

NO. 39077-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARRELL K. JACKSON,

Appellant.

APPELLANT'S BRIEF
FILED
NOV 19 2019
COURT OF APPEALS
DIVISION TWO
SEATTLE, WA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan Chushcoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the right to public access to court records by sealing the jury questionnaires without first applying the "Bone-Club"¹ factors.

2. The prosecutor improperly vouched for the credibility of the state's most important witness during opening statement, direct examination, and closing argument, therefore depriving the appellant of his constitutional due process right to a fair trial.

3. The appellant was twice put in jeopardy in violation of the state and federal constitution because his possession of a deadly weapon and/or a gun were both elements of the robbery and burglary charges and elements of the deadly weapon and firearm sentencing enhancements.

Issues Pertaining to Assignments of Error

1. Must the trial court's agreed order sealing jury questionnaires be remanded for reconsideration where the court entered the order without first applying the Bone-Club factors?

2. During direct examination of the state's key witness and both opening statement and closing argument, the prosecutor emphasized the witness's plea agreement for more lenient treatment was conditioned

¹ State v. Bone-Club, 128 Wn. 2d 254, 259, 906 P.2d 325 (1995).

upon truthful testimony. Did the prosecutor violate the appellant's constitutional due process right to a fair jury trial by improperly vouching for the credibility of this witness?

3. Did the trial court violate the appellant's right to be free from double jeopardy when it sentenced him for first degree robbery and first degree burglary, each of which included possession of a deadly weapon and/or a firearm as elements, and then imposed both deadly weapon and firearm sentencing enhancements for each offense?

B. STATEMENT OF THE CASE

1. *Defendants' Statements and Trial Testimony*

Ruben Doria and his roommate, Edgardo Abrazado, were found stabbed to death in their apartment. 7RP 607-10, 628-29, 677-78, 750-52, 761-63, 819-20, 1026-28.² Doria was a marijuana dealer and grew marijuana in the apartment. 7RP 692-93, 711-12. He . 7RP 646-48, 663-67, 683-87, 752. It was apparent some of the marijuana plants were missing when the bodies were found. 7RP 732.

² The verbatim report of proceeding is referred to as follows: 1RP (11/17/08); 2RP (11/18/2008); 3RP (12/3/2008); 4RP (12/30/2008); 5RP (1/15/2009); 6RP (1/28/2009); 7RP (16 volumes covering 2/2/2009 – 2/26/2009); 8RP 3/27/2009).

About four months later, police arrested Darrell Jackson, Tyreek Smith and Pierre Spencer for suspicion of the murders. 7RP 1492-93, 1687-91, 1715, 1776-80. Smith and Jackson made statements implicating themselves in parts of the planning and commission of the burglary and robbery. 7RP 1693-1717 (Smith), 1759-73, 1781-1811 (Jackson).³

Smith told officers that on the night before the murders, they were driving in a Blazer when the topic of doing a robbery came up. 7RP 1695-96, 1713. The plan was for one of the others to go into Doria's apartment under the guise of buying marijuana. Another person was to break into the apartment and rob everyone. To make the crime seem more authentic, it was discussed how the "robber" might have to hit one of the "victims" with a gun. 7RP 1696, 1714. Smith said when he heard that, he told the others "he wanted out" and walked back to his apartment. 7RP 1696.

Later the next morning – the day of the crimes -- Smith went to Jackson's sister's apartment, which was in the same apartment complex as Jackson's apartment. 7RP 1120-21, 1697. He heard the Blazer's loud muffler at about 10 or 11 a.m., so he looked out the window. 7RP 1697-1715. He saw "[o]ne of them," dressed in black, come from an apartment

³ The statements were admitted after redactions designed to satisfy Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). 5RP 4-20, 7RP 4-7, 497-507, 1246-1264.

and enter the Blazer. The person dressed in black returned alone to the complex at about 4 p.m. and met with Smith. Smith later spent the night in Jackson's sister's apartment. 7RP 1124-28, 1697.

The following morning, Smith returned to the apartment and saw four or five marijuana plants. 7RP 1697. He said he thought his friend "Phaze" took the plants to someone who knew how to grow them. 7RP 1698. The next day, Smith went to his former girlfriend's apartment and saw a breaking news story on television about a homicide in a nearby apartment. 7RP 1271-74, 1697-98, 1715. Later that week, Smith returned to his native Georgia, where he was ultimately arrested. 7RP 1689, 1712, 1717-18.

Jackson told police Doria had been selling him marijuana for about two months before the incident. He knew Abrazado as Doria's roommate. 7RP 1782-83.

The night before the crimes, the topic of a robbery came up. 7RP 1783-84. Jackson was not part of the planning process. 7RP 1762. His role was to get the others into Doria's secured apartment by arranging to buy marijuana, being let into the apartment by Doria, and then pretending to be a victim of the robbery when the others came in. 7RP 1762, 1785-86.

Jackson and the others proceeded to Doria's apartment and Jackson went inside and bought marijuana from Doria. 7RP 1762-63, 1786-87. The robbery did not occur, however, because there were other persons in the apartment with Doria. 7RP 1762, 1786-87. The others blamed Jackson for the failed attempt because he told them there would be no guests at Doria's apartment. 7RP 1789.

The next morning the others awakened him early because they wanted to try the same plan again. 7RP 1789-90. Jackson called Doria and again arranged to buy marijuana. 7RP 1791. They drove to Doria's apartment in a red SUV. On the way, Jackson saw a .357 revolver and SKS rifle in the vehicle. 7RP 1765, 1791-92.

When they arrived at Doria's apartment building, Jackson called to buy marijuana. When Doria came downstairs and opened the door, the others jumped out of the SUV, rushed Doria up the stairs ahead of Jackson, and hit Doria in the back of the head. 7RP 1764, 1792-93. Jackson stood at the bottom of the stairs in shock because he did not know what was going on. 7RP 1794. He stayed there for five or ten minutes because he wanted no part in the episode. But the others came back down the stairs and told him he was going to get them all caught. 7RP 1794-95.

By the time he came up the stairs and into Doria's apartment, the others had bound Doria's hands and covered his mouth with tape. 7RP 1795-96. Doria was seated on a couch when one of the others hit him in the back of his head and then stabbed him in the back with a knife five or six times. 7RP 1797-1800.

Jackson, meanwhile, grabbed plants as he was told to do, and ran them down the stairs to the door that went outside. He returned for two more plants, then went outside to the SUV, where he remained for about 30 minutes. 7RP 1765-66. When he returned, he saw the person with the knife then slit Doria's throat. 7RP 1767-68, 1798-99.

According to Jackson, Abrazado returned home shortly thereafter. 7RP 1768, 1801. Another person hit him on the head with the butt end of the .357 handgun and Abrazado went down to his knees. 7RP 1768-69, 1801-02. One of the others then slit Abrazado's throat. 7RP 1769, 1802-03. Jackson left the apartment and stood at the base of the stairs for five or ten minutes. 7RP 1803-04. The others came down with a video game player and laptop computer. They went back upstairs and Jackson went home. 7RP 1770, 1804-06. Jackson told police he never had a gun or knife and did not tape Doria. 7RP 1811.

At about dusk the others arrived at his apartment with a safe, a video game player and some marijuana plants. 7RP 1806-08. Jackson later called his friend, Phaze, who came by and picked him up. 7RP 1808-09. He spent the rest of the day and night at Phaze's residence, and returned to his apartment the next day. The others left the safe there and the marijuana plants eventually died at Phaze's home. 7RP 1809-10.

In contrast to Smith and Jackson, Spencer made a statement to police about 11 months after his arrest. 7RP 1499-1500, 1508. By then he had been charged with two counts of first degree aggravated murder and one count each of first degree robbery and first degree burglary, appointed an attorney, and given access to police reports. 7RP 1351, 1485-87, 1510-12, 1539.

Spencer made a deal with the prosecution nearly one month after he gave his statement. 7RP 1509-11. He pleaded guilty to two counts of first degree aggravated murder with an understanding that after he testified for the state, the plea would be withdrawn and he would instead plead guilty to one count of first degree murder and one count of manslaughter. 7RP 1514-15, 1355-56. Spencer expected to be sentenced to 25 years in prison. 7RP 1355-56, 1515-16.

The state charged Jackson (and Smith) with two counts of first degree premeditated murder, two counts of first degree felony murder, and one count each of first degree burglary and first degree robbery. The state also alleged Jackson committed each offense while armed with a knife and/or a firearm. Finally, the state alleged the existence of four aggravating circumstances. CP 201-05.⁴

At trial, Spencer was the state's key witness. He testified he met Smith while both served in the army and Smith later introduced him to Jackson. 7RP 1362-64, 1369-70. Smith lived in Jackson's apartment. 7RP 1371.

On the afternoon of the day before the crimes, Smith called him and they later met at Jackson's apartment. 7RP 1368-69. Jackson and Jackson's cousin were also there. 7RP 1369-71. Smith discussed plans to rob a marijuana dealer who had a growing operation in his apartment. 7RP 1372. They hoped to take \$7,000 or \$8,000 and "a bunch of plants."

⁴ The aggravators were: (1) murders committed to conceal commission of crime protect or conceal identity of any person committing crime, RCW 10.95.020(9); and/or (2) there was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant, RCW 10.95.020(10); and/or (3) murders committed in the course of, in furtherance of, or in immediate flight from (3) first degree robbery, RCW 10.95.020(11)(a); or (4) first degree burglary, RCW 10.95.020(11)(c). CP 201-02.

7RP 1373. Jackson was to arrange a marijuana transaction with Doria, gain access to the apartment while armed with Smith's .357 revolver, and hold Doria while others came in. 7RP 1378, 1380.

Spencer drove the three men to Doria's apartment in his Chevrolet Blazer. 7RP 1375-79. Jackson called Doria, who came down to open the door. 7RP 1382. Once Jackson was inside Doria's apartment, he called his cousin, who remained in the Blazer, and said, "No," meaning the plan would have to be aborted because there were too many people in the apartment. Jackson instead bought marijuana and returned to the Blazer. 7RP 1383-84. On the way back to Jackson's apartment, the men said they would try the robbery again the next day. 7RP 1384.

The next day, Spencer drove to Jackson's apartment. Smith came out and climbed into the Blazer. 7RP 1387-88. Smith announced they needed to go to a nearby apartment complex for another weapon in the event there were other people inside Doria's apartment. 7RP 1388-89, 1417. When they arrived, Smith entered an apartment and came out shortly thereafter with an SKS assault rifle concealed in a blanket. 7RP 1415-17. They returned to pick up Jackson, and the three men proceeded to Doria's apartment. Jackson had the .357 handgun in his pants pocket.

7RP 1417-19. Smith had a knife with a four-inch to six-inch blade on his belt loop. 7RP 1419-20.

Jackson again called Doria and arranged to buy marijuana. 7RP 1422. Doria opened the ground floor door and the three men followed him up the stairs. 7RP 1423, 1426-27. When they got inside Doria's apartment, Jackson pulled out the .357 and pointed it at Doria. 7RP 1427-29, 1438-39. Jackson gave Spencer duct tape and told him to bind Doria's wrists and ankles, and to tape his mouth. 7RP 1440-43. Meanwhile, Jackson had retrieved the SKS and guarded Doria. Once finished binding Doria, Spencer joined Smith in grabbing marijuana plants and moving them near the door. 7RP 1444-46.

At some point Jackson asked Spencer to look for a safe in a bedroom while Smith continued moving plants toward the door. 7RP 1447. Spencer could not find the safe, so Jackson called Smith to guard Doria while he looked for the safe. 7RP 1447-48. While Jackson looked for the safe, Smith hit Doria on the head with the butt of the .357. 7RP 1448-49. After Jackson found the safe and returned from the bedroom, Smith said they needed to "get rid of" Doria because he knew where Jackson lived. 7RP 1450-51.

Spencer continued moving plants toward the door when he noticed Smith stabbing Doria in the back. 7RP 1454-56. Jackson then came over and stabbed Doria one time in his back. The knife was then handed to Spencer and he, too, stabbed Doria once in the back, explaining at trial that "we were all in this together." 7RP 1457-59. Smith checked Doria's pulse and then stabbed him in the throat. 7RP 1459-61.

They were getting ready to move the plants down and into his Blazer when Abrazado returned home. 7RP 1464-65. He opened the door and Smith and Jackson pulled him inside. While Abrazado was on his knees, Jackson slashed his throat. 7RP 1465-66. They loaded the plants into Doria's truck and left. 7RP 1466-68. Jackson and Smith were in Doria's truck and Spencer drove his Blazer. 7RP 1468-70.

Spencer testified they returned to Jackson's apartment and unloaded the plants. 1470-74. Once finished, Jackson said he and Spencer needed to get rid of Doria's truck. They drove to a casino parking lot, Jackson parked the truck, and they returned to the Jackson's apartment in the Blazer. 7RP 1475-77. A police officer found the vehicle in the casino lot two days later. 7RP 901-02.

For his participation, Spencer received two marijuana plants and a laptop computer. 7RP 1481-82. Smith kept the knife and .357 and left the

SKS in the Blazer. 7RP 1483. Spencer sold the plants to a friend and the SKS to a man he knew from the army. 7RP 1552.

Spencer testified he met Michael Johnston about one month after the stabbings and moved into Johnston's apartment about two months after they met. 7RP 1584-87. Spencer said he never told Johnston he robbed and cut the throat of a marijuana dealer. He denied being promised \$2,000 for his participation and receiving the money. 7RP 1587-88. He said he sold the SKS before moving into Johnston's apartment and did not think Johnston ever handled the rifle. 7RP 1589-90.

Johnston testified he saw Spencer with the SKS shortly before he moved into his apartment and handled the rifle for about 10 minutes. 7P 1838-39. Spencer later told him about the robbery. Specifically, Spencer said he slit the marijuana dealer's throat and received \$2,000 for his participation. 7RP 1840. Johnston gave police a statement on the same day Spencer was arrested. 7RP 1843-44.

Detective Daniel Davis was one of the officers who interviewed Spencer. 7RP 1676-77, 1729. Toward the beginning of the interview, Davis told Spencer, "What I want to kind of emphasize to you, Pierre, is that this is your free pass, I mean, as far as really getting out there what your role in this situation was." 7RP 1737. Davis testified he meant he

was telling Spencer "to dish the dirt out here and really wring it out dry and tell the truth." 7RP 1747-48. Davis did not want Spencer to minimize his own involvement and wanted him to feel comfortable. 7RP 1748.

Natausha Sabin-Lee testified she began dating Smith about six months before the robbery. 7RP 1271-72. They rented a town home and lived together until Smith moved out about a month before the crimes. 7RP 1272-73.

Either on the day of the crimes, or some time thereafter, Smith called her and said "he" had committed a robbery and had marijuana plants. 7RP 1281-82, 1306, 1328-30. Sabin-Lee testified it was also possible Smith said "we" did a robbery. 7RP 1331. Because she had heard a marijuana dealer had been killed nearby, she asked Smith whether the plants had anything to do with the killing. 7RP 1328-28. Smith denied any connection between the two and said the plants were medical marijuana from the University of Washington. 7RP 1281-82, 1288-89, 1328-30.

Brian Moore, who went by "Phaze," testified Jackson called and asked him if he could drop off a few marijuana plants at Phaze's apartment. Jackson said he bought the plants for a good price and wanted him to hold them. Phaze gave his permission and left his home open to

assist Jackson. When he returned home from work, several plants were inside his apartment. He did not know how to care for them and they died within one month. 7RP 1620-23.

2. *Voir Dire and Order Sealing Jury Questionnaire*

The judge brought up the subject of private questioning of individual venire persons at the outset of jury selection, noting "we have some recent cases which talk about closing the courtroom or not closing the courtroom in the event that a juror wishes to discuss things privately." 7RP 49. The court then explained its procedure, stating the defendants have a right to a public trial and would have to decide whether they want to waive the right and request closure. 7RP 49-52. The questioning of individual jurors ultimately occurred in the open courtroom. 7RP 235-269.

The court and parties used a jury questionnaire to assist them in jury selection. 5RP 21, 27, 6RP 4-10, 7RP 4. The court said "the way that we have always done it" was to require the parties to return their copies of the questionnaires to judicial assistant for shredding once jury selection ended. 7RP 69-70. The court would retain the original set of questionnaires and order them sealed once voir dire ended, thereby giving jurors "some expectation of privacy[.]" 7RP 70. The court asked

Jackson's counsel whether he was satisfied with the process, and counsel said, "Yes." 7RP 70.

The first page of the questionnaire stated:

The information obtained through this questionnaire will be used solely for the purpose of selecting a jury. The questionnaire will become part of the court's permanent record and will not be distributed to anyone except the lawyers and the judge. The original will be filed under seal and no one will be allowed access by court order.

Supp. CP __ (no sub. no., Jury Questionnaire, filed 2/3/2009).

During introductory comments to the venire, the trial court explained the juror questionnaires would be sealed and kept in a special place by the clerk. 7RP 103-04. Consistent with that announcement, the court entered an order sealing the questionnaire. Counsel for the state and the defendants also signed the order. Supp. CP __ (no sub. no., Order to Seal Jury Questionnaires, 2/6/2009), attached as appendix.

3. *Improper Vouching for Spencer's Credibility*

During opening statement, the prosecutor informed jurors the "third villain" responsible for the murders was Pierre Spencer. 7RP 516.

Spencer, the prosecutor told jurors,

agreed with the State of Washington to tell you the truth about what happened in exchange for a fairly modest leniency. He has stepped up. He has pled guilty to the charges against him. You will learn that he is looking at approximately 30 years of hard time in prison. I don't mean 30 years' sentence, serve five years, and get

out on patrol [sic]. The evidence will show you that he is looking at three decades in prison as punishment for his role, and that is after providing truthful testimony to you.

7RP 516-17.

Spencer's plea agreement was admitted as Exhibit 263 without objection. 7RP 1351-52. On direct examination, the prosecutor asked Spencer what type of information he was bound to provide according to the agreement. Spencer testified he was obligated to give a truthful account of the events that occurred in Doria's apartment and to cooperate with the investigation. 7RP 1352.

Reiterating Spencer's obligation to be truthful, the prosecutor asked, "And was it, basically, your understanding that you had an ongoing duty to provide truthful information in connection with this case?" 7RP 1354. Spencer answered in the affirmative. 7RP 1354.

Almost immediately thereafter, the prosecutor asked, "If you have failed to comply with the Plea Agreement, what's your understanding as to what happens?" 7RP 1354. Spencer answered, "It is life without parole." 7RP 1354. Then, "If you provide information that is not truthful, what is your understanding of what happens to you?" 7RP 1354. Spencer responded, "I will get life without parole." 7RP 1354. After a few more questions, the prosecutor asked, "If you provide truthful information, if

you cooperate, if you meet with the attorneys for both sides, do everything that you are supposed to do, how much time do you understand that you are looking at that point?" 7RP 1355. Spencer replied, "25 years, something like that." 7RP 1355.

The prosecutor then reviewed a copy of Spencer's guilty plea form, which was admitted without objection as Exhibit 262. 7RP 1357-58. After reading the factual bases set forth in the plea form, the following exchange occurred: "So what happens to you today, Mr. Spencer, if you say something that is not true? My plea agreement is void. What happens to you? I get life without parole." 7RP 1362.

On cross examination, Spencer testified that when he gave his statement to police in November 2008, he did not believe the state was going to consider giving him leniency. 7RP 1512. Smith's attorney asked Spencer whether under the terms of the agreement, he would be pleading guilty to first degree murder and first degree manslaughter. 7RP 1514-15. Spencer said "yes." 7RP 1515. Smith's counsel asked Spencer if he expected to be sentenced to 25 years in prison, and Spencer said "yes." 7RP 1515.

On redirect examination, the prosecutor asked, "[I]s it your understanding that you will get that deal regardless of whether you tell the

truth?" Spencer answered, "No sir." 7RP 1591-92. On recross examination, Jackson's counsel asked, "Isn't it true that the person who decides whether or not you are being completely truthful is . . . the prosecutor?" 7RP 1599. Spencer answered, "I don't think so, sir." 7RP 1599.

During closing argument the prosecutor relied on the plea agreement in asserting Spencer was credible:

He was told, from day one, you need to tell the truth. Never was he told, hey, you need to implicate Jackson; you need to implicate Smith; you need to make the State's case work. What he was told, from day one, was that you have to tell the truth. He knows because he has signed this written plea agreements that tells them in no uncertain, terms, if you don't tell the truth, life in prison, no parole. That is a huge incentive for him to come in here and take his oath seriously and tell you the truth.

7RP 1884-85.

4. *Jury Verdicts and Sentence*

The jury found Jackson guilty of each charged offense, found he was armed with both a knife and a gun during each offense for purposes of sentencing enhancement, and found the existence of all aggravating factors with respect to the two premeditated murder counts. CP 249-64.

To find Jackson guilty of first degree robbery, the jury necessarily found he or an accomplice "was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily

injury." CP 239 (instruction 31, robbery "to-convict" instruction).⁵ To find guilt for first degree burglary, the jury found Jackson or an accomplice "was armed with a deadly weapon." CP 241 (instruction 33, burglary "to-convict" instruction).⁶

For purposes of sentence enhancement, a "deadly" weapon was defined as "an implement or instrument that has the capacity to inflict death and, from the manner in which it was used is likely to produce or may easily produce death." It was also defined as a "knife having a blade longer than three inches." Finally, a "deadly weapon" was also defined as a "firearm . . . whether loaded or unloaded." CP 248 (instruction 38).

The trial court imposed sentences of life in prison without parole for the premeditated murder counts and standard range sentences for first degree robbery and first degree burglary. The court imposed no sentences for first degree felony murder, finding those two counts merged into the other murder counts. Finally, the court imposed standard enhancements for being armed with (1) a knife and (2) a firearm. CP 269-81.

⁵ RCW 9A.56.200(1)(a)(i), (ii), (iii).

⁶ RCW 9A.52.020(1)(a).

D. ARGUMENT

1. SUMMARILY SEALING THE JURY QUESTIONNAIRES VIOLATED THE RIGHT TO OPEN COURT RECORDS.

The trial court sealed the jury questionnaires without first weighing the need for sealing against the constitutional right to public court records. The court committed constitutional error requiring remand for reconsideration of the order to seal.

a. The Order Sealing Must be Reconsidered.

Under both the Washington and United States constitutions, a defendant has a constitutional right to a public trial. Const. art. I, § 22; U.S. Const. amend. VI; State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. Easterling, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system, particularly in the context of a criminal proceeding." State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).⁷

⁷ According to ACORDS, Momah filed a motion to reconsider

The right to a public trial encompasses voir dire. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); see State v. Frawley, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to jury questionnaire, violated right to public trial).

The right to a public trial is not absolute. Momah, 217 P.3d at 325; State v. Bone-Club, 128 Wn. 2d 254, 259, 906 P.2d 325 (1995); United States v. Lnu, 575 F.3d 298, 305, cert. denied, ___ S. Ct. ___, 2009 WL 3561529 (3d Cir. 2009). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. Momah, 217 P.3d 325. Before a court can close any part of a trial from the public, it must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004).

The Bone-Club requirements are:

October 28, 2009. The Supreme Court requested the state file an answer, which it did December 7. The Supreme Court number is 81096-6.

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure. 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. 4. The court must weigh the competing interests of the proponent of closure and the public. 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Article I, section 10 guarantees public access to court records as well as court proceedings. State v. Waldon, 148 Wn. App. 952, 957, 202 P.3d 325, review denied, 166 Wn.2d 1026 (2009). In Waldon, the court reversed a trial court's order sealing a record on conviction without incorporating the Bone-Club factors into its analysis. Waldon, 148 Wn. App. at 967.

Relying on Waldon, the court in Coleman held a trial court must conduct the Bone-Club analysis before sealing jury questionnaires. State v. Coleman, 151 Wn. App. 614, 623, 214 P.3d 158 (2009). The court held juror questionnaires are "court records" under Article 1, section 10, and reasoned there is no meaningful difference between a court record that

contains written responses to a questionnaire and spoken responses during voir dire. Coleman, 151 Wn. App. at 621.

In Jackson's case, the trial court did not consider the Bone-Club factors before sealing the questionnaires. This was error under Coleman and Waldon.

b. The remedy is remand for reconsideration.

Where courts have found improper closure of voir dire, the remedy has been reversal for a new trial. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310, 316 (2009) ("denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed."); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008) ("As Erickson's failure to object to the process does not constitute a waiver and because we presume prejudice, we reverse and remand for a new trial."), petition for review pending; State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007) ("Prejudice is presumed, and the remedy is a new trial.").

In Coleman, however, the court rejected appellant's structural error claim, finding (1) the questionnaires were used only for jury selection, which occurred in open court; and (2) because the questionnaires were not sealed until several days after the jury was seated and sworn, "there is nothing to indicate that the questionnaires were not available for public

inspection during the jury selection process." Coleman, 151 Wn. App. at 623-24. Under the circumstances, the court found, the proper remedy was remand for reconsideration of the order sealing the questionnaires under Bone-Club. See Momah, 217 P.3d at 326 (if appellate court finds violation of defendant's right to public trial, "it devises a remedy appropriate to that violation.")

The circumstances in Jackson's case are similar to those in Coleman. First, the questionnaires were used for jury selection, all of which occurred in open court. Second, the jury questionnaire was filed in open court on the day voir dire began and sealed the day after it ended. The record does not reveal whether the public could have viewed the questionnaires during voir dire. This court should remand for reconsideration of the order sealing the questionnaires.

c. Jackson Did not Invite or Waive the Error.

Until Momah, courts consistently held the failure to object to private court proceedings did not waive the issue. Easterling, 157 Wn.2d at 176 n.8; Brightman, 155 Wn.2d at 517; Orange, 152 Wn.2d at 801-02; Bone-Club, 128 Wn.2d at 257. And in Coleman, the court addressed the closure issue even though neither party objected to the order. Coleman, 151 Wn. App. at 618-19.

The Momah Court agreed the failure to object did not constitute a waiver such that Momah was prohibited from raising the issue for the first time on appeal. Momah, 217 P.3d at 328. Combining the concepts of waiver and invited error, however, the Court found Momah's situation distinguishable because defense counsel affirmatively advocated for closure of voir dire, argued for its expansion, and actively participated in the private questioning. Momah, 217 P.3d at 328-29. Additionally, "and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests." Momah, 217 P.3d at 327.

Extensive media coverage of Momah's case caused the defense to request individual questioning of all members of the panel for fear that those members with prior knowledge of the case would contaminate the entire venire. Momah, 217 P.3d at 324. The Court held it was important to harmonize the competing article I, section 22 rights to a public trial and to an impartial jury. Momah, 217 P.3d at 327. Observing courts have used the invited error rule to analyze the effect tactical choices have on alleged error, the Court "presume[d] Momah made tactical choices to achieve what he perceived as the fairest result." Momah, 217 P.3d at 328-29. More specifically, the Court found defense counsel "made a deliberate

choice" to pursue private questioning to avoid contamination of the venire. Momah, 217 P.3d at 329. Concluding the facts and effect of the closure were "significantly different" than previous cases, the court held reversal of the convictions "cannot be the remedy under these circumstances." Momah, 217 P.3d at 329.

While this combined "invited error/waiver" analysis may apply to the facts in Momah, it does not apply to Jackson's case. Unlike in Momah, Jackson's counsel did not advocate for sealing the questionnaire and his assent to sealing the jury questionnaires cannot fairly be described as "tactical." Instead, he merely acquiesced to the court's standard method of handling such matters. See Erickson, 146 Wn. App. at 206 n.2 (Erickson "did not ask the trial court to close the courtroom. He merely acquiesced to the trial court's proposal and Erickson's failure to object does not waive his right to public trial under article I, section 22.").

Additionally, unlike in Momah, no one expressed concern about media coverage or the possibility of venire persons who may have prejudged Jackson's case. Therefore, the trial judge did not seal the questionnaire to safeguard Jackson's constitutional right to a fair trial by an impartial jury, but rather to protect the privacy of individual jurors.

Moreover, the invited error doctrine is designed to prohibit a defendant from setting up an error at trial and later complaining about it on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). It applies only where the defendant affirmatively acted to knowingly and voluntarily set up the error. In re Personal Restraint of Call, 144 Wn.2d 315, 328-329, 28 P.3d 709 (2001); State v. Hockaday, 144 Wn. App. 918, 924 n.5, 184 P.3d 1273, 1276 (2008). Similarly, waiver of a constitutional right requires knowing, intentional, and voluntary conduct. State v. Ashue, 145 Wn. App. 492, 502, 188 P.3d 522 (2008).

Under these rules, Jackson did not invite the court's error or waive his right to challenge it because it is reasonable to infer neither the court nor either party knew the new rule requiring a trial judge to consider the Bone-Club factors before sealing a jury questionnaire. First, the decision in Coleman issued well after the order to seal in Jackson's case. See State v. Cuble, 109 Wn. App. 362, 370, 35 P.3d 404 (2001) (noting trial counsel's strategy may have been explained by fact trial occurred before Supreme Court issued opinion on same subject).

Second, in contrast to the silence regarding the right to open court records, the trial court referred to "recent cases" addressing private voir

dire and informed defense counsel they could "waive" their right to open proceedings. Jackson did not waive this right and the court conducted voir dire, even of individual jurors, in open court. This suggests counsel would not have acquiesced in the order to seal had he been aware the trial court was committing legal error.

In summary, Jackson neither knowingly "set up" the trial court's error nor waived his right to assert the error on appeal under the reasoning of Momah. This Court should therefore remand the closure order for reconsideration under Bone-Club.

2. THE PROSECUTOR VOUCHER FOR SPENCER'S CREDIBILITY, WHICH DEPRIVED JACKSON OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR JURY TRIAL.

A prosecutor's misconduct may deprive the defendant of his constitutional right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment. Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The prosecutor in Jackson's case relied on Spencer's plea agreement, specifically the requirement that he testify truthfully, to vouch for his credibility. A prosecutor may not vouch for the credibility of witnesses. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Spencer provided the only evidence directly implicating

Jackson in the premeditated murders. His credibility was therefore critical. Vouching is particularly troubling in cases where the credibility of the witnesses is crucial. U.S. v. Combs, 379 F.3d 564, 576 (9th Cir. 2004). This Court should reverse Spencer's premeditated murder convictions and remand for a new trial.

a. The Prosecutor Improperly Vouched for Spencer's Credibility by Using the Plea Agreement.

One form of vouching occurs where the prosecutor elicits testimony a witness entered into a plea agreement that contained a requirement the witness testify truthfully. See, e.g., United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007); United States v. Rudberg, 122 F.3d 1199 (9th Cir. 1997); United States v. Necochea, 986 F.2d 1273 (9th Cir. 1993); United States v. Smith, 962 F.2d 923 (9th Cir. 1992); United States v. Wallace, 848 F.2d 1464, 1473-1474 (9th Cir. 1988); United States v. Shaw, 829 F.2d 714 (9th Cir. 1987), cert. denied, 485 U.S. 1022 (1988); United States v. Roberts, 618 F.2d 530 (9th Cir. 1980).

Courts condemn this type of evidence because it implies the state can confirm the witness's testimony and thereby enforce the truthfulness condition of its plea agreement. Wallace, 848 F.2d at 1474. Discussing a plea agreement promise suggests "the prosecutor is forcing the truth from

his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." Roberts, 618 F.2d at 536. The prosecutor may not imply the state has "taken steps to assure the veracity of its witnesses." United States v. Simtob, 901 F.2d 799, 805 (9th Cir. 1990). Conveying the message either explicitly or implicitly is improper. Roberts, 618 F.2d at 536.

The Washington Court of Appeals relied on Roberts in State v. Green, 119 Wn. App. 15, 24-25, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035 (2004), cert. denied, 543 U.S. 1023 (2004). A witness in Green testified under an immunity agreement that required him to "testify truthfully" with the stated intent of "secur[ing] the true and accurate testimony" of the witness. Green, 119 Wn. App. at 24, 79 P.3d 460. The prosecutor, anticipating cross examination about the agreement, moved to admit the entire agreement, without redactions, as an exhibit during direct examination. The prosecutor said it did not intend to highlight the "testify truthfully" proviso or argue the witness was credible because he testified consistently with the agreement. The trial court found the agreement admissible. Green, 119 Wn. App. at 22.

The Green court, held the trial judge erred by not first redacting the truthfulness provisions from the agreement because they were "prejudicial

and improperly vouched for [the witness's] veracity." Green, 119 Wn. App. at 24. This Court also held the state could have asked the witness about the existence of the agreement as well as the reasons for cooperating on direct examination, but not about the purpose of the accord or its requirement that the witness "testify truthfully." Green, 119 Wn. App. at 24.

This Court recently declined to follow Green in State v. Ish, 150 Wn. App. 775, 786-87, 208 P.3d 1281, review granted, ___ Wn.2d ___, (No. 83308-7). The trial court ruled the state could elicit testimony that one of its witnesses promised to testify truthfully in a plea agreement to rebut any defense inference that the agreement says, "'You can lie as much as you want to. We just want you to get up there and testify.'" Ish, 150 Wn. App. at 781.

During cross examination, defense counsel questioned the witness about the terms of the plea agreement. The witness admitted violating several of the terms and acknowledged the state had to issue a material witness warrant to compel him to testify. Ish, 150 Wn. App. at 781-82. On redirect examination, the State asked the witness whether he knew if the agreement was going to be revoked. The witness answered, "No, I don't." Ish, 150 Wn. App. at 782. The prosecutor asked whether one of

the terms of the agreement was that the witness testify truthfully. The witness answered, "Yes." Id. The prosecutor then asked the witness if he testified truthfully, and the witness answered, "Yes, I have." Id.

This Court held the trial court did not err by admitting the evidence. Ish, 150 Wn. App. at 786-87. Citing State v. Kirkman,⁸ this Court held the evidence that the plea agreement required the witness to testify truthfully "merely set the context for the jury to evaluate" the witness's testimony. Ish, 150 Wn. App. at 787. This Court also observed prejudicial error occurs only when the prosecutor clearly expresses a personal opinion as opposed to arguing an inference from the evidence. Ish, 150 Wn. App. at 786 (citing State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)).

There are several reasons not to follow Ish in Jackson's case. First, the clear import of the prosecutor's examination and argument was that the prosecutor personally believed Spencer's story. Second, the prosecutor introduced the evidence during opening statement and again on direct examination before there was a need to rebut anything. At no time, unlike in Ish, did the defense elicit evidence from Spencer or any other witness that Spencer violated some of the terms of the agreement.

⁸ 159 Wn.2d 918, 925, 155 P.3d 125 (2007).

Third, unlike in Ish, the prosecutor relied on the truthfulness requirement of the agreement both during opening statement and closing argument.⁹ This reveals the prosecutor's intent from the start of trial was to use the agreement to unfairly bolster Spencer's credibility rather than to respond to any impeachment. In any event, neither defense counsel implied that Spencer would benefit from the agreement whether he lied or not. So, unlike in Ish, there was nothing to rebut.

Finally, in Jackson's case, the prosecutor used the truthfulness requirement of the agreement to do more than "merely set the context for the jury to evaluate" Spencer's testimony. Instead, the prosecutor plainly implied the state vetted Spencer's story and determined it was true.

For these reasons, this Court should eschew the reasoning in Ish and instead follow the longstanding analysis applied by the federal courts cited above. In one of those cases, the court emphasized that "[t]he prosecution may not portray itself as a guarantor of truthfulness." Roberts, 618 F.2d at 537. This is the portrayal made by the prosecutor during examination of Spencer and during both opening statement and closing argument. The prosecutor committed misconduct.

⁹ In contrast, the prosecutor in Ish argued the state's goal was to "seek justice" and "to seek the truth," but the trial court sustained an objection to this argument and struck the comments. 7RP at 782.

b. Jackson Did not Waive This Issue Because the Prosecutor's Misconduct was Flagrant and Ill-Intentioned.

Defense counsel failed to object to the prosecutor's examination of Spencer or his argument. The failure to object waives a claim of prosecutorial misconduct unless the misconduct is so flagrant and ill-intentioned it could not have been cured by an admonition to the jury. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007).

"Vouching for a government witness in closing argument has often been held to be plain error, review able even though no objection was raised." Roberts, 618 F.2d at 534. In Jackson's case, of course, the prosecutor not only vouched for Spencer during argument but also during examination of the witness.

The reason for the prohibition on vouching is clear. Great potential for jury persuasion arises from a prosecutor's status and role in government. United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978); see State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (prosecutor's statements made during trial may often be perceived by jurors as being especially reliable or trustworthy). Where there is conflicting testimony, it is for the jury to determine which witnesses are

telling the truth. United States v. Richter, 826 F.2d 206, 208 (2d Cir. 1987); State v. Castenada-Perez, 61 Wn. App. 354, 360, 810 P. 2d 74, review denied, 118 Wn.2d 1007 (1991). Vouching for the credibility of a witness is an improper invasion of the jury's exclusive province as fact-finder. State v. Mendoza-Solorio, 108 Wn. App. 823, 834, 33 P.3d 411 (2001).

Spencer's credibility was the key to the state's case. No physical evidence implicated Jackson in the killings and in his statement to police, he said he took no part in the planning of the crimes or the killings. There is, therefore, a substantial likelihood the prosecutor's improper invasion of the jury's truth-finding province unfairly affected the verdict. State v. Padilla, 69 Wn. App. 295, 301-02, 846 P.2d 564 (1993). Moreover, the misconduct was not the type to be remedied by a curative instruction.

In State v. Sargent, the prosecutor's comments bolstered the credibility of the only witness directly linking Sargent to the crime. 40 Wn. App. 340, 345, 698 P.2d 598, 602 (1985). The court found the prosecutor's remarks "could not have been cured with an appropriate instruction, and the remarks were so prejudicial as to deprive Sargent of a fair trial." Sargent, 40 Wn.2d at 345.

Similarly, the prosecutor's arguments and examination could not have been cured with an appropriate instruction. The prosecutor's repeated references to the truthfulness requirement of the plea agree constitutes flagrant and ill-intentioned misconduct. See State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (prosecutor's repeated attempt to bolster witness's trial testimony and credibility by instilling inadmissible evidence in juror's minds "was so flagrant as to constitute misconduct."); State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) ("the incidents of misconduct throughout this trial were so numerous as to irreparably taint the proceedings.").

c. The Prosecutor's Misconduct Requires Reversal.

Where misconduct is flagrant and ill intentioned, it is necessarily reversible error. State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001) ("If the misconduct was so flagrant and ill intentioned that no curative instruction could obviate the prejudice engendered by the misconduct, then the conviction is overturned."); State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) ("If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.") (quoting State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d

500 (1956)). Because the prosecutor's misconduct was flagrant, this Court should reverse Jackson's convictions.

The same result obtains because the misconduct was not harmless. Constitutional error is presumed prejudicial and the State must prove beyond a reasonable doubt the error is harmless. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The state cannot meet its burden here with respect to the premeditated murder counts. The state offered no physical evidence suggesting Jackson intended or premeditated the murders. Jackson admitted being in Doria's apartment and allowing Spencer and Smith into the apartment. But he denied planning the offenses or taking part in the murders. Spencer provided the only evidence Jackson stabbed either of the victims. As an accomplice with the built-in motivation to shift blame elsewhere, Spencer was not a credible witness.

By vouching for Spencer through argument, examination, and introduction of his plea agreement, including his out-of-court promise to testify truthfully in return for reduced charges, the prosecution suggested jurors should believe Spencer and disbelieve Jackson's version of events. The misconduct went to the heart of Jackson's defense, which was that the

state failed to prove him guilty of premeditated murder beyond a reasonable doubt. 7RP 1974-76, 1980-81, 1984.

The state cannot establish beyond a reasonable doubt that the improper vouching was harmless. Because the error was not harmless, Jackson's convictions for first degree premeditated murder with aggravating factors must be reversed and the case remanded for a new trial, with instructions to exclude Spencer's out-of-court promise to testify truthfully in return for consideration from the prosecutor.

3. THE IMPOSITION OF FIREARM AND DEADLY WEAPON ENHANCEMENTS FOR FIRST DEGREE ROBBERY AND FIRST DEGREE BURGLARY VIOLATED THE CONSTITUTIONAL PROHIBITIONS ON DOUBLE JEOPARDY.¹⁰

Among the elements of Jackson's first degree robbery charge was commission of the crime while he or an accomplice "was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly

¹⁰ Jackson acknowledges the Court of Appeals has in several cases rejected the same argument. See State v. Tessema, 139 Wn. App. 483, 493, 162 P.3d 420 (2007), review denied, 163 Wn.2d 1018 (2008); State v. Nguyen, 134 Wn. App. 863, 867-68, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008), cert. denied, 129 S. Ct. 644 (2008). But the Supreme Court has accepted review of this issue in State v. Kelley, 146 Wn. App. 370, 374-75, ___ Wn. 2d ___, 189 P.3d 853 (2008), review granted, 165 Wn.2d 1027 (2009) and State v. Aguirre, 146 Wn. App. 1048, 2008 WL 4062820 (2008) (NO. 36186-8-II) (unpublished), review granted, 165 Wn.2d 1036 (2009). Jackson raises this issue to preserve it for possible future litigation.

weapon or inflicted bodily injury." CP 239. An element of first degree burglary was commission of the crime while he or an accomplice "was armed with a deadly weapon." CP 241. Those were also elements of the sentencing enhancements for those offenses. Using the same facts for both conviction and sentence enhancement violated double jeopardy. This Court should reverse and remand for vacation of the sentence enhancements.

The Fifth Amendment and article I, section 9 of the Washington Constitution protect criminal defendants from being punished multiple times for the same crime. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). Although this is a constitutional protection, in deciding whether multiple punishments are allowed, the judicial inquiry is limited to determining whether the Legislature intended more than one punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the intent is clear and the Legislature authorized cumulative punishments under two different statutes, double jeopardy is not offended and the court's analysis ends. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

The statutes at issue in Jackson's case are RCW 9A.56.200 (a)(i) and (ii) (first degree robbery), RCW 9A.52.020(1)(a) (first degree

burglary) and RCW 9.94A.533(3) (firearm sentence enhancement) and (4) (deadly weapon sentence enhancement). RCW 9.94A.533 is a product of Initiative 159, which the Legislature enacted without amendment in 1995. State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999). The measure shows the voters' intent to exempt crimes of which possession of a firearm is an element, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.533(3)(f).

It appears, however, voters were unaware that similar redundant punishment would result from using possession of a firearm or deadly weapon to enhance a sentence for an offense already requiring a firearm or deadly weapon as an element. There is no language showing the intent to punish crimes committed with a firearm again with a firearm enhancement. This is a change from earlier law, where the legislative intent to attach two punishments was clear in the language itself. See State v. Adlington-Kelly, 95 Wn.2d 917, 924, 631 P.2d 954 (1981) (presence of firearm does not elevate second degree assault to first degree assault because firearm is not necessary element for any degree of assault)

Of course, Initiative 159 became law before the changes brought about by Apprendi and Blakely, where the Supreme Court held that any fact that increases the maximum punishment faced by a defendant must be

submitted to a jury and proved beyond a reasonable doubt, even if the fact is labeled a “sentencing enhancement” by the Legislature. Apprendi v. New Jersey, 530 U.S. 466, 476-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 306-7, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Accordingly, the Supreme Court treats sentencing factors, like elements, as facts that must be tried to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 306-7.

The Supreme Court has also held that “aggravating factors” that may make a defendant eligible for an exceptional sentence or the death penalty “operate as the functional equivalent of an element of a greater offense.” Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), quoting Apprendi, 530 U.S. at 494 n. 19.

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of double jeopardy. Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In fact, the plurality in Sattazahn found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment jury-trial right and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. Sattazahn, 537 U.S. at 111.

In the wake of these Supreme Court cases, it is now clear a Washington defendant has a right to have a jury determine beyond a reasonable doubt if he was guilty of the crime and the sentencing enhancement charged. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). As such, the commission of a crime while armed with a deadly weapon and/or while armed with a firearm is treated like an element of an offense rather than an enhancement. Those Court of Appeals decisions (e.g., Aguirre, Kelley, and Nguyen) that interpret the Double Jeopardy Clause as permitting consecutive punishments for matching elements in these circumstances should be repudiated.

This Court should vacate Jackson's sentencing enhancements for robbery and burglary. See State v. League, __ Wn.2d __, __ P.3d __, 2009 WL 4681579, at *1 (2009) ("When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.").

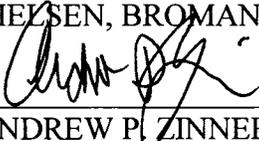
D. CONCLUSION

The trial court violated the constitutional right to open access to court records by improperly sealing the jury questionnaires. In addition, the prosecutor's misconduct violated Jackson's right to a fair trial as guaranteed by the Fourteenth Amendment's due process clause. Finally, the trial court violated double jeopardy by both imposing sentence for first degree robbery and first degree burglary while armed with a deadly weapon and/or a firearm, and enhancing the sentences for those offenses for being armed with the same weapons. This Court should reverse the premeditated murder convictions and remand for a new trial on those counts, remand for reconsideration of the order sealing the jury questionnaires under Bone-Club, and vacate the four sentencing enhancements for robbery and burglary.

DATED this 30 day of December, 2007.

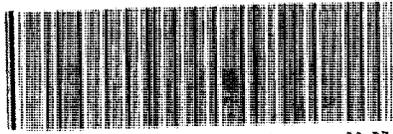
Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX



08-1-00299-5 31575301 ORSJO 02-27-09



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff ,

vs.

JACKSON, DARRELL KANTREAL,

Defendant .

Cause No. 08-1-00299-5

ORDER TO SEAL JURY
QUESTIONNAIRES

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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

Cause No. 08-1-00298-7
08-1-00299-5

vs.

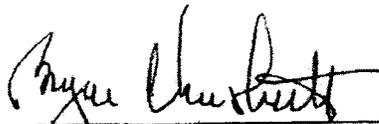
ORDER TO SEAL JURY
QUESTIONNAIRES

SMITH, TYREEK DEANTHONY,
JACKSON, DARRELL KANTREAL,
Defendant

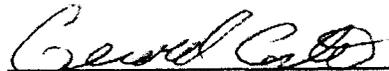
THIS MATTER having come on regularly by stipulation/motion of the parties to seal jury questionnaires, and the Court having read the files and record herein, Now, Therefore, it is hereby

ORDERED that the jury questionnaires in the above matter be sealed and not opened, except by counsel of record or upon order by the above-entitled Court.

DATED February 5th, 2009.



Judge BRYAN CHUSHCOEF



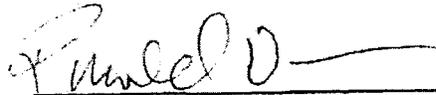
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39077-9-II
)	
DARRELL K. JACKSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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TACOMA, WA 98402

- [X] DARRELL K. JACKSON
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1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

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12/30/09 11:17 AM
12/30/09 11:17 AM
12/30/09 11:17 AM

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2009.

x *Patrick Mayovsky*