

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Court of Appeals No. 40376-5-II
Cowlitz County No. 09-1-01047-9

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH LEE MOORE

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

 I. MR. MOORE’S CONVICTION FOR ASSAULT SECOND DEGREE SHOULD BE REVERSED BECAUSE OF INSTRUCTIONAL ERROR. 1

 II. MR. MOORE’S CONVICTIONS FOR ASSAULT SECOND DEGREE AND ROBBERY FIRST DEGREE VIOLATE DOUBLE JEOPARDY..... 1

 III. THE STATE WAS REQUIRED TO PROVE THAT THE FIREARMS ALLEGEDLY USED BY MR. MOORE AND MR. REPP WERE OPERABLE AND THE STATE FAILED TO MEET THAT BURDEN. 1

 IV. MR. MOORE WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO ADMINISTER AN OATH TO MR. REPP PRIOR TO HIS TESTIMONY..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

 I. MR. MOORE’S CONVICTION FOR ASSAULT SECOND DEGREE SHOULD BE REVERSED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED ON THE DEFINITION OF DEADLY WEAPON, AND BECAUSE, IN HITTING MRS. BARRETT ON THE HEAD WITH THE BUTT OF A GUN, MR. MOORE’S ACCOMPLICE DID NOT USE THE GUN AS A DEADLY WEAPON PER SE..... 1

 II. THE COURT’S FAILURE TO MERGE THE FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY, AND THE SECOND DEGREE ASSAULT CONVICTION MUST BE DISMISSED AND THE FIREARM ENHANCEMENT AS TO THAT COUNT VACATED..... 1

 III. THE STATE FAILED TO PROVE THAT THE GUNS BRANDISHED BY MR. MOORE AND MR. REPP WERE OPERABLE FIREARMS. MR. MOORE’S FIREARM

ENHANCEMENTS MUST BE VACATED AND REPLACED WITH DEADLY WEAPON ENHANCEMENTS, HIS CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED AND DISMISSED, AND HIS CONVICTION FOR ASSAULT IN THE SECOND DEGREE REVERSED AND REMANDED FOR A NEW.....	2
IV. MR. MOORE WAS DENIED A FAIR TRIAL WHERE THE JURY WAS PERMITTED TO CONSIDER THE UNSWORN TESTIMONY OF DENNIS REPP, WHICH WAS GIVEN ON BEHALF OF THE STATE.....	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	9
I. MR. MOORE’S CONVICTION FOR ASSAULT SECOND DEGREE SHOULD BE REVERSED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED ON THE DEFINITION OF DEADLY WEAPON, AND BECAUSE, IN HITTING MRS. BARRETT ON THE HEAD WITH THE BUTT OF A GUN, MR. MOORE’S ACCOMPLICE DID NOT USE THE GUN AS A DEADLY WEAPON PER SE.....	10
II. THE COURT’S FAILURE TO MERGE THE FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY, AND THE SECOND DEGREE ASSAULT CONVICTION MUST BE DISMISSED AND THE FIREARM ENHANCEMENT AS TO THAT COUNT VACATED.....	14
III. THE STATE FAILED TO PROVE THAT THE GUNS BRANDISHED BY MR. MOORE AND MR. REPP WERE OPERABLE FIREARMS. MR. MOORE’S FIREARM ENHANCEMENTS MUST BE VACATED AND REPLACED WITH DEADLY WEAPON ENHANCEMENTS, HIS CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED AND DISMISSED, AND HIS CONVICTION FOR ASSAULT IN THE SECOND DEGREE REVERSED AND REMANDED FOR A NEW.....	18

**IV. MR. MOORE WAS DENIED A FAIR TRIAL WHERE THE
JURY WAS PERMITTED TO CONSIDER THE UNSWORN
TESTIMONY OF DENNIS REPP, WHICH WAS GIVEN ON
BEHALF OF THE STATE..... 26**

E. CONLCUSION..... 30

TABLE OF AUTHORITIES

Cases

<i>In re M.B.</i> , 101 Wn.App. 425, 3 P.3d 780 (2000).....	32, 33
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)...	20
<i>In re Winship</i> , 397 U.S. 358, 25 L. Ed. 2d 368 (1970).....	29
<i>Nirk v. City of Kent Civil Serv. Comm'n</i> , 30 Wn.App. 214, 633 P.2d 118 (1981).....	32
<i>Plankel v. Plankel</i> , 68 Wn.App. 89, 841 P.2d 1309 (1992).....	26
<i>State v. Ashcraft</i> , 71 Wn.App. 444, 859 P.2d 60 (1993).....	35
<i>State v. Avila</i> , 78 Wn.App. 731, 899 P.2d 11 (1995).....	33, 34
<i>State v. Berrier</i> , 110 Wn.App. 639, 41 P.3d 1198 (2002)	24
<i>State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988)	23
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995)	19
<i>State v. Collier</i> , 23 Wash.2d 678, 162 P.2d 267 (1945)	33
<i>State v. Dixon</i> , 37 Wash.App. 867, 684 P.2d 725 (1984)	34
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	35
<i>State v. Faille</i> , 53 Wn.App. 111, 766 P.2d 478 (1988).....	18
<i>State v. Faust</i> , 93 Wn.App. 373, 967 P.2d 1284 (1998).....	24
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	20, 21
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	29
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	35
<i>State v. Hall</i> , 46 Wn.App. 689, 732 P.2d 524 (1987)	18
<i>State v. Hoeldt</i> , 139 Wn.App. 225, 160 P.3d 55 (2007)	17, 31
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	20, 21, 22
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	16
<i>State v. Pam</i> , 98 Wn.2d 748, 659 P.2d 454 (1983).....	23
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	30
<i>State v. Petrich</i> , 101 Wn.2d 566, 693 P.2d 173 (1984)	15, 16
<i>State v. Pierce</i> , 155 Wn.App. 701, 230 P.3d 237 (2010).....	24, 26, 30, 31
<i>State v. Raleigh</i> , 238 P.3d 1211 (2010)	25, 26
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008)....	24, 25, 26, 27, 28, 29, 30
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	29
<i>State v. Shilling</i> , 77 Wn.App. 166, 889 P.2d 948 (1995).....	17
<i>State v. Shove</i> , 113 Wn.2d 83, 776 P.2d 132 (1989).....	26
<i>State v. Sledge</i> , 83 Wn.App. 639, 922 P.2d 832 (1996).....	26
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	20
<i>State v. Watkins</i> , 61 Wn.App. 552, 811 P.2d 953 (1991)	26

Statutes

RCW 9.41.010	23, 24, 25, 26, 28, 29, 31
RCW 9.94A.602.....	31
RCW 9.94A.825.....	31
RCW 9A.04.110.....	17, 31
RCW 9A.36.021.....	15, 31
RCW 9A.56.200.....	22

Rules

ER 603	32, 33
RCW 9.94A.533.....	23, 25, 26

Treatises

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC)	23
--	----

Constitutional Provisions

U.S. Const., amend. V.....	19, 20
Wash. Const. art. I., sec. 9	19, 20

A. ASSIGNMENTS OF ERROR

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CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED AND DISMISSED, AND HIS CONVICTION FOR ASSAULT IN THE SECOND DEGREE REVERSED AND REMANDED FOR A NEW TRIAL.

IV. MR. MOORE WAS DENIED A FAIR TRIAL WHERE THE JURY WAS PERMITTED TO CONSIDER THE UNSWORN TESTIMONY OF DENNIS REPP, WHICH WAS GIVEN ON BEHALF OF THE STATE.

C. STATEMENT OF THE CASE

Sixty-nine year old Beverly Barrett lives with her husband Robert in Kelso, where they run a clock repair shop out of their home. RP, p. 125-26. Robert is seventy years old and is paralyzed from the neck down (but still has use of his hands), living on a ventilator and confined to his bed. RP, p. 127, 136. On October 3rd, 2009 Mrs. Barrett was at home with her husband Robert and her grandson's girlfriend, Courtney Anderson. RP, p. 115-16. While helping Mrs. Barrett cook dinner Courtney heard a knock at the door. RP, p. 116-17. She answered the door and saw two men standing on the porch. RP 117-18. They asked if "Jason" lived there. RP 119. Courtney told them "no" and the men left. RP 120. Shortly thereafter Courtney left and walked to her own house across the street. RP 120.

After Courtney left Mrs. Barrett heard a knock on the door and answered it to find the same men who had been at the door asking for

Jason. RP 131. Mrs. Barrett told them that there was no Jason there at which point the man wearing a black knit hat pushed his way into the house. RP 131. He was holding what Mrs. Barrett believed was a gun. RP 131. The second man, wearing a red hat, then pushed his way in holding a gun that Mrs. Barrett described as a .380. RP 133-34. The man in the red hat said "Give me your money, bitch," at which point the man in the black cap came over and hit her in the head with the butt of his gun. RP 134. The man in the red cap told her "We won't hurt you if you give us your money." RP 136. She called out to her husband to tell him there were men with guns demanding money. RP 135.

The man in the black cap went to the bedroom and so did Mrs. Barrett. RP 136-37. The man in the black cap was holding a gun, described by Mrs. Barrett as a Mac-10, over Mr. Barrett. RP 137. The Barretts kept an envelope of money in their bedroom, containing money that belonged to their grandson. RP 137. The man in the red hat yelled into the bedroom "Make sure it's in there." RP 137. Mrs. Barrett reached for the envelope and handed it to Mr. Barrett, and Mr. Barrett then handed it to the man in the black cap. RP 136-37. As the men left Mrs. Barrett saw the men run toward the train depot. RP 138. There was between \$2000 and \$2500 in the envelope. RP 139.

Tammy Smith lives about two blocks away from the Barrett's home. RP 143. On the night of the robbery she was sitting on her porch with a friend when two men she knew, Joe Moore and Dennis Repp, came around the corner and asked her for a glass of water. RP 146. She said "sure" and told them to go upstairs to get some water. RP 146. When they came back down they told her they were waiting for a ride and were in a hurry. RP 147. Then a car came around the corner and they got into it and left. RP 147, 149.

Mr. Barrett told Officer Damon Blaine that the envelope contained an old coin in addition to the cash. RP 162. Mr. Barrett said the gun he was threatened with was a Mac 10, and described it as a Mac 10 because it had a long, straight clip. RP 169. Detective Voelker recovered the stolen coin from Wade Hook, who had gotten it from Dennis Repp. RP 197-98, 213.

Wade Hook picked up Joe Moore and Dennis Repp from Tammy Smith's house. RP 209-210. Hook claimed that Repp and Moore were talking about something "going down," but not about a robbery. RP 211. Hook said that Repp said something about a woman being hit, but that she was fine. RP 212. Hook bought a double-headed coin from Repp for twenty dollars. RP 213. Hook said that Moore gave him \$150 in cash from what could have been an envelope, but he wasn't sure. RP 214.

Hook testified that he took Moore and Repp to a hotel where they rented a room, and that he saw Repp pull something from his waistband that looked like a gun and hide it under the mattress. RP 215. He didn't see Moore with a gun, but saw him counting money. RP 217. Hook eventually gave the coin to Detective Voelker. RP 217-18. Mr. Hook cut a deal with the prosecutor to offer testimony against Moore. RP 222.

Dennis Repp, having entered into a plea bargain with the State, was brought to the witness stand outside the presence of the jury. RP 270. He initially refused to testify. RP 270-75. The trial court informed him he had no choice but to testify as he had no claim of potential incrimination, and that he would be held in contempt if he refused. RP 270-75. His plea bargain with the State would also be placed in jeopardy. *Id.* He agreed to testify. *Id.* He was not sworn in at any time prior to his examination. RP 270-75. He at no time promised to tell the truth under penalty of perjury. RP 270-75. The court only asked him to state his name. RP 275. Repp told the jury he pled guilty to robbery, burglary, assault and unlawful possession of a firearm for his actions at Bob's Clock Shop (the Barrett's residence and business). RP 275-76. Repp said that an elderly lady answered the door but he didn't know if she was hit. RP 277. He said he took money from the Barretts. RP 277. Repp said he was armed with a black B-B gun. RP 278. Repp said he was high on heroin,

methamphetamine and oxycontin during the incident and couldn't recall if anyone was with him when he committed the crime. RP 279. A short time later he changed his answer to say that he thought there was someone with him. RP 280.

Repp was impeached with his statement of defendant on plea of guilty in which he said that "On October 3rd, 2009, in Cowlitz County, Joey Moore and I forced our way into a residence in order to take property from the occupants. We were each armed with a firearm. While inside the residence, we pointed the guns at the occupants and demanded cash, which we got." RP 289. Repp said that he based his statement, however, on information he read from the police report and had no independent recollection of that. RP 289. Repp was adamant that when he pled guilty, he pled to having used a B-B gun. RP 294-95.

No firearms were recovered in this case. Report of Proceedings.
The jury was instructed as follows with regard to the robbery:

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

- (1) That on or about October 3rd, 2009, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;

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

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

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

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 29.

With regard to the crime of assault, the jury was instructed as follows:

To convict the defendant of the crime of Assault in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 3, 2009, the defendant intentionally assaulted Beverly Barrett with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 31.

At instruction number 23 the jury was instructed:

A firearm, whether loaded or unloaded, is a deadly weapon.

CP 36.

At instruction number 24 the jury was instructed:

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 37.

Mr. Moore did not propose any instructions. The prosecutor made the following argument during closing remarks to the jury:

The next crime, robbery. They took property from Mr. Barrett at gunpoint in his home, by threat of force. They already used force against Mrs. Barrett...

Assault for the pistol whipping of Mrs. Barrett with the handgun, with a gun during the entry.

RP, p. 441.

Mr. Moore was convicted of burglary in the first degree with two firearm enhancements, robbery in the first degree with two firearm enhancements, assault in the second degree with two firearm enhancements, unlawful possession of a firearm in the first degree, and tampering with a witness. CP 47-57. The jury also found, inter alia, that the victims were particularly vulnerable or incapable of resistance. CP 58. That finding, as well as the base charges of burglary, robbery, and tampering with a witness are not challenged in this appeal.

Mr. Moore was given a sentence of 572 months, 312 months of which are attributable to the firearm enhancements. CP 69. This timely appeal followed. CP 77.

D. ARGUMENT

I. MR. MOORE'S CONVICTION FOR ASSAULT SECOND DEGREE SHOULD BE REVERSED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED ON THE DEFINITION OF DEADLY WEAPON, AND BECAUSE, IN HITTING

MRS. BARRETT ON THE HEAD WITH THE BUTT OF A GUN, MR. MOORE'S ACCOMPLICE DID NOT USE THE GUN AS A DEADLY WEAPON PER SE.

The State's theory of the case on the second degree assault charge was that Mr. Moore or his accomplice used a deadly weapon, to wit: a firearm, to assault Beverly Barrett, proscribed by RCW 9A.36.021 (1) (c). The State relied on two acts to suggest that Mr. Moore was guilty of assault in the second degree: Pointing the gun at Mrs. Barrett to gain compliance and to create the apprehension of deadly force, and hitting Mrs. Barrett on the head with the butt of the gun. Here is what the prosecutor argued to the jury:

The next crime, robbery. They took property from Mr. Barrett at gunpoint in his home, by threat of force. They already used force against Mrs. Barrett...

Assault for the pistol whipping of Mrs. Barrett with the handgun, with a gun during the entry.

RP, p. 441. Notably, the State did not argue, nor was the jury instructed, that Mr. Moore was guilty of assault second degree because he had inflicted substantial bodily injury on Mrs. Barrett. The State elected to proceed only on the deadly weapon prong of RCW 9A.36.021.

A jury must unanimously conclude that the defendant committed a charged criminal act. *State v. Petrich*, 101 Wn.2d 566, 569, 693 P.2d 173 (1984), modified, *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105

(1988). When the State charges one count of criminal conduct but introduces evidence of multiple distinct acts, (1) the State must specify the particular act on which it relies for each conviction, or (2) the trial court must instruct the jury that it can convict only if it unanimously agrees on at least one criminal act. *Petrich*, 101 Wn.2d at 572. This requirement guards against the State's using multiple acts to prove one count, thus obscuring whether the jury unanimously based its conviction on the same act. *Petrich*, 101 Wn.2d at 572; *Kitchen*, 110 Wn.2d at 411. Nevertheless, a unanimity error may be harmless:

[I]n multiple acts cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.

Kitchen 405-06.

Because the State declined to elect which of these two distinct acts supported the charge of assault second degree, sufficient evidence must support both theories. *Kitchen*, supra. If the theory was that the assault occurred when Repp and Moore pointed guns at Mrs. Barrett to gain her compliance, then the assault was incidental to the robbery and merged with it (argued below in Part II). If the theory was that the assault occurred when Mr. Repp hit Mrs. Barrett with the butt of his gun, thus

making it a distinct act from the force used to gain Mrs. Barrett's compliance for purposes of the robbery, then the State failed to prove that the gun was a deadly weapon *per se* because the gun was not pointed at Mrs. Barrett during that act and was not used to threaten Mrs. Barrett with deadly force. Rather, it was used as a blunt instrument to inflict pain. As such, the State was required to prove the gun was a deadly weapon based on the manner in which it was used. This, the State failed to do.

Under RCW 9A.04.110 (6), a deadly weapon:

[M]eans any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

See also *State v. Hoeldt*, 139 Wn.App. 225, 160 P.3d 55 (2007). "An instrument that is not defined as a deadly weapon *per se* may still meet the statutory definition of 'deadly weapon' if it is used in a manner 'capable of causing...substantial bodily [harm].'" *Hoeldt* at 230, citing *State v. Shilling*, 77 Wn.App. 166, 171, 889 P.2d 948 (1995).

In this case, the jury was not instructed on the "manner of use" prong of the deadly weapon definition, and was merely instructed that a firearm is a deadly weapon *per se*. Using the butt of a gun to hit someone, however, does not constitute using a firearm to threaten someone with

deadly force. The reason firearms are considered deadly weapons per se is because when a person points a gun at someone, the purpose of doing so is either to make the person threatened *believe* he is about to be shot, whether true or not (which is why a gun does not have to be loaded to be considered a deadly weapon); or because the person holding the gun actually intends to shoot the person threatened.

Using the butt of gun as a blunt object to hit someone does not convey the threat that the person is about to be shot. Rather, it was used as a blunt object to inflict pain. As such, the gun, in this circumstance, was not used in the manner contemplated by the legislature when they classified a firearm as a deadly weapon per se. See e.g. *State v. Faille*, 53 Wn.App. 111, 766 P.2d 478 (1988); *State v. Hall*, 46 Wn.App. 689, 732 P.2d 524 (1987). Because Mr. Moore's accomplice did not use the gun in the manner required for it to be considered a deadly weapon per se, the court was required to instruct the jury that in order to find that Mrs. Barrett was assaulted with a deadly weapon when she was hit on the head, it had to find that the butt of the gun was a weapon, device, instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, was readily capable of causing death or substantial bodily harm. Because the jury was not so instructed, Mr.

Moore's conviction for assault in the second degree should be reversed and a new trial ordered on that charge.

Should the State argue in response that even though the jury was inadequately instructed on the definition of a deadly weapon, Mr. Moore's conviction for assault second degree should stand because of the act of Mr. Moore and Mr. Repp pointing their guns at Mrs. Barrett in order to gain her compliance and create apprehension of deadly force, then that conduct is the same conduct relied upon by the State to support the charge of first degree robbery and the second degree assault was incidental to the robbery (argued in part II).

II. THE COURT'S FAILURE TO MERGE THE FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY, AND THE SECOND DEGREE ASSAULT CONVICTION MUST BE DISMISSED AND THE FIREARM ENHANCEMENT AS TO THAT COUNT VACATED.

The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similarly, the Washington State Constitution provides that a person may not be "twice put in jeopardy for the same offense." Wash. Const. art. I., sec. 9. The constitutional guarantee against double jeopardy protects against multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); U.S.

Const., amend. V; Wash. Const., art. I, sec. 9. “Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Merger is a “doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” *State v. Vladovic*, 99 Wn.2d 413, 419, n. 2, 662 P.2d 853 (1983). Under the merger doctrine, when the degree of one offense is raised by conduct that constitutes a separate crime, the two offenses merge. *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008).

The question in *Freeman* was whether the legislature intended separate punishments for both an assault committed in furtherance of first degree robbery and the robbery. *Freeman* at 771. Two cases were consolidated in *Freeman*, one involving first degree assault and first degree robbery, and one involving second degree assault and first degree robbery. As to second degree assault, the Court held “we find no evidence that the legislature intended to punish second degree assault separately

from first degree robbery when the assault facilitates the robbery.”

Freeman at 776.

In *Freeman*, the Court noted that in both cases, to prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed assault in furtherance of the robbery. Thus, without the conduct amounting to assault, each defendant would be guilty of only second degree robbery. *Freeman* at 778. Under the merger doctrine, in the absence of contrary legislative intent, an assault committed in furtherance of a robbery merges with the robbery. *Freeman* at 778.

The Court found evidence that the legislature did not intend first degree assault to merge with first degree robbery. *Freeman* at 778. It held, however, that second degree assault and first degree robbery will generally merge unless the two crimes had an independent purpose and effect.

Freeman at 780.

In *State v. Kier*, supra, the Supreme Court reaffirmed its holding in *Freeman*, emphasizing that in cases where multiple acts could form the basis of the assault or the robbery, and where the State has failed to elect on which act it relied, it is important to look to at the facts of each case and the way in which the case was presented to the jury. *Kier* at 808.

Here, the State elected to proceed only on the “displays what appears to be a firearm or deadly weapon” prong of the robbery first degree statute. See

RCW 9A.56.200 (1) (a) (ii), CP 29. Here, as in *Kier*, the jury instruction on the robbery did not name a particular victim. *Kier* at 808, CP 29. The instruction on assault in the second degree named Beverly Barrett. CP 31. Beverly Barrett was clearly one of the two victims of the robbery because her acquiescence (through the threat of deadly force) was sought during the entry to the home, she was present when the envelope of money was taken (she, in fact, handed the envelope to Mr. Barrett who then handed it to the man in the black cap), and she jointly owned the property. Because the State did not elect which of the two possible acts of assault upon which the jury should base its decision, the rule of lenity compels a finding that the assault in this case was committed in furtherance of the robbery and Mr. Moore's convictions on both offenses violates double jeopardy. See *Kier* at 808, 811-12.

Mr. Moore's conviction for assault in the second degree violates the prohibition against double jeopardy and it should be reversed and dismissed, and the firearm enhancement attached to that count vacated.

III. THE STATE FAILED TO PROVE THAT THE GUNS BRANDISHED BY MR. MOORE AND MR. REPP WERE OPERABLE FIREARMS. MR. MOORE'S FIREARM ENHANCEMENTS MUST BE VACATED AND REPLACED WITH DEADLY WEAPON ENHANCEMENTS, HIS CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED AND DISMISSED, AND HIS CONVICTION FOR ASSAULT IN THE SECOND DEGREE REVERSED AND REMANDED FOR A NEW

TRIAL.

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533 (3). RCW 9.94A.533 (3) instructs us that the definition of a firearm is found in RCW 9.41.010. RCW 9.41.010 defines a firearm as follows: “‘Firearm’ means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” See RCW 9.41.010 (7).

Before a firearm enhancement may be imposed, the state must prove “beyond a reasonable doubt [that] the weapon in question falls under the definition of a ‘firearm:’ ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” *State v. Recuenco*, at 437 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC)). The Supreme Court has held that the firearm enhancement applies only to working firearms:

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

Recuenco, at 437 (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). Published cases decided by the Court of Appeals after *Pam* but prior to *Recuenco* took the position that *Pam*

allowed the enhancement even in the case of an inoperable gun, as long as it was a “real” gun. *See, e.g., State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284 (1998); *State v. Berrier*, 110 Wn.App. 639, 41 P.3d 1198 (2002). But *Recuenco* made clear that *Pam* prohibited the enhancement unless the state established that the gun was operable. *Recuenco*, at 437.

Since *Recuenco*, Division II of the Court of Appeals has twice addressed the question of whether a gun must be operable in order to meet the definition of a firearm under RCW 9.41.010. The first case was *State v. Pierce* decided on April 27th, 2010. *State v. Pierce*, 155 Wn.App. 701, 230 P.3d 237 (2010). In *Pierce*, the Court of Appeals, relying on the holding in *Recuenco* in which the Supreme Court stated that the jury must be presented with sufficient evidence to find a firearm operable in order for it to qualify as a firearm under RCW 9.41.010, held that Mr. Pierce’s firearm enhancements must be vacated where the State presented no evidence of the operability of the firearms. *Pierce* at 714-15. The *Pierce* Court further held that it was error for the trial court to fail to instruct the jury that it must find that a gun is operable in order for it to meet the definition of a firearm under RCW 9.41.010. *Pierce* at 714.

Then, on September 8th, 2010, a different panel of Division II¹ was presented with the identical issue decided in *Pierce*, namely whether the State must prove a firearm was operable for it to meet the definition of a firearm under RCW 9.41.010, and reached the opposite result. See *State v. Raleigh*, 238 P.3d 1211 (2010). In *Raleigh*, the Court of Appeals held that in order to qualify as a firearm under RCW 9.41.010 a gun need only be a “gun in fact” as opposed to a toy gun. *Raleigh* at 1214, citing *State v. Faust*, 93 Wn.App. 373, 380, 967 P.2d 1284. The *Raleigh* Court further held that the above-cited language found at page 437 of the opinion in *Recuenco* was merely dicta:

The cited language *Raleigh* relies on, that the firearm must be “operable,” was cited merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement. *Recuenco*, 163 Wash.2d at 437, 180 P.3d 1276. That language was not part of *Recuenco*'s holding and is non-binding dicta.

Raleigh at 1215. The *Pierce* panel of Division II, on the contrary, held that this cited language from *Recuenco* was part of the Supreme Court's holding, and not “non-binding dicta.” Curiously, the opinion in *Raleigh* did not cite, or even acknowledge, the contrary holding in *Pierce*. The only difference between *Raleigh* and *Pierce*, it must be noted, is postural: *Pierce* involved firearm enhancements under RCW 9.94A.533 whereas *Raleigh* involved a conviction for unlawful possession of a firearm.

¹ Judge Van Deren sat on both panels and joined the majority in both cases.

Pierce at 714, *Raleigh* at 1214. That postural difference is of no moment, however, because the *issue* presented was identical, to wit: Whether the State bears the burden of proving that a firearm was operable before it can meet the definition of a firearm under RCW 9.41.010. Both the crime of unlawful possession of a firearm and the sentencing enhancement for committing a crime while armed with a firearm rely on RCW 9.41.010 for the definition of a firearm. See RCW 9.41.010 and RCW 9.94A.533 (3).

Mr. Moore maintains that the language in question from *Recuenco* was, in fact, part of the holding of *Recuenco* and that the *Pierce* Court was correct in holding that the jury must be presented with evidence that a gun was operable in order to find that it meets the definition of a firearm under RCW 9.41.010, and that the jury must be instructed that the State bears the burden of proving the firearm was operable.

Washington's appellate courts identify *dicta* as that part of an opinion that is unnecessary to the Court's holding. *Dicta* is not binding authority. *Plankel v. Plankel*, 68 Wn.App. 89, 92, 841 P.2d 1309 (1992); *State v. Watkins*, 61 Wn.App. 552, 559, 811 P.2d 953 (1991). Inclusion of *dicta* in opinions tends to cloud rather than clarify the law. See e.g. *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (recognizing that *dicta* is "often...ill considered"); *State v. Sledge*, 83 Wn.App. 639, 645, 648, 922 P.2d 832 (1996). Presumably, in ruling on a case that was before it for the

second time and which had already seen the inside of the United States Supreme Court, our Supreme Court, knowing how *dicta* can muddy the waters and promote needless litigation, would have strained to avoid it in *Recuenco*.

The discussion at issue in *Recuenco* is not *dicta*, as the text demonstrates. During the portion of the opinion at the center of this dispute the majority was rebutting the argument of the dissent on the precise question before the Court: Whether the sentencing error that occurred in at Mr. Recuenco's trial was harmless. The Supreme Court was tasked with deciding whether the trial court erred in sentencing Mr. Recuenco to a firearm enhancement where the jury had only been asked to decide whether he was armed with a deadly weapon. All parties agreed that the only weapon mentioned during Mr. Recuenco's trial was a handgun. *Recuenco* at 437. The full text of the disputed portion of the opinion is this:

The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. ***The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:"*** "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC). We

have held that a jury must be presented with sufficient evidence to find a *firearm operable under this definition in order to uphold the enhancement*. *State v. Pam*, 98 Wash.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988).

Recuencoat 437. (Emphasis added).

Central to the Court's holding that the error could not be harmless (the precise issue before the Court) was the fact that although the only weapon mentioned at the trial was a handgun, there had been no evidence presented that the gun *met the definition of a firearm* under RCW 9.41.010 because there had been no evidence presented that the gun was *operable*. See *Recuenco* at p. 437. That the *Recuenco* Court considered it axiomatic that the State must prove the gun was operable (“*We have held* that a jury must be presented...”²) does not relegate this language to the lowly status of *dicta*. The language about the State bearing the burden of proving a firearm operable was central to the *Recuenco* Court's holding because the State's failure to meet that burden was one of the two facts which, taken together, rendered the error not harmless.² Indeed, the Court concluded its treatment of this issue by stating: “The jury was *not given facts supporting the firearm enhancement* nor given instructions to determine if

² The other fact that rendered the error not harmless was that because the State failed to provide notice that it was seeking a firearm enhancement, the trial court's imposition of such an enhancement violated Mr. Recuenco's right to notice and due process. See *Recuenco* at 440-41.

it was applicable in this case,” a second reference to the Court’s holding that in order for a gun to meet the definition of a firearm under RCW 9.41.010, the jury must find it was operable. *Recuenco* at 439. (Emphasis added).

Mr. Moore respectfully asks this Court to adopt the holding in *Pierce* and reject the irreconcilable holding in *Raleigh*, and hold that the State was required to prove that the guns brandished by Mr. Moore and Mr. Repp were operable firearms and the trial court was required to instruct the jury that it needed find operability in order to find that the guns met the definition of a firearm.

Here, the State did not meet its burden. Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the

State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The standard applies with equal force to sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Here, the guns were not recovered and there was no other evidence presented that would demonstrate operability. The only evidence offered by someone who actually touched one of the guns (Mr. Repp) was that he held a B-B gun. As noted by the majority in *Pierce*, the State is not required to produce the actual firearm at trial so long as there is other evidence of operability, "such as bullets found, gunshots heard, or muzzle flashes." See *Pierce* at 715, note 11. There was no such other evidence of operability in this case.

Because the State did not prove these guns were even real guns, much less that they were operable, and because the jury was not properly instructed that it needed to find the guns were operable, Mr. Moore's conviction for unlawful possession of a firearm should be reversed and dismissed due to insufficient evidence. His six firearm enhancements should be vacated and his case remanded for entry of deadly weapon enhancements, because the statute which defines deadly weapons for

purposes of a deadly weapon enhancement specifically includes firearms whether operable or not. See Former RCW 9.94A.602, recodified as RCW 9.94A.825.³, *Pierce* at 715, note 11. Mr. Moore's conviction for assault in the second degree should be reversed and remanded for a new trial. This is so because RCW 9A.36.021 (1) (c) refers to assault with a deadly weapon, and the definition of deadly weapon found in RCW 9A.04.110 (6) includes firearms. Firearms are defined by RCW 9.41.010, and in order to qualify as a firearm under that section a firearm must be operable. Firearms, so long as they meet this definition, are deadly weapons per se. See *Hoeldt*, supra. The State, as argued above, failed to prove these alleged guns were operable, but is arguably entitled to the opportunity to prove on remand that the gun Mr. Repp used to hit Mrs. Barrett was a deadly weapon based on the manner in which it was used.

IV. MR. MOORE WAS DENIED A FAIR TRIAL WHERE THE JURY WAS PERMITTED TO CONSIDER THE UNSWORN TESTIMONY OF DENNIS REPP, WHICH WAS GIVEN ON BEHALF OF THE STATE.

What occurred in this case was unusual. When Mr. Repp was called to testify the jury was not in the courtroom, presumably because the parties anticipated his recalcitrance. In an abundance of caution, they obviously thought it better to discuss the matter outside the presence of the

³ Former RCW 9.94A.602 does not refer to RCW 9.41.010 for the definition of firearm.

jury. After disabusing Mr. Repp of his belief that he was entitled to refuse to testify, the court had the jury brought back in to the courtroom. This is where the court should have sworn Mr. Repp in by requiring him to take an oath or make an affirmation to testify truthfully. See ER 603. Instead, it appears the court simply forgot this step and instead merely asked Mr. Repp to state his full name.

ER 603 provides:

Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

The purpose of requiring testimony under oath or affirmation is to provide “additional security for credibility” by impressing upon witnesses their duty to tell the truth, and to furnish the basis for a perjury charge. *In re M.B.*, 101 Wn.App. 425, 471, 3 P.3d 780 (2000), citing *Nirk v. City of Kent Civil Serv. Comm'n*, 30 Wn.App. 214, 221, 633 P.2d 118 (1981).

In *M.B.*, a consolidated case involving several juvenile appellants, the Supreme Court held that in juvenile contempt proceedings in ARY and CHINS cases, due process requires that witnesses give sworn testimony.

The Court said:

Here, the child's liberty interest is obviously substantial. The risk of error is also high, because the primary function of requiring

testimony under oath or affirmation is to provide “additional security for credibility” by impressing upon witnesses their duty to tell the truth, and to furnish a basis for a perjury charge. This function is compromised where the participants are not aware of their duty to speak truthfully...

The oath requirement is important to the truth-finding process. Failure to require testimony under oath, therefore, “taints the integrity of the entire proceeding.” ^{FN127} Because R.T.'s contempt finding was based on unsworn testimony, it is vacated.

M.B. at 471. The Court further held that because of the liberty interest involved, namely potential incarceration, the issue was one of manifest constitutional error which could be raised for the first time on appeal.

M.B. at 470.

In contrast, courts have held that in cases involving child witnesses the trial court need not administer a *formal* oath so long as the importance of truth-telling is impressed upon the witness. In *State v. Avila* the Court of Appeals stated:

Although a trial court may dispense with *formal* oaths when dealing with child witnesses, the cases cited above do not suggest that the court can dispose of an oath to tell the truth entirely. ER 603 clearly requires that the trial court administer some type of oath to tell the truth or elicit an assurance that the witness will tell the truth before allowing the witness to testify.

State v. Avila, 78 Wn.App. 731, 738, 899 P.2d 11 (1995). See also *State v. Collier*, 23 Wash.2d 678, 694, 162 P.2d 267 (1945) (court did not abuse its discretion in deviating from statutory form of oath and asking 8-year-old

witness whether he “promised” to tell the truth); *State v. Dixon*, 37 Wash.App. 867, 876, 684 P.2d 725 (1984). These cases have also held that the failure to object to such testimony at trial waives the issue on appeal because the error is not one of constitutional magnitude. *Avila* at 738. See also *Dixon* at 876 (failure to object at trial to admission of testimony of child witness who has not been administered a formal oath constitutes a wavier). However, in each of these cases the trial court, although failing to administer an oath, nevertheless impressed upon the child witness the importance of telling the truth.

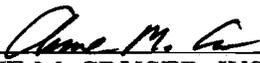
To be sure, the liberty interest of Mr. Moore, who was sentenced to 47 and ½ years in prison, is no less compelling than the liberty interest held by the juvenile appellants in *M.B.* Further, the trial court in this case engaged in no colloquy whatsoever with Mr. Repp about the importance of telling the truth, nor secure anything close to a promise from Mr. Repp that he would do so. Mr. Repp was not an inconsequential witness; he was Mr. Moore’s accomplice and his testimony was very damaging to Mr. Moore. Mr. Repp fingered Mr. Moore as his accomplice. By claiming that he actually carried a B-B gun that night he opened the door to the State’s elicitation of his statement of defendant on plea of guilty in which he admitted to carrying an actual firearm. Even if he hadn’t been confronted with his statement of defendant on plea of guilty, his testimony

that he was carrying a B-B gun was limited to *his conduct*. He made no claim that Mr. Moore carried a B-B gun. Further, he was a witness for the State, not Mr. Moore. “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable juror would reach the same result absent the error and “the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The presumption of prejudice may be overcome if and only if the reviewing court is able to express an abiding belief that the error “cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.” *State v. Ashcraft*, 71 Wn.App. 444, 465, 859 P.2d 60 (1993).

The trial court’s failure to administer an oath to Mr. Repp was not harmless beyond a reasonable doubt for the reasons set forth above. Mr. Moore was denied due process when the jury considered Mr. Repp’s unsworn testimony. His convictions should be reversed and his case remanded for a new trial.

E. CONCLUSION

Mr. Moore's convictions for assault second degree should be reversed and remanded for a new trial. His conviction for unlawful possession of a firearm should be reversed and dismissed. His six firearm enhancements should be vacated. Alternatively, all of his convictions should be reversed and he should be granted a new trial because he was denied due process by the admission of Mr. Repp's testimony.
RESPECTFULLY SUBMITTED this 25th day of October, 2010.


ANNE M. CRUSER, WSBA# 27947
Attorney for Mr. Moore

STATE OF WASHINGTON
DEPUTY
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COURT OF APPEALS
DIVISION II

CERTIFICATE OF MAILING

I, Anne M. Cruser, certify that on October 25, 2010 I placed a copy of this document in the mails of the United States addressed to: (1) David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; (2) Susan I. Baur, Cowlitz County Prosecuting Attorney, 312 S.W. 1st, Kelso, WA 98626; (3) Mr. Joseph L. Moore DOC# 740940, Stafford Creek Corrections Center, 191 Constantine Way Aberdeen, WA 98520.

APPENDIX

1. 9.41.010. Terms defined

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Antique firearm" means a firearm or replica of a firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898, including any matchlock, flintlock, percussion cap, or similar type of ignition system and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(2) "Barrel length" means the distance from the bolt face of a closed action down the length of the axis of the bore to the crown of the muzzle, or in the case of a barrel with attachments to the end of any legal device permanently attached to the end of the muzzle.

(3) "Crime of violence" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, assault of a child in the second degree, extortion in the first degree, burglary in the second degree, residential burglary, and robbery in the second degree;

(b) Any conviction for a felony offense in effect at any time prior to June 6, 1996, which is comparable to a felony classified as a crime of violence in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense comparable to a felony classified as a crime of violence under (a) or (b) of this subsection.

(4) "Dealer" means a person engaged in the business of selling firearms at wholesale or retail who has, or is required to have, a federal firearms license under 18 U.S.C. Sec. 923(a). A person who does not have, and is not required to have, a federal firearms license under 18 U.S.C. Sec. 923(a), is not a dealer if that person makes only occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or sells all or part of his or her personal collection of firearms.

(5) "Family or household member" means "family" or "household member" as used in RCW 10.99.020.

(6) "Felony" means any felony offense under the laws of this state or any federal or out-of-state offense comparable to a felony offense under the laws of this state.

(7) "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.

...

2. 9.94A.533. Adjustments to standard sentences

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

...

3. 9A.04.110. Definitions

In this title unless a different meaning plainly is required:

(1) "Acted" includes, where relevant, omitted to act;

(2) "Actor" includes, where relevant, a person failing to act;

(3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;

(4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

(c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;

(5) "Building", in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

(6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;