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DIVISION II

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STATE OF WASHINGTON

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

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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MONTEECE TRUSEAN SMITH-LLOYD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 08-1-05094-9

BRIEF OF RESPONDENT

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

1. Whether the trial court properly allowed the State to amend the information after it rested its case-in-chief where that amendment did not change the crime charged and did not prejudice the defendant.
2. Whether the trial court properly imposed a firearm sentence enhancement for the first-degree robbery count where such imposition was not violative of constitutional protections against double jeopardy because it was consistent with legislative intent to impose cumulative punishments.

B. STATEMENT OF THE CASE.

1. Procedure

On October 28, 2008, Appellant Monteece Trusean Smith-Lloyd, hereinafter referred to as the “defendant”, was charged by information with robbery in the first degree in count I, unlawful possession of a firearm in the first degree in count II, possession of a stolen firearm in count III, and escape in the third degree in count IV. CP 1-3. Count I charged the defendant with burglary in the first degree “as an accomplice” under RCW 9A.56.200(1)(a)(ii) for displaying what appeared to be a firearm and included a firearm sentence enhancement. *Id.* The information listed Melvin J. Shobey as a co-defendant. *Id.*

The matter was called for trial on April 22, 2009. RP 4. Mr. Shobey pleaded guilty that same day to an amended information charging robbery in the second degree, and agreed to testify in the defendant's trial. RP 4-5.

On April 30, 2009, the State moved to dismiss count III; the defendant did not object and that motion was granted. RP 30.

Jury selection began on April 30, 2009, and concluded May 4, 2009. The prosecutor gave his opening statement on May 4, 2009, and the defense reserved its statement. RP 44. The State then took testimony from Deputy Douglas Maier, RP 45-62; RP 05/04/09 6-30, Deputy Douglas Shook, RP 05/04/09 37-57, Bryce Phinney, RP 05/04/09 57-97; RP 67-112, Misty Stephens, RP 112-124, Deputy Dennis Banach, RP 124-133, Lieutenant James Kelly, RP 133-39; Brianna Lewis, RP 139-165, Melvin Schobey, RP 165-221, Alissa Andrews, RP 221-46, Steven Mell, RP 252-291, and Deputy Eric Lopez, RP 291-306.

The State rested its case in chief on May 6, 2009, and the defendant moved to dismiss count I, robbery in the first degree. RP 300-02. The State responded to the motion to dismiss and moved to amend the information to change the phrase, in count I, from "acting as an accomplice" to "acting as either a principle (sic) or an accomplice". RP 303-304; CP 1-3; CP 6-8. The defendant did not object to the motion to

amend the information. RP 304. The Court denied the motion to dismiss and granted the motion to amend. RP 302-04.

The defendant then testified and the defense rested. RP 306-23.

The jury was instructed and the parties gave closing arguments on May 7, 2009. RP 337; RP 337-77.

On May 8, 2009, the jury returned verdicts of guilty to robbery in the first degree charged in count I, guilty to unlawful possession of a firearm in the first degree charged in count II, and guilty to escape in the third degree charged in count IV. RP 402; CP 46-48. The jury also answered the special verdict form in the affirmative, finding that the defendant was “armed with a firearm at the time of the commission of the crime in Count I”. RP 403; CP 49.

The defendant was sentenced on May 22, 2009, to total confinement of 90 months on count I, 48 months on count II, and 365 days on count IV, to be served concurrently. RP 418; CP 68-79. The court imposed 60 months for the firearm sentence enhancement consecutive to count I. *Id.*

On June 15, 2009, the defendant filed a timely notice of appeal. CP 67-79.

2. Facts

Bryce Phinney had listed a cell phone for sale on the internet site "Craigslislist" RP 60. On October 27, 2008, at about 1:00 p.m., he got a text message on his cellular telephone asking, "[a]re you still selling your cell phone." RP 05/04/09 61. Mr. Phinney testified that after a series of text messages he and the potential buyers agreed to meet at the 7-11 store in University Place. RP 05/04/09 61-62.

When he arrived he found two men, who he described as African-American, 20 to 25 years of age. RP 05/04/09 64. One was taller than the other and was wearing a "do-rag or a beanie". *Id.* Mr. Phinney said that he gestured towards them and one of them asked, "[a]re you the one with the cell phone." *Id.* Mr. Phinney gave the cell phone to the shorter man so that he could insure that it functioned. RP 05/04/09 66. That man then made a call with the telephone while the other man asked Phinney if he could have a cigarette from a package of cigarettes in Phinney's vehicle. RP 05/04/09 69-70. Mr. Phinney opened his vehicle door, grabbed the cigarettes, and sat down in the vehicle with his legs outside. RP 05/04/09 70. He then saw the man with his cell phone run "across the street". *Id.* The other man then came up to Phinney, blocked Phinney's exit from his vehicle, and lifted up his own shirt to reveal a black pistol tucked in his waistband. RP 05/04/09 70-71. The man then demanded that Phinney

give him all of the money he had in his wallet and his car keys, and told Phinney not to look. RP 05/04/09 71-75. Phinney testified that he gave the man about \$377.00 from his wallet as well as his vehicle keys. RP 05/04/09 72. The man then told Mr. Phinney that if Phinney “said anything, he would spray it all over the place” before running off in the same direction as the other man. RP 05/04/09 73.

Mr. Phinney then went inside the 7-11 store and a store clerk called the police. RP 05/04/09 74.

Pierce County Sheriff’s Deputy Douglas Maier was dispatched to that 7-11 store, which was located at 4720 Bridgeport Way West in University Place, Washington. RP 45-46. Mr. Phinney indicated that the deputy arrived about one minute after the call to police was made. RP 05/04/09 75. Mr. Phinney told the deputy that money, keys, and a cell phone were stolen from him. RP 05/04/09 13. Deputy Banach later interviewed Mr. Phinney, and Phinney told him that he had about \$400 stolen from him, in the form of “six or seven 1s, a couple 100s, and the rest were 20s.” RP 130.

Deputy Maier got descriptions of the suspects and information as to their direction of travel from Mr. Phinney, and requested a canine unit. RP 47-50. Mr. Phinney told the deputy that one suspect was a black man, approximately 20 to 21 years of age and about six feet tall, and he

described the other as a 5 foot-ten-inch tall black man. RP 49. Both were of medium build. *Id.* The shorter one was wearing a “red hoodie and black baggy sweatpants” and the other a white do-rag, a t-shirt, and jeans, with large diamond earrings in his ears. RP 50.

The canine unit responded and tracked the two suspects, later identified as the defendant and Mr. Shobey, to a residence, located at 7514 49th Street Court West, which was about four blocks from the 7-11 store. RP 52-53; RP 127. The suspects matched the physical description that was given by Mr. Phinney. RP 53.

Alissa Andrews, who lived at that residence, RP 224-25, stated that after the police arrived, she took a black bag from the defendant that contained a gun and hid it in a closet. RP 232-36. Andrews also put a cell phone in a garbage bag. RP 236.

During a subsequent search of that residence, officers found, among other things, two cell phones, RP 262-66, one of which was later identified by Mr. Phinney as the phone stolen from him, RP 05/04/09 95-96, a “black-colored knit cap,” RP 266-68, “a white do-rag”, RP 268-69, and a “9mm semiautomatic handgun”. RP 273-80. The handgun was subjected to testing and found to be operable. RP 282-84.

After they had been identified, the defendant and Mr. Shobey were arrested and read the *Miranda* warnings. RP 55. The defendant was searched incident to arrest and found to have \$377 in cash, including three

\$100 bills, one \$50 bill, two \$10 bills, and seven \$1 bills, in his pants pocket. RP 05/04/09 13, 16. Although the defendant initially identified himself to deputies as Mosses W. Malachi, Deputy Maier later found the defendant's driver's license on him, identifying him as Monteece Smith-Lloyd. RP 05/04/09 9-13.

After deputies had concluded their investigation and arrested and handcuffed him, the defendant slipped his handcuffs to the front of his body and "took off running". RP 58-59. The defendant went over two fences and ran to the north, towards the 7-11. *Id.* Deputy Douglas Shook heard the call go out that the defendant was fleeing towards Cirque Drive and responded to assist. RP 05/04/09 40-42. Sergeant Kelly located and took the defendant back into custody in the area of Cirque Drive and Bridgeport Way. RP 61; RP 05/04/09 42; RP 136-39.

Melvin Shobey testified that he pleaded guilty to robbery in the second degree in relation to the incident that occurred on October 27, 2008. RP 166-67. He testified that he knew the defendant as "Lamar" at that time, and that the defendant would come over and "kick it with him." RP 167-68. Shobey testified that he and the defendant went to the 7-11 store on October 27, 2009. RP 171-72. He stated that the defendant was going there to wait for a friend to pick him up and said that he himself was going to buy iced tea. RP 171-72. Shobey testified that, after they arrived at the 7-11, they saw "another gentleman", who "was talking about some cell phones." RP 172. Shobey said that they started talking to this other

gentleman and that he took the man's cell phone to see what kind of phone it was, but then gave it back to him. RP 174. According to Shobey, he then left and did not know what happened after that. RP 172. When asked if he just walked back to his house, Shobey said that he moved at "[k]ind of a slow-paced jog." RP 174. He did not buy ice tea. RP 174. Shobey testified that he then saw the man's cell phone about five minutes later when the defendant returned to the house and tossed it, along with another telephone, on a table. RP 176-77; *but see* RP 212. Shobey testified that the defendant was wearing "a black beanie" with "a white do-rag hanging down." RP 214-15.

The defendant testified that he stayed at the residence located at 7514 49th Street Court West the night before the incident, but denied going to the 7-11 store. RP 307-09. He denied having seen the cell phones found in the house, RP 310-12, but admitted that he ran from the police after he was arrested. RP 312. The defendant indicated that the \$377 found on him was from his mother. RP 313-14.

The parties stipulated that the defendant had "previously been found guilty of a felony defined as a serious offense, and therefore on October 27, 2008, and at all relevant times relating to this trial, was not permitted by law to possess a firearm." RP 05/04/09 36-37.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INFORMATION AFTER IT RESTED ITS CASE-IN-CHIEF BECAUSE THAT AMENDMENT DID NOT CHANGE THE CRIME CHARGED AND DID NOT PREJUDICE THE DEFENDANT.

“The Sixth Amendment to the United States Constitution, and article I, section 22 (amen. 10) of the Washington Constitution, require that a charging document include all essential elements of a crime, statutory and nonstatutory, so as to inform the defendant of the charges against him and to allow him to prepare his defense.” *State v. Phillips*, 98 Wn. App. 936, 991 P.2d 1195 (2000). See RCW 10.37.052; *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997).

An information may be amended “at any time before the verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d). “A trial court’s decision to allow the State to amend the charge is reviewed for abuse of discretion.” *State v. Ziegler*, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

“A criminal *charge* may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.” *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987)(emphasis added). The Court in *Pelkey* drew a bright line rule that any amendment from one crime to a different crime after the

State has rested its case is per se prejudicial error unless the change is to a lesser included or lesser degree crime. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995). However, because *Pelkey* deals specifically with amendments from one crime to a different crime,

[t]he rule announced in *Pelkey* is not applicable to all amendments to informations. It is not applicable, for instance, to amendments which ‘merely specif[y] a different manner of committing the crime originally charged.

State v. DeBolt, 61 Wn. App. 58, 808 P.2d 794 (1991)(quoting *Pelkey*, 109 Wn.2d at 490). See *State v. Downing*, 122 Wn. App. 185, 93 P.3d 900 (2004). Similarly, the *Pelkey* rule does not apply where the defendant has agreed to, and thereby waived his right to, object to an otherwise untimely amendment. *State v. Hockaday*, 149 Wn. App. 521, 204 P.3d 283 (2009). “Where the *Pelkey* rule does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d).” *Ziegler*, 138 Wn. App. at 809 (citing *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

In the present case, although the information was amended after the State rested its case-in-chief, the criminal charge remained unchanged. The defendant was charged in count I with robbery in the first degree before the amendment, and he was charged in count I with robbery in the first degree after the amendment. CP 1-3; CP 6-8. Rather than changing the charge, the amendment in this case only changed the phrase, in count I,

from “acting as an accomplice” to “acting as either a principle (sic) or an accomplice”. *Id.*

This change is of no legal significance. While the defendant argues that charging him as a principal “was akin to amending the Information to charge a greater crime”, Brief of Appellant, p. 8, he is simply incorrect. The law is quite clear that the elements of a crime are the same for a principal or an accomplice. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 ((1974)(citing *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *overruled on other grounds* in *State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984)). *See, e.g., State v. Bobenhouse*, 166 Wn.2d 881, 891, 214 P.3d 907, 911 (2009); *State v. McDonald*, 138 Wn.2d 680, 689, 981 P.2d 443, 449 (1999)(quoting *State v. Hoffman*, 116 Wn.2d 54, 104, 804 P.2d 577 (1991), for the proposition that “[a]ccomplice liability represents a legislative decision that one who participates in a crime is *guilty as a principal*, regardless of the degree of the participation.”)).

Therefore, regardless of whether a defendant is charged as a principal or an accomplice, the crime charged remains the same. As a result, amending the information to charge liability as a principal rather than as an accomplice, as was done here, does not change the crime charged. Not only is such an amendment unnecessary, it was legally irrelevant. *See Teal*, 117 Wn. App. at 838 (noting that “[a]n information need not allege accomplice liability in order to state the nature of the

charge; charging the accused as a principal is adequate notice of the potential for accomplice liability.”). Because the amendment in this case was not from one crime to a different crime, the *Pelkey* rule does not apply and the defendant has the burden of demonstrating prejudice under CrR 2.1(d).

The defendant has made no such demonstration nor can he. While the defendant argues that the proof required to support a conviction as a principal to a crime is much higher than that required to prove liability as an accomplice, Brief of Appellant, p. 8, he makes no showing as to why this prejudiced him in his defense of the charge. Brief of Appellant, p. 7-9. The defendant did not object to the amendment during trial, nor did he request a continuance. RP 304. A defendant’s choice not to move for continuance is an indication that an amended information is not prejudicial. *Ziegler*, 138 Wn. App. at 809-10 (citing *State v. Murbach*, 68 Wn. App. 509, 512, 843 P.2d 551 (1993)). Hence, the amendment in this case did not prejudice the defendant in any way.

Because the amended information did not change the crime charged and did not prejudice the defendant, the trial court’s decision to allow that amendment after the State rested its case-in-chief was proper, and the defendant’s conviction should be affirmed.

2. THE TRIAL COURT PROPERLY IMPOSED A FIREARM SENTENCE ENHANCEMENT FOR THE FIRST-DEGREE ROBBERY COUNT WHERE SUCH IMPOSITION WAS NOT VIOLATIVE OF CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY BECAUSE IT WAS CONSISTENT WITH LEGISLATIVE INTENT TO IMPOSE CUMULATIVE PUNISHMENTS FOR THE SAME CONDUCT.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. It applies to the States through the due process clause of the Fourteenth Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wn. Const. Art. I, sec. 9. Washington’s double jeopardy clause “offers the same scope of protection as its federal counterpart.” *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Double jeopardy claims are questions of law that are reviewed *de novo*. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

The double jeopardy clause encompass three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

Id., 127 Wn.2d at 100.

With respect to the third protection,

[a] legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. ‘With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

State v. Kelley, 168 Wn.2d 72, __ P.3d __ (2010)(quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). See *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605 (1986)(citing *Missouri v. Hunter*, 459 U.S. 359, 365, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535, 542 (1983). Therefore, “[i]f the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause.” *State v. Kelley*, 168 Wn.2d 72.

Consequently, in subjecting multiple punishments to double-jeopardy analysis, “the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed.” *Id.* “If there is clear legislative intent to impose multiple punishments for the same act

or conduct, this is the end of the inquiry and no double jeopardy violation exists." *Id.* (citing *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995)).

It is only when such legislative intent is unclear that courts may resort to the "same elements test" outlined in *Blockburger v. United States*, under which the court determines "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under this test, there is no double jeopardy violation if each crime requires proof of an element not required by the other. The Court does not even reach a *Blockburger* analysis if the legislative intent is clear. "[T]he *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent.*" *State v. Kelley*, 168 Wn.2d 72.

In the present case, the defendant was convicted in count I of robbery in the first degree under RCW 9A.56.200(1)(a)(ii), which provides for guilt when the offender "[d]isplays what appears to be a firearm or other deadly weapon". A sentence enhancement was then imposed under this count under RCW 9.94A.533(3), which requires imposition of firearm sentence enhancements for felonies if the offender or an accomplice was armed with a firearm during the commission of the felony.

In *Kelley*, the Washington State Supreme Court was very recently presented with a double jeopardy argument analogous to that put forth by the defendant here. There, the Court considered an appeal from a conviction of assault in the second degree under RCW 9A.36.021(1)(c), in which the defendant's sentence was enhanced under RCW 9.94A.533(3), and held "that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm." *State v. Kelley*, 168 Wn.2d 72.

In reaching this conclusion, the Court indicated that the first question was whether the legislature's intent was clear that cumulative punishments were intended. *State v. Kelley*, 168 Wn.2d 72. The Court noted that RCW 9.94A.533(3)(e) unambiguously states that "all firearm enhancements under this section are mandatory." *State v. Kelley*, 168 Wn.2d 72. It further noted that the firearm enhancement applies to all felony crimes except those expressly stated in RCW 9.94A.533(3)(f). It found that the fact that the exceptions are expressly stated "shows intent that crimes that involve weapons other than those [crimes] listed are *not* to be excepted." *State v. Kelley*, 168 Wn.2d 72. (emphasis in the original)(citing *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003)). Because assault in the second degree using a firearm was not among the

list of exceptions, the firearm enhancement must be mandatory even when the crime of conviction was assault in the second degree with a firearm. As a result, *Kelley* found that “[c]umulative punishment is clearly intended”, and therefore, “that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm.” *State v. Kelley*, 168 Wn.2d 72.

Indeed, the Court noted that “both the United States and Washington State Supreme Courts have held that “no double jeopardy violation occurs when additional punishment is imposed based upon the defendant’s use of a firearm or other deadly weapon during a crime, and this is true when use of the firearm or other weapon is an element of the underlying, or base, offense.” *Kelley*, 168 Wn.2d at ___ (citing *Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 533 (robbery with a firearm); *State v. Harris*, 142 Wn.2d 148, 158-60, 685 P.2d 584 (1984), *overruled on other grounds*, *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991); *State v. Caldwell*, 47 Wn. App. 317, 734 P.2d 542 (1987)).

In the present case, the defendant was convicted of robbery in the first degree by display of a firearm under RCW 9A.56.200(1)(a)(ii). This crime, like the assault in the second degree with a firearm at issue in *Kelley*, was the same when RCW 9.94A.533 was enacted as it is now. *State v. Kelley*, 168 Wn.2d 72 (citing Laws of 1975 1st Ex. Sess. ch. 260,

sec. 9A.56.200). Nevertheless, it is not among the exceptions to the firearm enhancement listed by the legislature in RCW 9.94A.533(3)(f). Therefore, the legislature must have intended the firearm enhancement to apply to this crime. Consequently, there is clear legislative intent to impose multiple punishments and no double jeopardy violation exists.

Therefore, the trial court's imposition of a firearm enhancement in this case does not violate double jeopardy, and the court's imposition of that sentence enhancement should be affirmed.

Nevertheless, the defendant urges that this analysis does not survive the decisions in *Apprendi*, *Blakely*, *Recuenco*, and *Ring*. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). He seems to argue that these cases mandate that the firearm enhancement be treated as the functional element of a second offense, and that the *Blockburger* same elements test then be applied. See Brief of Appellant, p. 10-14. His argument cannot be supported.

As an initial matter, it should be pointed out that *Apprendi*, *Blakely*, *Recuenco*, and *Ring* were all concerned with the Sixth Amendment right to a jury trial, not the Fifth Amendment right not to be

placed in double jeopardy at issue here. As a result, the defendant's argument that the firearm enhancement is the functional equivalent of an element of a separate crime "is essentially based upon semantics" and "assigns unsupportable weight to the *Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors." *State v. Kelley*, 168 Wn.2d 72 (quoting *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006)). That argument, in the words of the Court in *Kelley* "is without merit" and "[i]t is important to lay it to rest." *State v. Kelley*, 168 Wn.2d 72.

Indeed, the Court in *Kelley* rejected the virtually identical argument that "the 'offense' of being armed with a firearm (the sentence enhancement) is the same in fact and law as the second degree assault of which he was convicted" and hence, a double jeopardy violation. *State v. Kelley*, 168 Wn.2d 72. The Court found that this argument failed "to account for the fact that cumulative punishments can be imposed in the same proceeding if this is the legislature's intent, notwithstanding *Blockburger*." *State v. Kelley*, 168 Wn.2d 72.

As in *Kelley*, the defendant here seems to have "invoked *Blockburger's* rule of statutory construction without regard to the initial question whether there is clear evidence of legislative intent that

cumulative punishments be imposed.” *Id.* The Court in *Kelley* concluded that:

Apprendi and *Blakely* have not altered application of the [firearm enhancement] statute. The defendant must spend a mandatory set amount of time in addition to the sentence for the base crime. This was true when Initiative 159 [later codified as RCW 9.94A.533(3)] was enacted into law, it is plainly the intent behind the legislation, and it accords with precedent from this court and the United States Supreme Court that holds that cumulative punishments may be imposed for the same act or conduct in the same proceeding if that is what the legislature intended.

State v. Kelley, 168 Wn.2d 72.

Because it is equally clear that the legislature intended the firearm enhancement to be mandatory when the crime of conviction was burglary in the first degree by use of a firearm, there is clear legislative intent to impose multiple punishments for the act at issue here and no double jeopardy violation exists. Therefore, the trial court’s imposition of a firearm enhancement in this case does not violate double jeopardy and the court’s imposition of that sentence enhancement should be affirmed.

D. CONCLUSION.

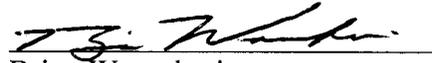
The trial court properly allowed the State to amend the information after it rested its case-in-chief where that amendment did not change the

crime charged and did not prejudice the defendant. Therefore, the defendant's conviction should be affirmed.

Further, the trial court properly imposed a firearm sentence enhancement of the first-degree robbery count where that imposition was not violative of constitutional protections against double jeopardy because it was consistent with legislative intent to impose cumulative punishments for the same conduct. Therefore, the trial court's imposition of that enhancement should be affirmed.

DATED: April 12, 2010.

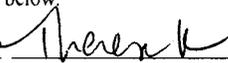
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Certificate of Service:

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.

4.12.10 
Date Signature

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