an element* that must be charged in the Information.

One method of determining what constitutes an element of a crime is whether it must be included in a charging document. It is clear that sentencing enhancements, such as a deadly weapon allegation, must be included in the information. *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981). Washington law requires the State to allege in the information the crime which it seeks to establish. “This includes sentencing enhancements.” *State v. Recuenco*, 163 Wn.2d at 435, citing *State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information). *See also State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

RCW 9.94A.602 increases the maximum sentence that might be imposed over and above the *Blakely* statutory maximum – *i.e.*, the standard Guidelines range – for the crime. Hence, following *Blakely*, *Apprendi*, and *Recuenco*, the enhancement statute is the functional equivalent of an element of the crime. Prior decisions holding that there is no double jeopardy

problem because there is no duplication of elements between the underlying crime and the weapon enhancement must be reconsidered.

McChristian acknowledges that this argument has been rejected post-*Blakely*. See e.g., *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008). However, the Washington Supreme Court recently accepted it for review. *State v. Aguirre*, No. 82226-3.

4. THE TRIAL COURT ERRED WHEN IT IMPOSED A MANDATORY MINIMUM SENTENCE BASED ON AN ALLEGATION THAT WAS NOT CHARGED IN THE INFORMATION AND WHERE THE STATE PROVIDED NO OTHER FORM OF PRE-TRIAL OR PRE-SENTENCING NOTICE THAT IT WOULD SEEK SUCH A FINDING.
5. AT SENTENCING, THE TRIAL COURT IMPOSED A MANDATORY MINIMUM SENTENCE OF FIVE YEARS BASED ON ITS APPARENT (BUT UNSTATED) FINDING THAT THE OFFENDER USED FORCE INTENDED OR LIKELY TO KILL. BECAUSE THE FINDING INCREASED McCHRISTIAN'S MAXIMUM TERM OF PUNISHMENT BY DEPRIVING HIM OF THE POSSIBILITY OF EARNED EARLY RELEASE TIME FOR THE MANDATORY MINIMUM, THE SIXTH AMENDMENT REQUIRES A JURY, RATHER THAN A JUDGE, FINDING.
6. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S APPARENT FINDING RESULTING IN THE IMPOSITION OF THE MANDATORY MINIMUM, WHERE THE REQUISITE FINDING REQUIRES PROOF THAT THE "OFFENDER," AND NOT AN ACCOMPLICE, POSSESSED THE REQUISITE INTENT.

These three arguments all arise from the imposition of a mandatory "five-year, no good time" sentence by the trial court. No notice was given by the State that it was seeking this mandatory sentence—not in the Information or through any other mechanism. No findings in support of the mandatory

minimum were made—not by the jury or by the judge. Instead, the minimum was simply imposed without comment at sentencing.

Obviously, the imposition of a mandatory minimum, a sentence increasing McChristian’s punishment by depriving him of any “earned early release” for the first five years of his sentence, without any of the attributes of due process violates the law in several respects. However, perhaps the easiest way to decide this issue is by reversing the claims of error and reaching the sufficiency of the evidence issue, first.

Insufficiency of the Evidence

Although the State did not concede that McChristian did not personally assault the victim with a knife (RP 201-02), the State’s theory supporting first-degree assault was almost entirely premised on accomplice liability.

RCW 9.94A.540(1)(b) provides in pertinent part: “An offender convicted of the crime of assault in the first degree...where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.” Although the statute’s first reference to “offender” includes an accomplice, there is ambiguity about whether the statute’s second reference to “offender” encompasses accomplice liability or requires proof that the person being sentenced used the requisite force. For that reason, the rule of lenity applies. *See generally State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996) (“The

rule of lenity provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the defendant.”) (citing *State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227 (1984); *State v. Sass*, 94 Wn.2d 721, 726, 620 P.2d 79 (1980)).

Applying the rule of lenity, the evidence is insufficient to support a finding that McChristian personally used the requisite amount of force. Thus, while the minimum could be properly applied to the principal, it does not apply to McChristian.

This Court should reverse and remand with instructions to dismiss the mandatory minimum based on insufficient evidence.

McChristian now moves to his procedural arguments.

The Sixth Amendment Mandates a Jury Trial

A defendant convicted of the crime of assault in the first degree shall be sentenced to a term of total confinement not less than five years with no possibility of good time (or any other form of early release), but only where the offender used force or means likely to result in death or intended to kill the victim. In contrast, a person is guilty of assault in the first degree if he, with intent to inflict great bodily harm, assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death. As a result, the Washington Supreme Court recently held that the mandatory minimum finding does not automatically follow and is not coextensive with a first-degree assault verdict. *In re Pers. Restraint of Tran*,

154 Wn.2d 323, 111 P.3d 1168 (2005). In other words, an additional finding beyond the jury verdict is required prior to imposing the mandatory minimum.

The Sixth Amendment requires a jury to make any finding increasing a defendant's range of punishment. *Apprendi, supra; Blakely, supra*. Eliminating the possibility of earned early release increases the maximum punishment that may be imposed. *Tran, supra* ("DOC's determination that Tran and Roberts must serve five years of "flat time" for their first degree assault convictions leaves them ineligible for the earned early release credit of which they might otherwise take advantage. As a result, the petitioners are likely to spend substantially more time in DOC custody than their sentences should allow. This error on the part of DOC constitutes a fundamental defect that inherently results in a miscarriage of justice."). Likewise, in *State v. Conley*, 121 Wash. App. 280, 87 P.3d 1221 (2004), the Court of Appeals held "the statutory prohibition against earned early release credit for the period of the mandatory minimum sentence had a definite, immediate, and automatic effect on the range of Mr. Conley's sentence."

Thus, state law is settled that removing the possibility of good time increases the maximum possible punishment. Consequently, the Sixth Amendment mandates a jury trial, unless waived.

In this case, McChristian was denied that right.

Due Process Mandates Some Sort of Notice and Opportunity to Defend

In addition to denying McChristian the right to a jury trial, imposition of the mandatory minimum without any notice, in the Information or in any other document, violated McChristian's right to notice—to Due Process.

At its most basic, due process requires notice and a meaningful opportunity to defend. See *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 553, 627 P.2d 953 (1981) (noting that deadly weapon allegations must be included in the information where defendant is charged with robbery while armed with a deadly weapon); *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980) (remanding for resentencing where jury found by special interrogatory that defendant was armed with deadly weapon upon commission of the crime but prosecutor had neglected to file notice advising defendant that the State intended to seek an enhanced penalty); *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972) (“Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue ... must be presented to the jury ... before the court can impose the harsher penalty.”(citing *State v. Nass*, 76 Wn.2d 368, 456 P.2d 347 (1969))).

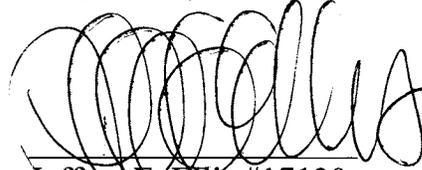
In this case, the State provided no notice whatsoever. Thus, imposition of the mandatory minimum was improper.

E. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial. Alternatively, this Court should vacate McChristian's sentence and remand for resentencing without the deadly weapon enhancement and without imposing the mandatory minimum.

DATED this 17th day of August, 2009.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Jeffrey E. Ellis', written over a horizontal line.

Jeffrey E. Ellis #17139

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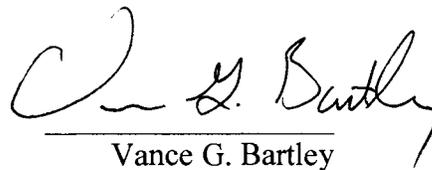
CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 17, 2009 I served the parties listed below with a copy of *Appellant's Opening Brief* as follows:

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8-17-09 Sea, WA
Date and Place


Vance G. Bartley

09 AUG 19 PM 11:25
STATE OF WASH. JUDG.
BY W. BARTLEY
COUNTY OF PIERCE