

NO. 39027-2

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY D. MCCHRISTIAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck, Judge

No. 08-1-00350-9

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

10/14/08 10:45 AM
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
CLERK OF COURT
BY: [Signature]

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the prosecutor err when her closing argument was consistent with well-settled case law and the jury was correctly instructed as to the law?..... 1

 2. Should this Court follow well-settled law, and find that the trial court could properly imposed, based upon jury findings, additional time for a deadly weapon enhancement pertaining to defendant's assault in the first degree conviction, even though one of the elements of that offense required the jury to find the defendant committed the assault with a deadly weapon? 1

 3. Did the court err in ordering a mandatory minimum sentence when it was within the standard range, defendant's 6th amendment rights were not violated, and there was sufficient evidence to support the court's ruling? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 6

 1. THE JURY WAS INSTRUCTED CORRECTLY AS TO ACCOMPLICE LIABILITY AND THE STATE'S ARGUMENT WAS CONSISTENT WITH WELL SETTLED CASE LAW 6

 2. THE JURY WAS INSTRUCTED CORRECTLY AS TO ACCOMPLICE LIABILITY AND THE STATE'S ARGUMENT WAS CONSISTENT WITH WELL SETTLED CASE LAW 12

3. THE COURT DID NOT ERR IN ORDERING A MANDATORY MINIMUM SENTENCE THAT WAS WITHIN THE STANDARD RANGE, DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED AND THERE WAS SUFFICIENT EVIDENCE FOR THE COURT'S RULING19

D. CONCLUSION.25

Table of Authorities

State Cases

<i>In re Borrereo</i> , 161 Wn.2d 532, 536, 167 P.3d 1106 (2007)	12
<i>In re Tran</i> , 154 Wn.2d 323, 111 P.3d 1168 (2005)	23
<i>In re Wilson</i> , 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).....	6
<i>Sarausad v. State</i> , 109 Wn. App. 824, 835, 39 P.3d 308 (2001)	10, 11
<i>State v. Bockman</i> , 37 Wn. App. 474, 491, 682 P.2d 925, <i>review denied</i> , 102 Wn.2d 1002 (1984).....	7
<i>State v. Borboa</i> , 157 Wn.2d 108, 117, 135 P.3d 469 (2006)	20
<i>State v. Caldwell</i> , 47 Wn. App. 317, 319, 734 P.2d 542, <i>review denied</i> , 108 Wn.2d 1018 (1987).....	14, 15
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995).....	12
<i>State v. Carothers</i> , 84 Wn.2d 256, 262, 525 P.2d 731 (1974), <i>overruled on other grounds in State v. Harris</i> , 102 Wn.2d 148, 685 P.2d 584 (1984)	7
<i>State v. Claborn</i> , 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981).....	14
<i>State v. Clarke</i> , 156 Wn.2d 880, 891, 134 P.3d 188 (2006)	20
<i>State v. Conley</i> , 121 Wn. App. 280, 87 P.3d 1221 (2004)	21
<i>State v. Cronin</i> , 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000)	10
<i>State v. Davis</i> , 101 Wn.2d 654, 658, 682 P.2d 883 (1984)	11
<i>State v. Freeman</i> , 153 Wn.2d 765, 771, 108 P.3d 753 (2005)	12
<i>State v. Galista</i> , 63 Wn. App. 833, 839, 822 P.2d 303 (1992).....	6, 7
<i>State v. Gerber</i> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981)	24

<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	23
<i>State v. Harris</i> , 102 Wn.2d 148, 160, 685 P.2d 584 (1984), <i>overruled on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988)	15
<i>State v. Huested</i> , 118 Wn. App. 92, 95, 74 P.3d 672 (2003)	14
<i>State v. Johnson</i> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)	22
<i>State v. Kelly</i> , No. 82111-9 (decided Jan. 21, 2010)	18
<i>State v. Lubers</i> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996)	24
<i>State v. Munden</i> , 81 Wn. App. 192, 196, 913 P.2d 421 (1996)	7
<i>State v. Nguyen</i> , 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), <i>review denied</i> , 163 Wn.2d 1053, 187 P.3d 752 (2008)	14, 16, 17, 18
<i>State v. Olson</i> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995)	22
<i>State v. Pentland</i> , 43 Wn. App. 808, 811, 719 P.2d 605, <i>review denied</i> , 106 Wn.2d 1016 (1986)	14, 15
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003)	23
<i>State v. Roberts</i> , 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000)	10
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	24
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)	24
 Federal and Other Jurisdictions	
<i>Albernaz v. United States</i> , 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)	13
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	15, 18, 20
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	15, 16, 18, 19, 20, 21

Harris v. United States, 536 U.S. 545, 557, 122 S. Ct. 2406,
153 L. Ed. 2d 524 (2002).....21

McMillan v. Pennsylvania, 477 U.S. 79, 87-88, 106 S.Ct. 2411,
91 L.Ed.2d 67 (1986).....20

Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673,
74 L. Ed. 2d 535 (1983)..... 13, 15, 17

Sarausad v. Porter, 479 F.3d 671 (9th Cir. 207) 10

Schriro v. Summerlin, 542 U.S. 348, 354, 124 S. Ct. 2519,
159 L. Ed. 2d 442 (2004)..... 18

Waddington v. Sarausad, __ U.S. __, 129 S. Ct. 823,
172 L.Ed.2d 532 (No. 07-772)(2009)..... 10

Constitutional Provisions

Sixth Amendment..... 18, 20, 21

U.S. Const. amend. V 12

Wash. Const. art. I, sec. 9 12

Statutes

RCW 9.94A.533(4)..... 13

RCW 9.94A.533(4)(f)..... 17

RCW 9.94A.535 19

RCW 9.94A.540 19, 22

RCW 9.94A.540(1)..... 20

RCW 9.94A.540(1)(b)..... 20

RCW 9A.08.020(3)..... 6

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

1. Did the prosecutor err when her closing argument was consistent with well-settled case law and the jury was correctly instructed as to the law?
2. Should this Court follow well-settled law, and find that the trial court could properly imposed, based upon jury findings, additional time for a deadly weapon enhancement pertaining to defendant's assault in the first degree conviction, even though one of the elements of that offense required the jury to find the defendant committed the assault with a deadly weapon?
3. Did the court err in ordering a mandatory minimum sentence when it was within the standard range, defendant's 6th amendment rights were not violated, and there was sufficient evidence to support the court's ruling?

B. STATEMENT OF THE CASE.

1. Procedure

On January 22, 2008, the State charged defendant, Anthony McChristian, with one count of assault in the first degree, and one count of malicious mischief in the first degree. CP 5-6. Each charge had a deadly weapon enhancement, as well as the enhancement alleging that defendant

had committed these crimes to further his involvement with an organization, association or identifiable group. CP 5-6.

The case was assigned to trial in front of the Honorable Kitty-Ann van Doorninck. RP 2. After the State rested, defense counsel moved to dismiss count II, the malicious mischief charge. RP 135-6. The count was dismissed with no objection from the State. RP 136.

The jury found defendant guilty as charged of assault in the first degree. RP 232, CP 40. The jury also found defendant was armed with a deadly weapon when he committed the assault. RP 233, CP 42. The jury did not find that defendant committed the crime to further his involvement in any organization, association to identifiable group. RP 233, CP 43.

The court held sentencing on March 13, 2009. RP 237, CP 44-56. Defendant had an offender score of zero. RP 237, CP 44-56. The court sentenced defendant to the low end of the sentencing range of 93 months, plus the 24 months for the deadly weapon enhancement. RP 251, CP 44-56. The 93 months included a mandatory minimum sentence of 60 months. CP 44-56.

Defendant filed this timely appeal. RP 253, CP 57.

2. Facts

On January 17, 2008, Robyn Ching was working as the front end manager of the Safeway store in Spanaway. RP 18-19. Ms. Ching was working as a cashier when she noticed a boy walk into the store backwards with his hands up. RP 19-20. Three other boys ran in after him. RP 20. The boys were yelling and shouting as they came into the store. RP 20. One of the three boys grabbed the first boy and they started wrestling. RP 20. The boy was knocked into the video display and a sign was knocked down. RP 20. The other two boys were involved in the fight as well, although the first boy and the boy who grabbed him were the main ones fighting. RP 21. All three boys were kicking and beating the first boy. RP 22. There was also a girl yelling and shouting. RP 21.

The fight continued and chairs and tables were knocked down in the store. RP 22. Ms. Ching told them to stop but they did not. RP 32. The fight ended when the boys moved outside the doors of the store. RP 22.

Deputy John Delgado arrived at the scene immediately after the call came out. RP 66. The victim, Alexander Williams, had been stabbed. RP 66. Deputy Delgado observed the victim's eyes rolling back into his head and he was non-responsive. RP 67. Deputy Fredrick Johnson observed that the victim had a cut to his abdomen. RP 119. There was a substantial amount of blood. RP 120. Deputy Johnson observed that the laceration was a fairly serious injury. RP 120.

Defendant is a member of a gang: the 46 Neighborhood Crips. RP 63, 148. CJ Valiant and Daniel Rice, the other two boys involved in the fight with defendant, are members of the same gang¹. RP 63, 148-50. The victim, Alexander Williams, is a member of the 74 Hoover Crips. RP 66. The two gangs are rivals. RP 56-7, 88.

Gang culture is such that there are not a lot of one on one fights. RP 58. The fights are not usually fair fights. RP 58.

The victim went to Bethel Jr. High with defendant. RP 87. Mr. Williams did not know CJ Valliant or Daniel Rice. RP 116.

On January 17, 2008, Mr. Williams was walking to Safeway. RP 91. Mr. Williams was with a friend from his gang and two females. RP 92. None of them had any weapons. RP 92. A vehicle approached them; defendant was in it. RP 93. Defendant followed them into the store. RP 93. Mr. Williams recognized defendant and thought there would be a fight. RP 96. All three boys ran up to him and started fighting. RP 97. Mr. Williams fell to the ground. RP 97. He was kicked and punched. RP 97. Then all three boys ran out of the store. RP 97. Mr. Williams then realized he had been stabbed. RP 97. He collapsed in front of Safeway. RP 98. His shirt was wet with blood. RP 98. He had trouble breathing. RP 99.

¹ The victim initially indentified the three assailants as defendant, Andrew McChristian and Daniel Rice, but it was later determined that Andrew McChristian was not involved and that CJ Valliant was involved. RP 68-9.

Mr. Williams' stomach lining was pierced from the stab wound. RP 102. He was in the hospital for a week. RP 103. The wound required 36 staples. RP 103.

Mr. Williams testified that defendant came at him first. RP 108. Mr. Williams thought he had been stabbed at the end of the fight. RP 99. He was assaulted because he was a member of the 74 Hoovers. RP 97.

Daniel Rice testified that he was with defendant and CJ Valliant. RP 139. They saw Mr. Williams. RP 141. Defendant told Rice to pull over because he wanted to talk to Mr. Williams. RP 141, 146, 158. Mr. Williams had supposedly said something about defendant on MySpace. RP 155. Neither he nor Valliant knew Mr. Williams. RP 153. He followed because he wanted to make sure defendant was ok. RP 146. They ran after the victim into Safeway and they started fighting. RP 142. Defendant and Mr. Williams were fighting. RP 169. Rice jumped into help. RP 152, 167. He hit the victim with a chair, the victim fell to the ground and they started kicking him. RP 143, 178. They punched, kicked and struck Mr. Williams. RP 177. Rice said he didn't know anyone had a knife, but that CJ was bleeding and almost lost two fingers. RP 144, 181. All three of them assaulted Mr. Williams and all of them attacked him at the same time. RP 182, 187.

There was video surveillance of the fight. Deputy Delgado identified defendant as one of the people running out of the store. RP 71.

Deputy Delgado also observed that Rice ran into the store first, defendant was second, and then CJ. RP 73.

Blood was found on the floor of the store. RP 28. Drops of blood were found at the entrance. RP 129. Drops of blood were found throughout the store. RP 43.

C. ARGUMENT.

1. THE JURY WAS INSTRUCTED CORRECTLY AS TO ACCOMPLICE LIABILITY AND THE STATE'S ARGUMENT WAS CONSISTENT WITH WELL SETTLED CASE LAW.

RCW 9A.08.020(3) addresses accomplice liability and in relevant part states:

A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support or presence. *State v. Galista*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). "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.” *Id.* “The State need not show that the principal and accomplice share the same mental state.” *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984), *see also State v. Munden*, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). The jury was given instructions consistent with the statute and case law. CP 14-39, instructions 12-13. Defendant did not object to these instructions.

Defendant alleges that the State committed error during closing argument by stating:

Now, the defense may argue that the State cannot prove that the defendant knew that one of his accomplices had a knife. The defense may argue the State can't prove that the defendant had a knife, and the State can't prove that he knew one of his accomplices had a knife. But you know what, the State doesn't have to prove that he knew.

Why do I say that? The law requires the State to prove 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.

So then why is that language knowledge – that word "knowledge" in the accomplice instruction? There's that word "knowledge." What does that mean? If the State doesn't have to prove he knew the accomplice was wielding

a knife, why is that word there? It's there because of this: Ladies and gentlemen, say for a moment that Rice and CJ park the car and said to McChristian, "We're going to go in the store and we're going to buy some chips. Why don't you stay here, stay out here," and McChristian said, "Okay, I'll just wait for you guys," Say the two go in the store and beat up Alexander.

McChristian's in the car and didn't see a thing. The two run out of the store, they jump in and they say, "Drive. Drive, Anthony, drive," and Anthony starts driving the getaway car. Can the State charge Anthony as an accomplice to the assault of Alexander that happened inside the store when he was sitting outside? If that's the scenario, then the State has the burden of proving that he knew there was an assault going on inside that store, and that's why that word "knowledge" is in that instruction.

Does that make sense? In this case, we don't have the scenario that I just talked about. In this case, all three were in the store. All three were attacking the victim. All three were punching and kicking. So the issue of knowledge, nonexistent.

I want to talk about another scenario. You and I plan to rob a store. We plan to rob the neighborhood am/pm two blocks away. We plan the date, the time, who is going to drive, how we are going to get inside the store, who is going to wear gloves, but you're the only one with the gun. If you use that gun, I am just as guilty as you. I'm responsible for you holding that knife -- excuse me, the gun. When we talk about it in real-life sense then, yes, the law does make sense.

In this case, in the commission of the crime, which is the assault, defendant or an accomplice stabs the victim. Since all were accomplices in the crime of assaulting the victim, each is guilty of whatever happened during the assault of the victim. They all are guilty of assaulting because they all did it together.

The knife, when it became introduced by one of the accomplices, it elevated that assault to an assault in the first degree. And each participant in the crime of the assault is guilty for wielding that knife, no matter who held that knife. That's what the law is.

Now, you may say, you know what, I don't like that law. I don't really think it's fair. I think the State should have to prove that the defendant actually knew which one of his friends had a knife. But ladies and gentlemen, your personal belief about what the law should be, it doesn't matter. And we talked about this in voir dire. It doesn't matter, because each of you took an oath to follow the law as is given to you, each of you swore to disregard your personal beliefs about what you think the law ought to be, and each of you is bound by that oath because you have a duty to be a fair juror and an impartial juror and to follow the law. We all talked about this in voir dire.

Now, defense would have you believe that, in fact, it was CJ who stabbed the victim. Rice said it was CJ because he had a cut, a serious cut on his hand.

Ladies and gentlemen, so what? It doesn't matter. It doesn't matter because of all the reasons that I've just explained to you. Even if it was CJ, the defendant is just as guilty. But you know what, ladies and gentlemen, talk about this. What reason does CJ have to stab the victim? He didn't know Alexander. CJ had no issues with Alexander. He was 15 years old. What possible reason would he have to want to stab Alexander in the stomach?

What reason? Did the defendant tell him to do it? Did the defendant ask him to do it? Did the defendant solicit, command, encourage or request him to do it? If it was CJ, you know without a doubt that the defendant encouraged him, solicited him, requested him and commanded him. You know this because the defendant was the only one who had a personal issue with Alexander. The defendant was the only one who knew him. The defendant had been disrespected by Alexander. The defendant had a reason to be angry with Alexander. He had a reason to want to hurt him, injure him, stab him, and he was the only one who had a motive to stab him. It was the defendant who stabbed him or had someone else stab him. He is guilty. They're all guilty of stabbing him.

RP 198-20.

The prosecutor's argument mirrors the case law on accomplice liability. "An accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime." *Sarausad v. State*, 109 Wn. App. 824, 835, 39 P.3d 308 (2001)²(citing *State v. Roberts*, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000).) "The crime" means the crime charged, but it does not mean the specific degree charged. See *Sarausad*, 109 Wn. App. at 835, *State v. Cronin*, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000). In fact, in *State v. Bui*, which was consolidated with *Cronin*, the court said that in order for the State to prove that defendant was an accomplice to assault in the first degree with a deadly weapon, the State had to prove that defendant possessed general knowledge that he was facilitating an assault. See *Sarausad*, 109 Wn. App. at 835, *Cronin*, 142 Wn.2d 580.

In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple misdemeanor-level assault, and need not have known that the principal was going to use deadly force

² This case was vacated in part by the 9th Circuit in *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 207). The United State Supreme Court found that the federal court of appeals had erred by granting defendant's writ of habeas corpus and found the Washington Court of Appeals had not acted unreasonably. *Waddington v. Sarausad*, __ U.S. __, 129 S. Ct. 823, 172 L.Ed.2d 532 (No. 07-772)(2009). The action of the Federal Court of Appeals was reversed.

or that the principal was armed.” *Sarausad*, 109 Wn. App. at 836. The accomplice takes the risk that the principal will exceed the scope, i.e.: escalate the degree of the planned crime. *See State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (court found defendant could be convicted as an accomplice to first degree robbery without proof that the accomplice knew the principal was armed with a deadly weapon during the crime).

The prosecutor’s argument was not in error. It was clear from the testimony and the video that defendant had participated in the assault. RP 20-22, 71, 73, 97-98, 108, 142, 169, 177, 182, 187. In fact, defendant was the one that had an issue with the victim. RP 141, 146, 153, 155, 158. The evidence indicates that defendant was observed participating in an assault so the general knowledge of the assault was proven. Whether or not the defendant himself wielded the knife that increased the level of the crime is irrelevant for this analysis. According to the well-settled case law, the fact that the degree was ratcheted up by one participant having a deadly weapon means all are as guilty as the one with the knife. *See Davis*, 101 Wn.2d at 658. The prosecutor’s argument is consistent with well-settled case law. There is no error.

2. THE WELL-SETTLED RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED IN DOUBLE JEOPARDY BY AN IMPOSITION OF A DEADLY WEAPON SENTENCE ENHANCEMENT WHEN THE UNDERLYING OFFENSE HAS USE OF A DEADLY WEAPON AS AN ELEMENT IS UNAFFECTED BY **BLAKELY**.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. "The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the*

Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Here, it is clear that the Legislature intended to impose separate enhancements for each crime committed with a deadly weapon, regardless of whether the crimes involved the same weapon. RCW 9.94A.533(4) provides in part:

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

. . .

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

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

The “statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). Legislative intent is clear as to the purpose and applicability of deadly weapon enhancements.

Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *Husted*, 118 Wn. App. at 95 (citing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); *see also*, *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008). In *Claborn*, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, Claborn argued that separate enhancements for the “single act” of being armed with a deadly weapon during the burglary and theft violated double jeopardy. Noting that burglary and theft have separate elements and that the enhancement statutes did not themselves create criminal offenses, the *Claborn* court held that the enhancements did not create multiple punishments for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. *See State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, *review denied*, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *review denied*, 106 Wn.2d 1016 (1986);

State v. Harris, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *Pentland*, 43 Wn. App. at 811-12 (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983))). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. *Caldwell*, 47 Wn. App. at 320.

In the case before the court, defendant was convicted of assault in the first degree. RP 232, CP 40. The jury found a deadly weapon enhancement as well. RP 233, CP 42. Thus, defendant’s sentence included 24 months of enhancement time added to the standard range. CP 44-56.

Defendant challenges the 24 months he received for the deadly weapon enhancement on his conviction for assault in the first degree, arguing that in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court must reexamine the well-settled rule that a sentence enhancement imposed for being armed

with a deadly weapon does not violate double jeopardy where the use of a deadly weapon is also an element of the offense.

In *State v. Nguyen*, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008), Division I found that “nothing in *Blakely* gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime.” The court relied on legislative intent in reaching its decision:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

Nguyen, 134 Wn. App. at 868. This analysis follows the holdings of the United States Supreme Court pointing out that the *Blockburger* test is a tool used to discern legislative intent; when the legislature has made its intent clear, however, then the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court’s power to impose convictions and punishments when the will of Congress is

not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Hunter, 459 U.S. at 368.

The Washington Legislature specifically exempted certain crimes from being eligible for enhancement. The Legislature did not include crimes on this list that had use of a deadly weapon as an element of the crime, such as assault in the second degree or robbery in the first degree. RCW 9.94A.533(4)(f). Because the intent of the Legislature is unambiguous in its desire to authorize additional punishment on crimes committed with a deadly weapon, even when such crimes include the use of a deadly weapon as an element, double jeopardy is not violated.

Nguyen, 134 Wn. App. at 868.

Division I also rejected a claim similar to the one that defendant makes here- that the deadly weapon allegation essentially is duplicative of an element of the crime.

Nguyen's argument is essentially based upon semantics, and he assigns an unsupportable weight to the *Blakely* Court's use of the term "element" to describe sentencing factors. But the meaning of the Court's language in *Blakely* was made clear in *Recuenco*, wherein the Court pointed out that "elements and sentencing factors must be treated the same for Sixth Amendment purposes." Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

Nguyen, 134 Wn. App. at 869 (citations omitted). The requirement that sentencing enhancements be presented to the jury was a procedural requirement in that it only altered the method for determining the sentencing enhancement. *Schriro v. Summerlin*, 542 U.S. 348, 354, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The jury trial guarantee for the sentencing enhancement did not alter the range of conduct that the State could criminalize. *Id.*

In the instant case, the jury made a finding that defendant had been in possession of a deadly weapon: a knife. RP 233, CP 42. Defendant does not contend that his Sixth Amendment rights were violated on this issue. As the sentencing enhancement was submitted to the jury, the requirements of *Blakely* were met.

The Supreme Court recently decided this same issue in terms of the firearm enhancement. In *State v. Kelly*, No. 82111-9 (decided Jan. 21, 2010), the Supreme Court rejected the notion that *Blakely* and *Apprendi* require a new analysis of firearm sentencing enhancements in terms of double jeopardy. Citing clear legislative intent, the court found that there was no violation of double jeopardy when a firearm sentencing enhancement is imposed on a crime that has use of a weapon as an element. *Id.*

Defendant's argument is not persuasive and has now been rejected by the Court of Appeals and a similar argument rejected by the Supreme Court. Any legislative redundancy in mandating enhanced sentences for offenses involving the use of a deadly weapon is intentional. Double jeopardy ensures that the punishment is not more than the legislature intended. The legislative intent is clear that because defendant committed assault in the first degree while armed with a knife, his sentence can be properly enhanced. The jury made the finding that defendant was armed with a deadly weapon. Imposition of additional time for the enhancement does not violate double jeopardy principles or *Blakely*.

3. THE COURT DID NOT ERR IN ORDERING A MANDATORY MINIMUM SENTENCE THAT WAS WITHIN THE STANDARD RANGE, DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED AND THERE WAS SUFFICIENT EVIDENCE FOR THE COURT'S RULING.

RCW 9.94A.540 concerns mandatory minimum terms. It states in relevant part:

Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(b) An offender convicted of the crime of assault in the first degree or assault of a child 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.

RCW 9.94A.540(1), RCW 9.94A.540(1)(b).

The Washington State Supreme Court has addressed the subject of whether or not *Blakely* applies when a minimum sentence is imposed.

The Court concluded that *Blakely* is not implicated. “The Sixth Amendment does not bar judicial fact-finding related to a minimum sentence that does not exceed the relevant statutory maximum.” *State v. Clarke*, 156 Wn.2d 880, 891, 134 P.3d 188 (2006); *see also, State v. Borboa*, 157 Wn.2d 108, 117, 135 P.3d 469 (2006).

The United States Supreme Court has found that judicial fact finding to determine a minimum sentence does not violate the 6th amendment as the minimum sentence does not “alter the maximum penalty for the crime committed nor create a separate offense calling for a separate penalty.” *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986). The Court in *Apprendi* specifically did not overrule *McMillan*. *See Clarke*, 156 Wn.2d at 891, *Apprendi*, 530 U.S. at 487, n.13. Post *Apprendi*, the Court reiterated its distinction between facts that extend a defendant’s sentence beyond the maximum authorized by the jury verdict and those facts that set a mandatory minimum in *Harris v. United States*, 536 U.S. 545, 557, 122 S. Ct. 2406,

153 L. Ed. 2d 524 (2002). Both the United States Supreme Court and the Washington State Supreme Court have held that the imposition of a minimum sentence by the court does not violate the 6th Amendment.

Defendant cites *State v. Conley* for the proposition that this Court should find that the mandatory minimum sentence increased defendant's punishment. *State v. Conley*, 121 Wn. App. 280, 87 P.3d 1221 (2004). However, the proper inquiry under *Blakely* is whether the punishment was increased beyond the statutory maximum, which in the instant case it did not. Defendant's statutory maximum was life and the high end of the sentencing range was 123 months. CP 44-56. Further, the court in *Conely* ruled that although defendant was misinformed by both the court and defense counsel as to the mandatory minimum sentence he was facing, he was not prejudiced so as to be able to withdraw his plea. *Conely*, 121 Wn. App. at 284-88. The court found that since defendant was facing a range of 102 months to 136 months, it was reasonable to assume that defendant expected a sentence longer than the mandatory five year minimum sentence. *Id.* at 287.

In the instant case, the court ordered the mandatory minimum five years, or 60 months as part of defendant's sentence. CP 44-56. Defendant's standard range was 93 months to 123 months. CP 44-56. As such, the 60 months was well within the standard sentencing range and did not impose a punishment greater than the statutory maximum. The jury, by finding defendant guilty, had authorized the judge to impose a sentence

anywhere between 93 months to 123 months. The trial court did not error in imposing a minimum sentence of 60 months.

Further, defendant has cited no authority that requires the State to give notice of the minimum sentence, nor has defendant shown how this sentence violates his due process since the 60 months is included in the standard range sentence. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Defendant also has not shown where particular findings of fact are required. The statute under which this minimum sentence was imposed does not require findings. See RCW 9.94A.540. The sentence is not an exceptional sentence so findings of fact and conclusions of law are not required. Contrary to defendant's assertion, the court did make a finding as to the minimum sentence. Defendant's judgment and sentence contains the court's findings, and the court sentenced defendant to 93 months and included the 60 months minimum sentence. CP 44-56. The Court also addressed defendant before pronouncing sentence by saying,

You said, "I just wanted to fight him." And for everybody here, you understand what happens when you do that kind of thing. All sorts of things are out of your control at that point. And that's the behavior -- that's a problem. And the fact that you or somebody else had a knife, that just really ups the ante, as it were, in terms of the punishment because it's a very serious situation, and very easily, Mr. Williams could have died. Very easily.

RP 251.

The instant case differs from the case cited by defendant in that the court included the mandatory minimum sentence within its findings. The case cited by defendant shows DOC arbitrarily imposing a mandatory minimum sentence without court authorization. See *In re Tran*, 154 Wn.2d 323, 111 P.3d 1168 (2005). In the instant case, the trial court included in its findings on the judgment and sentence that defendant serve a minimum sentence. There was no requirement for any further findings and the sentence was within the standard range. There is no error.

Finally, defendant asserts that there is insufficient evidence that defendant is subject to the mandatory minimum sentence. Again, defendant raises the issue of insufficient without authority or persuasive argument. However, should the court review the issue, there is sufficient evidence to support the minimum sentence.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth

of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

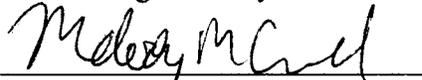
In the instant case, there was sufficient evidence that used force or means likely to result in death. Defendant was the only one who knew the victim. RP 87, 116, 141, 146, 153, 155, 158. Defendant had a conflict with the victim and was the one who thought he and his friends should go after him. RP 141, 146, 155, 158. Defendant was shown on video assaulting the victim. RP 22, 71, 73. The victim sustained a severe injury, a stab wound to the abdomen, that required him to be hospitalized for a week and took 36 staples to close. RP 67, 102-103, 119-120. While a specific finding is not necessary, as argued above, there was sufficient evidence supporting the minimum sentence.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence entered below.

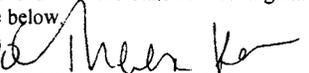
DATED: January 26, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-26-10 
Date Signature

RECEIVED
BY: 
JAN 27 2010
TACOMA, WA