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

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**STATE OF WASHINGTON,**  
**Respondent,**

v.

**OZIEL VILLEAR SUAREZ,**  
**Appellant.**

11 JUL -7 PM 12:44  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION/SUMMARY OF THE ARGUMENT**

The Appellant in this case, 36-year-old Oziel Villlear Suarez, is the father of two young children and a man with no prior criminal history. Before the night of the incident, he worked a full-time, well-paying construction job. In this appeal, he challenges his convictions for attempted robbery in the first degree and assault in the first degree and the special verdicts that he committed the crimes while armed with a deadly weapon. He also appeals his sentence.

On the night of June 27, 2009, a shooting occurred in a residence on South Huson Street in Tacoma. Two individuals, including Mr. Suarez, were severely injured. Four of the five or six individuals present that night testified at trial, including Mr. Suarez. All gave conflicting versions of the shooting and events leading up to it. Indeed, police initially could not distinguish between the victims, witnesses and suspects.

On appeal, Mr. Suarez argues the following errors require reversal of his convictions and sentence: the

trial court erred in finding he had knowingly and intelligently waived his Miranda rights shortly after a twenty-hour emergency surgery; the court abused its discretion in refusing to allow him to show the bias and improper motive of one of the State's key witnesses; the court provided an unobjected-to but unconstitutional jury instruction under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) regarding the special verdicts for the sentence enhancements; and the court imposed illegal sentences by running the sentences on the underlying charges consecutively to each other and by sentencing Mr. Suarez for an attempt within the range applicable to the completed crime.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

1. The superior court erred in ruling Mr. Suarez's injuries and medical situation did not affect his ability to waive his Miranda rights.

2. The superior court erred in finding Mr. Suarez made knowing, intelligent and voluntary decisions to waive his Miranda rights with regard to

any of his conversations or interviews with police guards while he was hospitalized.

3. The superior court erred in admitting all Mr. Suarez's statements to the police.

4. The superior court erred in denying Mr. Suarez his constitutional right to show the bias and improper motives of prosecution witness Derrick Cleary.

5. The superior court erred in providing an unlawful instruction to the jury regarding the special verdicts.

6. The superior court erred in imposing non-exceptional consecutive sentences on two current convictions.

7. The superior court erred in imposing a sentence for the attempted first degree robbery conviction within the range applicable to the completed crime.

**B. Issues Pertaining to Assignments of Error**

1. When Mr. Suarez was first interviewed by police only about 36 hours after a twenty-hour emergency surgery, did the trial court err in admitting

his statements when, given the vulnerable, isolated, and susceptible condition he was in, the State failed to prove he had knowingly and intelligently waived his Miranda rights?

2. When a defense witness had evidence that would have shown the bias and improper motive of one of the key witnesses for the State, a codefendant in the case, and the testimony was not offered for the truth of the matter asserted, did the trial court abuse its discretion in excluding the testimony on hearsay grounds?

3. Did the trial court commit manifest constitutional error requiring reversal when it instructed the jury it must be unanimous as to a reasonable doubt on the sentencing enhancements?

4. Did the trial court impose an illegal sentence when a) it imposed consecutive sentences for the two underlying current convictions when they were required to be served concurrently under RCW 9.94A.589(1)(a) and b) it sentenced Mr. Suarez for

attempted first degree robbery within the range applicable to the completed crime?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

By information filed June 11, 2010, the State charged Mr. Suarez with two crimes: 1) Assault in the First Degree with a firearm or deadly weapon or by any force or means likely to inflict great bodily harm in violation of RCW 9A.36.011(1)(a), and 2) Robbery in the First Degree in violation of RCW 9A.56.190 and RCW 9A.56.200(1)(iii). Both crimes were alleged to have been committed on or about June 27, 2009. Clerk's Papers (CP) 1-2. The information gave notice of the applicability of RCW 9.94A.310/9.94A.510 and the additional time added to the presumptive sentence under RCW 9.94A.370/9.94A.530. Id.

Two codefendants, Derrick Cleary and Devan Hopson, were initially charged with Mr. Suarez. Cleary ultimately pleaded guilty and testified for the State.

Verbatim Report of Proceedings 6RP & 7RP at 784-1000.

Hopson went to trial with Mr. Suarez. See RP.<sup>1</sup>

On June 9, 2010, the court, the Honorable Linda Lee presiding, conducted a hearing on the admissibility of the two defendants' statements. 2RP at 29-154. The court found the statements admissible. 2RP at 146-50.

On June 14, 2010, the State filed, without objection, an amended information reducing the second charge to Attempted Robbery in the First Degree. CP 16-17; 3RP at 157-58.

Jury trial was held June 14 through June 28, 2011. Mr. Suarez and codefendant Hopson were convicted of both charged crimes. Special verdicts were returned finding both men armed with a deadly weapon at the time of the crimes. CP 18-21.

Mr. Suarez was sentenced on July 23, 2010. 10RP. The court imposed a standard range sentence of 132 months on the first count and 54 months on the second. It imposed the mandatory sentencing enhancements of 60-

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1. References to the Verbatim Reports of Proceedings in this brief follow the same conventions as described in codefendant Hopson's Brief of Appellant at footnote 1.

and 36-months, to run consecutively to each other and to the underlying counts. CP 29-30.

Finally, the court imposed 36 months' and 18 months' community custody on the assault and attempted robbery charges, respectively, plus costs and fees. CP 30 & 28.

Notice of appeal was timely filed. CP 37.

**B. Substantive Facts**

**1. The CrR 3.5 Hearing<sup>2,3</sup>**

Tacoma Police Officer Douglas Billman responded to a 911 call regarding a shooting at around 10:30 p.m. on the night of June 27, 2009. Billman saw Mr. Suarez and Hopson in a grassy area near a retaining wall next to the sidewalk. Mr. Suarez had been shot in the stomach, Mr. Hopson in the head. Billman immediately sought medical attention. 2RP at 53-57.

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2. This synopsis focuses on the testimony of the officers who interacted with Mr. Suarez. The testimony related solely to Hopson is not summarized.

3. At the time Appellant's Brief was filed, the court's Findings of Fact and Conclusions of Law had not yet been entered. Prior to filing this brief, Appellant obtained two thirty-day extensions of time to file his brief to allow time to file the Findings and Conclusions. Upon information and belief, Findings and Conclusions were presented to the trial court on June 17, 2011.

Mr. Suarez was airlifted to Harborview Hospital. While there, he was kept under guard, in isolation, unable to talk with anyone other than medical personnel and his police guards. See 2RP at 71-72. Officer Dustin Myhre began guard duty the morning of June 30, 2009. Upon arrival, around 7:30 a.m., he read Mr. Suarez his Miranda rights. Mr. Suarez indicated he understood his rights and said he wished to talk to the officer. The officer spoke with him for about five minutes. 2RP at 83-89 & 93.

Myhre knew Mr. Suarez had been shot, but did not know where. He did not know if Mr. Suarez had had surgery or whether he was on medication, although he thought it likely Mr. Suarez was on intravenous medication. 2RP at 91-92.

Detective Robert Yerbury interviewed Mr. Suarez at around 11:15 a.m. the same day. 2RP 88; 2RP 108. Yerbury again advised Mr. Suarez of his Miranda rights. Mr. Suarez indicated he understood and waived his rights. Yerbury also spoke with the charge nurse who advised him Mr. Suarez was awake and alert. He did not

inquire about medications Mr. Suarez was taking. 2RP 99-103 & 106-07. Yerbury interviewed Mr. Suarez for about a half hour, during which time Mr. Suarez seemed willing to talk and never sought an attorney. 2RP 103-04.

Officer Joseph Harris, who had been a police officer around two years at the time of the incident, began guard duty the next day, starting around 7 a.m. 2RP 70-72 & 77-78. When Harris arrived, Mr. Suarez was sleeping. Upon waking about two hours later, Mr. Suarez said he wanted to talk about the shooting. Harris advised him of his Miranda rights; Mr. Suarez said he understood them. Harris and Mr. Suarez talked for a few hours throughout Harris's shift, with breaks when Mr. Suarez would drift to sleep or interact with medical personnel. 2RP 72-76 & 79.

Harris knew Mr. Suarez had suffered a gunshot wound in his lower back, had had surgery and was on medication. However, he did not speak to the staff about the effects of the medication and he believed Mr. Suarez completely understood their conversation. 2RP

80-81. Based on the officer's "training and experience," Mr. Suarez "was communicating quite well, very effectively given his state." 2RP 76. Nothing Mr. Suarez said made Harris concerned that Suarez's mental condition was affected by medication or injuries, "but then he would get tired. He was injured, so we would end our conversation, basically, at whichever point, and he would probably go back to sleep or rest." 2RP 76-77. Mr. Suarez never asked for an attorney or indicated he wished to stop speaking about the matter. 2RP 78.

The trial court ruled, "There was no indication that the defendant's medical condition was affected by any drugs or the injury." 2RP at 148; see 2RP at 148-49. It held all Mr. Suarez's statements to his police guards were admissible. 2RP at 146-50.

## **2. Trial Testimony**

Four of the five or six individuals present during the incident at the South Huson Street residence testified at trial. Each gave a different version of the events. Indeed, investigating officers initially

had difficulty distinguishing the suspects from the victims in this case. 3RP at 257.

Roshawn Laster-Cobb, who lived at the South Huson house with Jeremy Patchell, testified he discovered Patchell was doing a drug deal at the house about 10 minutes before it happened. Upon learning this information, he positioned himself in a chair facing the door, with his 10-millimeter pistol on the floor at the side of the chair. He did not have the money for the drug deal, but Patchell had a book bag. He heard, but did not see, a vehicle arrive at the house. 4RP at 339-41, 352-59; 413.

Cleary entered the house first, followed by Hopson. Patchell was standing near the door. Mr. Suarez entered next, put his foot in the door, pointed an assault rifle in Patchell's face and demanded money. Laster-Cobb grabbed his own gun, hearing a shot at almost the same time he began firing. He emptied his gun, tried to flee, and was shot. He saw Mr. Suarez shoot the rifle. Laster-Cobb was shot five times,

including a shot that shattered his femur. 4RP at 343-48; 360-61; 365-70.

On direct examination, Laster-Cobb testified that only three individuals entered the house. 4RP at 348. However, on cross examination, he explained that four people entered, including a black male who got away. He did not mention the fourth person on direct because he had been told there were only three. 4RP at 398-400; 445. In addition, when the police arrived at the house, Laster-Cobb lied about his name and what had happened that evening, telling them his name was Anthony and he was shot while he was sleeping. 4RP at 419-20 & 4VRP at 448-49. His testimony also conflicted with that of Patchell, Cleary, and Mr. Suarez.

Jeremy Patchell testified that he was only the middleman arranging the drug deal for Laster-Cobb. Patchell contacted Cleary to obtain \$8,000-10,000 worth of Oxycontin, which Laster-Cobb would pay for. Patchell never saw Laster-Cobb's money, but assumed he had it. He had been involved in about five or six

prior drug transactions with Cleary. 5RP at 487-99; cf. 5RP at 564 (on cross examination, Patchell testified he had had from five to fifteen prior transactions with Cleary).

Patchell directed Cleary by cell phone to the South Huson Street house to do the drug deal. He saw Cleary pull up in a gray truck with three passengers. Cleary and Hopson exited the truck and entered the house while Patchell stayed outside finishing a cigarette. 5RP at 508-15; 576-77.

When Patchell headed inside two to three minutes later, Mr. Suarez came up behind him, prevented him from closing the door, put a large gun to his face and told him to freeze. Seeing Laster-Cobb pulling out his gun, Patchell dove into the kitchen, ran through to his bedroom, punched out his bedroom window and ran. No shots were fired until Patchell fell out of the bedroom window. 5RP at 529-37.

Derrick Cleary, who testified in exchange for leniency, 7RP at 853 & 862-63, gave yet another version of events. He testified he was the middleman in a drug transaction between Patchell and Mr. Suarez and Hopson.

6RP 788-90. Around 8 p.m. that evening, Mr. Suarez and Hopson got into his truck. Neither man carried a weapon. They drove around for two or three hours, talking to Patchell on the phone and trying to arrange the drug deal. Hopson was in front and Mr. Suarez was in the back, behind Cleary. 6RP at 802-04.

At the South Huson house, Cleary and Hopson exited the truck and greeted Patchell. Cleary went inside and met Laster-Cobb. Mr. Suarez stayed in the truck and Hopson stayed outside the house. Inside the house, when Patchell made a remark about Cleary's boys riding with rifles, Laster-Cobb pulled out a gun and immediately began shooting towards the door. Cleary fled out the front door. 6RP at 808-20; 7RP at 830-32 & 835-38. He never saw any other gun than the one Laster-Cobb had and was not aware of any gunfire coming in toward the house. 7RP at 834-36. As he left the house, Mr. Suarez and Hopson demanded his truck keys; he told them they were in the house and kept running. 7RP at 843-45.

On cross examination, Cleary testified he actually saw Mr. Suarez holding a rifle in the doorway of the

house when Patchell made the remark about rifles. 7RP at 909-10 & 925.

Mr. Suarez testified he knew nothing about a drug deal. Instead, he believed he was going to a club that night with Cleary, Hopson and another acquaintance, Courtland Young. When he got into Cleary's truck, he saw a rifle under Cleary's seat, Cleary allowed him to handle it, and showed him another gun in his waistband. He told Mr. Suarez, "This is how I roll." 8RP at 1106-18.

Saying he had a quick stop to make along the way, Cleary took them to the South Huson house. Cleary asked Hopson to accompany him inside. About a minute later, Mr. Suarez heard gunshots. He and Young got out of the truck and Mr. Suarez was shot in the back. Young fled. Hopson came out of the house, bleeding and holding his head. Cleary also ran out of the house, got in his truck, realized he could not start it, and ran. Hopson helped Mr. Suarez up and they fled, Mr. Suarez falling twice along the way. 8RP at 1119-27.

The bullet that hit Mr. Suarez went in his back and exited his abdomen. 8RP at 1123. He was bleeding

profusely. 8RP at 1131. At some point, while fleeing with Hopson, he lost consciousness. The next thing he knew, he was in Harborview Hospital, waking up after a twenty-hour surgery. He was told the bullet had torn open an artery and gone through his intestines. He remained hospitalized following surgery for more than thirty days. 8RP at 1130-32.

Officer Myhre and Detective Yerbury testified in the State's case-in-chief about their hospital interviews with Mr. Suarez. Myhre stated Mr. Suarez told him he went to the house on Huson Street to sell some pills and marijuana. 5RP at 479.

Yerbury testified that Mr. Suarez told him Cleary took him and Hopson to the South Huson house to settle a dispute between Mr. Suarez and an individual he knew as Rocco. 7RP at 730-33. When the three arrived at the house, they all got out of the truck and Mr. Suarez was shot by a person he did not see but assumed to be Rocco. After the shots were fired, he and Hopson fled the area on foot toward the end of the block, where he collapsed. 7RP at 734. The State offered Officer

Harris's testimony as impeachment in its rebuttal case. 9RP at 1187-98.

Two firearms, a .45 caliber semiautomatic and an MAK-90 rifle, were located by following a trail of blood near the location where Hopson and Mr. Suarez were located by police. 4RP at 281-86; 6RP at 721-23. A latent print on the rifle belonged to Mr. Suarez. 8RP at 1047-49.

### **3. Ruling on Evidence of Bias**

Mr. Suarez's attorney questioned Traniece Armstrong, Mr. Suarez's girlfriend and the mother of their two children, about her contact with Cleary after the incident. She testified that Cleary "approached me asking me to write a statement. He offered me money to write a statement saying that the guns weren't his, and that they were --" 8RP at 1068. The State objected on hearsay grounds, the court excused the jury and the parties argued the point. Id.

Without specifying a particular rule of evidence, Mr. Suarez argued the testimony was admissible to impeach Cleary's testimony that he had no contact with Armstrong after the incident. 8RP at 1069. When

Cleary was on the witness stand, counsel for Mr. Suarez had asked him if he discussed the incident with Armstrong; Cleary responded in the negative. 7RP at 932.

The State argued the testimony was both hearsay and a discovery violation. Argument focused on whether Mr. Suarez had laid a proper foundation for the impeachment evidence. Mr. Suarez noted he had asked the one question and suggested the State could recall Cleary to question him about the matter. 8RP at 1070-72.

Stating that the issue was "the bias or improper motive on the part of a prosecutor's witness," the court relied on State v. Fankhouser, 133 Wn. App. 689, 138 P.3d 140 (2006), to exclude the testimony. 8RP at 1077. Holding Armstrong's testimony went to a material, not a collateral matter, the court nevertheless held the testimony was inadmissible hearsay. 8RP at 1077-83. It ordered the jury to disregard Armstrong's statement. 8RP at 1088.

#### **4. Jury Instruction Regarding Special Verdicts**

The trial court provided the jury with special verdict forms asking whether Mr. Suarez was armed with a deadly weapon (defined by the court as a firearm) during the commission of the charged crimes. CP 77 (Special Verdict Form No. 1) & 79 (Special Verdict Form No. 2). The court provided a separate instruction regarding the method the jury should employ in filling out the special verdict forms:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 69 (excerpt from Jury Instruction No. 26).

Mr. Suarez did not object to this instruction.

See RP.

#### **5. Sentencing**

The parties stipulated to Mr. Suarez's prior record. He had no prior convictions, only the two current convictions. The parties stipulated Mr. Suarez's offense score was 2 for both crimes. The

seriousness level was XII and IX, respectively, for the assault and the attempted robbery. These findings resulted in standard range sentences of 111 to 147 for the assault and 41 to 54 months for the attempted robbery. The parties also agreed that the applicable firearm enhancement for each crime was 60 months. CP 22-23.

At sentencing, the parties realized Mr. Suarez was subject to only a 36-month enhancement for the use of a firearm during the attempted robbery. The State requested a high end sentence on both counts: 147 plus 60 months (total of 207 months) for the assault conviction and 54 plus 36 months (total of 90 months) for the attempted robbery conviction. Mr. Suarez asked for the low end of the range, or a total of 171 months for the assault and 77 months for the attempted robbery. 10RP 1303-04.

After Mr. Suarez expressed his remorse to the court and the victims, the court imposed sentence of 132 months plus 60 months for the assault charge and 54 months plus 36 months for the attempted robbery charge. It also imposed the standard sentences of community

custody. 10RP 1306. There was no discussion of imposition of an exceptional sentence. See 10RP.

In the Judgment and Sentence, the court noted that the times for the enhancements should run "consecutive to each other and underlying counts." CP 30. However, it left blank the provision on the judgment form intended to provide for the counts that should be served consecutively. CP 30. Nevertheless, in computing the total term of imprisonment, the court added the terms of imprisonment for the two underlying charges to the terms of the mandatory sentence enhancements for a total sentence of 282 months' imprisonment. CP 30.

#### IV. ARGUMENT

##### Point I:

**When Mr. Suarez Was Hospitalized and Recovering from Major Surgery When the Officers Interviewed Him, the State Did Not Meet its Burden of Proving He Knowingly and Intelligently Waive His Miranda Rights**

Mr. Suarez did not knowingly, voluntarily, and intelligently waive his Miranda rights prior to speaking to the officers at the hospital; thus, this Court should reverse the trial court's finding that the

statements were admissible. A waiver of constitutional rights must be knowing, voluntary, and intelligent: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (discussing waiver of rights incident to guilty plea). Because Mr. Suarez had recently been shot, lost a large amount of blood, nearly died, undergone a twenty-hour-long surgery, and was being kept isolated from the comfort of family and friends, he was in a vulnerable and abnormal state when the officers interviewed him and could not knowingly and intelligently waive his Miranda rights.

A custodial statement is voluntary, and therefore admissible, if made after the defendant has been advised of his rights and then knowingly, voluntarily, and intelligently waives those rights. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966); State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). In determining voluntariness, a

trial court considers the defendant's physical condition, age, mental capabilities, experiences in custody and while being interrogated, and police conduct. Aten, 130 Wn.2d at 664.

The State has a "heavy burden" to establish the knowing and intelligent waiver of rights:

[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, n. 14 [12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964)]. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

Miranda, 384 U.S. at 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Moreover, the accused must in fact understand his rights in order to waive them. Tague v. Louisiana, 444 U.S. 469, 100 S. Ct. 652, 62 L. Ed. 2d 622 (1980) (holding statement inadmissible when prosecution did not prove waiver knowing and intelligent).

The State did not meet this "heavy burden" of showing Mr. Suarez's waiver was knowing, voluntary, and intelligent and the trial court's finding to the contrary was not supported by substantial evidence. This Court must determine whether challenged findings of fact are supported by substantial evidence. Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009) (citations omitted). This Court does not review credibility determinations on appeal. Id.

The voluntariness of a statement is determined from the totality of the circumstances under which it was made. Aten, 130 Wn.2d 663-64. In Aten, the Court ruled the defendant's statements voluntary when she had taken a medication with the possible side effects of drowsiness and confusion about six hours prior to her questioning, but showed no signs of being sedated. Id. at 664. The totality of the circumstances was sharply different here, where Mr. Suarez was interviewed shortly after undergoing a significant surgery.

Mr. Suarez was shot the night of June 27. After an airlift to Seattle, he underwent a twenty-hour surgery for life-threatening injuries, beginning sometime in the early hours of June 28. Thus, when he spoke to his police guards, he was just starting to recover from that experience. The hospital portion of his recovery would take more than thirty days. His interview by Yerbury and discussion with Myhre likely occurred fewer than 36 hours after surgery was completed. His conversation with Harris took place only 24 hours after that.

Anyone who has ever had a serious surgery would recognize the woozy and susceptible state a person remains in for several days following the event. Here, Mr. Suarez's vulnerable, stressed condition was heightened by the police guard which isolated Mr. Suarez and prevented him from obtaining any comfort or relief from his family or friends. Interviewing an individual under these conditions presents a unique situation. Under the totality of the circumstances in which police officers found Mr. Suarez, they needed to do more than just speak with him to determine his

ability to provide consent. Yet the court in this case determined the waiver was valid based on little more than the officers' conversations with Mr. Suarez.

Officer Myhre did not even know Mr. Suarez had had surgery before speaking to him. He apparently never inquired with hospital personnel about Mr. Suarez's condition. 2RP at 91-92. Yerbury, on the other hand, spoke with the charge nurse and learned Mr. Suarez was awake and alert. However, he did not even ask about medications Mr. Suarez was taking. 2RP 99-103 & 106-07. A day later, Harris relied on his two years as a police officer to determine Mr. Suarez was capable of providing consent. He reached this determination despite the fact that Mr. Suarez repeatedly drifted to sleep during their conversations. 2RP 76-77.

It was not Mr. Suarez's burden to establish he lacked capacity; it was the State's burden to prove the knowing and voluntary consent. Miranda, 384 U.S. at 475. At best, the State established Mr. Suarez was both awake and alert and extremely sleepy when police obtained his Miranda waivers under conditions of stress and isolation. Under the totality of the

circumstances, these facts were not sufficient to establish a knowing and intelligent waiver. Accordingly, the trial court's findings that his mental state was not affected by his medical conditions and that his statements were knowing and intelligent were erroneous.

Moreover, these violations of Mr. Suarez's Miranda rights were not harmless error. A constitutional error is only harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); see Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). No such assurance may be found here.

Here, the State used statements from Mr. Suarez's interview with Yerbury and Myhre in its case-in-chief, as direct evidence of his guilt. The statements put Mr. Suarez at the South Huson house on the night of the shooting to commit some type of unlawful act. Accordingly, the statements amounted to a confession of guilt. The erroneous admission of a confession carries a great risk of prejudice due to its nature: "A

confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), quoting, Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting). Under these circumstances, the error was not harmless because there is no assurance that the jury verdict was unattributable to the error.

For all of these reasons, the court's findings that Mr. Suarez's mental state was not affected by his medical condition, that his waiver of his Miranda rights was valid, and that his statements to police officers were admissible were not supported by substantial evidence. These errors were not harmless and this Court should reverse Mr. Suarez's convictions.

**Point II:  
The Trial Court Violated Mr. Suarez's Constitutional  
Right to Impeach Derrick Cleary with Bias Evidence,  
Creating Prejudicial Error Requiring Reversal**

When Mr. Suarez had the right to introduce evidence of codefendant Cleary's bias and improper motive, the trial court erred in holding it inadmissible hearsay. Defendants must be afforded "wide latitude" in a criminal trial to explore fundamental elements such as the motive, bias, and credibility of the State's key witnesses. State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006), citing, State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Indeed, a defendant has a constitutional right to impeach a prosecution witness with bias evidence. State v. Spencer, 111 Wn. App. 401, 408, 45 P. 3d 209 (2002), citing, Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. "Abuse exists when the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or

reasons.'" Darden, 145 Wn.2d at 619. The trial court abused its discretion in this case when it deemed the proffered testimony, offered to establish bias and improper motive, inadmissible hearsay.

In Spencer, this Court found reversible error when the trial court rejected the defendant's offer to impeach the State's chief witness with extrinsic evidence of her bias. There, a defense witness would have testified that the State's witness said she knew the defendant did not commit the crime, she spoke with the police a second time and changed her story because she was frightened for herself and her child, the police had threatened to call Child Protective Services, she would be taken to jail unless she told police what they wanted to hear, and she was angry because the defendant had another girlfriend (the defense witness). Spencer, 111 Wn. App. at 405-06. The trial court excluded the evidence because it was hearsay and defense counsel had not questioned the State's witness about the alleged statements while she was on the stand. Id. at 408.

This Court reversed, holding such statements were not hearsay. The Court explained that, rather than being offered for the truth of the matter asserted, the statements would have showed the witness's state of mind under ER 803(a)(3):

Regardless of whether the police actually threatened McMullen with CPS taking her child away, Schmidt would have testified to McMullen's state of mind regarding her statement to the police. As such, Schmidt's testimony would not have been hearsay and should not have been excluded on this basis.

111 Wn. App. at 409 (McMullen was the State's witness; Schmidt was the witness for the defense).

Similarly, in this case the proffered statements would have shown Cleary's state of mind. The defense witness, Traniece Armstrong, would have testified that Cleary, a defendant in the case and one of the State's chief witnesses, offered to pay her money to prepare a written statement to the effect that the guns recovered in this case belonged to someone other than Cleary. 8RP at 1068.

As was true in Spencer, here, regardless of whether Cleary actually would have given Armstrong money, the import of these statements went to Cleary's

state of mind, bias, and motive. They revealed the lengths to which he would go to avoid a conviction and, thus, his bias against Mr. Suarez and Hopson. Accordingly, the trial court erred in refusing to admit the statements on hearsay grounds.<sup>4</sup>

Further, Mr. Suarez's failure to specifically invoke ER 803(a)(3) as the reason for offering the testimony does not change this analysis. Counsel need not cite a specific rule of evidence if the rule is sufficiently invoked by the parties' argument. See State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992). Here, ER 803(a)(3) was sufficiently invoked by both the nature of the testimony itself and the trial court's acknowledgment that the issue was "the bias or improper motive on the part of a prosecutor's witness." 8RP at 1077.

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4. In Spencer, the Court also clarified that when statements are offered as extrinsic evidence of bias rather than as impeachment evidence, there is no requirement that counsel question the witness about the statements during his or her direct testimony. Instead, it is sufficient that the State be permitted to recall the witness to discuss the matters. 111 Wn. App. at 409-11. Here, the trial court did not deny defense counsel's request on the basis of a lack of foundation and, moreover, Mr. Suarez had questioned the witness about the matter.

The trial court's error requires reversal. It is reversible error to deny a defendant the right to establish the chief prosecution witness's bias by an independent witness. Spencer, 111 Wn. App. at 408, *citing*, State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980) (additional citations omitted). Any error in excluding such evidence is presumed prejudicial but is subject to a harmless error analysis: reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. Spencer, 111 Wn. App. at 408, *citing*, State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

Here, while Cleary was not *the* chief prosecution witness, he was one of the State's key witnesses. His testimony bolstered that of Patchell and Laster-Cobb regarding placing a gun in Mr. Suarez's hands, making their problematic testimony less incredible. Moreover, because he was a defendant testifying against the other defendants, the jury likely gave his testimony greater weight than even that of Patchell or Laster-Cobb. Indeed, if Mr. Suarez had been able to show the true

extent of Cleary's bias, he likely would not have been convicted. Accordingly, the trial court's error in denying Mr. Suarez his constitutional right to introduce evidence of a prosecution witness's bias was not harmless and this Court should reverse his convictions.

**Point III:**

**The Trial Court's Erroneous Jury Instruction Requiring Unanimity to Answer "No" on the Special Verdicts for the Deadly Weapon Enhancements Requires Reversal**

The trial court committed manifest constitutional error when it instructed the jury it needed to be unanimous in its special verdicts regarding the sentence enhancements. State v. Bashaw, 169 Wn.2d 133, 145-48, 234 P.3d 195 (2010). An incorrect instruction in this regard implicates due process concerns and requires reversal, even in the absence of an objection in the trial court. See 169 Wn.2d 133; Const. art. 1, §3; U.S. Const. Amend. XVI. Accordingly, this Court should vacate Mr. Suarez's sentencing enhancements.

Our Supreme Court has held that incorrectly informing the jury it must be unanimous to answer "no" on a sentence enhancement is error. Bashaw, 169 Wn.2d

at 145-46. The special verdict in Bashaw involved findings that the charged deliveries occurred within 1,000 feet of a school bus route stop. The trial court instructed the jury, without objection, that, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Bashaw, 169 Wn.2d at 139; State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008) (the Division 3 decision the Supreme Court reversed, which noted there was no objection to the instruction).

Division 3 had found both no error and no prejudice, since the jury was polled and proved to be unanimous on the special verdicts. Bashaw, 144 Wn. App. at 203. Relying on State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Supreme Court reversed, holding: "[A] unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt." Bashaw, 169 Wn.2d 133, 146.

Moreover, the Court found this error to be of constitutional magnitude and applied that standard in its harmless error analysis. "In order to hold that a jury instruction error was harmless, we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Bashaw, 169 Wn.2d at 147 (internal quotation marks omitted), quoting, State v. Brown, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

Again relying on State v. Goldberg, the Court held the error was not harmless beyond a reasonable doubt because it created a "flawed deliberative process" from which the Court could not determine what the verdict would have been without the error:

Given different instructions, the jury [in Goldberg] returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, 169 Wn.2d 133, 146. Because the instruction created a "procedure by which unanimity would be inappropriately achieved," id. at 147, the Court vacated the sentencing enhancements and remanded for further proceedings.

For the same reasons the erroneous instruction required vacation of the sentence enhancements in Bashaw, they should be vacated here as well. Here, the court instructed the jury in an even more erroneous fashion than in Bashaw. Instead of stopping with the injunction that the special verdict be unanimous, the court went on to instruct the jury it must be unanimous regarding any reasonable doubt that the State proved the finding. The instruction read:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no."*

CP 69 (Jury Instruction No. 26) (emphasis added). This instruction was clearly erroneous.

In addition, the harm in this case is the same as it was in Bashaw. As was true in Bashaw, given the “flawed deliberative process,” this Court cannot determine whether the verdicts would have been different without the error. Accordingly, Mr. Suarez’s sentence enhancements must be vacated. *Accord State v. Ryan*, 160 Wn. App. 944, ¶¶ 7-19, 252 P.3d 895 (2011) (relying on Bashaw to vacate aggravating circumstances found through instructional error identical to that occurring in this case).

This conclusion is not altered by Division 3’s determination that instructional error of this nature is not of constitutional magnitude. State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011). In Nunez, the facts were similar to those in Bashaw, but Division 3 refused to vacate the sentence enhancement because no objection to the erroneous instruction had been lodged at trial and it found no manifest constitutional error. Id. at 156-65. Division 3 reached this conclusion despite the Supreme Court having reversed it in Bashaw in the similar absence of a trial-level objection to the erroneous instruction. *Cf. Bashaw*, 169 Wn.2d at

147; Bashaw, 144 Wn. App. at 199. Under these circumstances, Nunez should not control this Court's decision.

Instead, Division 1's decision in Ryan is most persuasive. That Court considered and rejected the Nunez rationale, holding that the following considerations from Bashaw compel the conclusion that this type of instructional error is constitutional, grounded in due process:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as "the procedure by which unanimity would be inappropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 160 Wn. App. 944, ¶ 13.

For all of these reasons, this Court should vacate Mr. Suarez's sentencing enhancements and remand for resentencing.

**Point IV:  
If the Court Upholds Mr. Suarez's Convictions, it  
Should Nevertheless Remand for Resentencing When the  
Sentence Imposed was Unlawful**

The sentence in this case was unlawful for two reasons. First, the court erroneously imposed consecutive sentences on the two underlying current convictions when they were required to be run concurrently under RCW 9.94A.589(1)(a). Second, it erred in sentencing Mr. Suarez for attempted robbery within the standard sentencing range for the completed crime.

Although raised for the first time on appeal, these issues should be heard. See RAP 2.5(a). "In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (collecting cases). Indeed, a sentence not authorized by statute can always be heard as it may affect an individual's due process rights. See In re Pers. Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (addressing sentencing issue raised for first time in Personal Restraint

Petition). Accordingly, this Court may resolve these issues even though they were not raised in the trial court.

**A. The Court Erred in Imposing Consecutive Sentences on the Two Underlying Current Convictions**

The sentences on the underlying convictions in this case should run concurrently to each other and consecutively to the firearm enhancements. In general, sentences imposed for two or more current offenses must be served concurrently:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. . . . Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

RCW 9.94A.589(1)(a); State v. Jones, 137 Wn. App. 119, 124, 151 P.3d 1056 (2007) (holding trial court erred in running sentences on current crimes consecutively without jury's factual findings justifying exceptional sentence). When the court in this case did not impose an exceptional sentence under RCW 9.94A.535 and neither

of the stated statutory exceptions is applicable here, the consecutive sentences were erroneously imposed.

Neither exception set forth in subsections (b) or (c) of RCW 9.94A.589(1) applies to this case. Subsection (b) applies "[w]henver a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct." RCW 9.94A.589(1)(b). While Assault in the First Degree is a Serious Violent Offense, RCW 9.94A.030(44), Attempted Robbery in the First Degree is not. RCW 9.94A.030(53) (classifying the crime in the broader category of "violent offense"). Thus, Mr. Suarez was not convicted of two or more serious violent offenses and this exception does not cause the sentences on his underlying offenses to run consecutively. See In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 735, 147 P.3d 573 (2006) (noting that imposing a consecutive sentence for a crime which was not a serious violent offense required imposition of an exceptional sentence).

Subsection (c) also does not apply in this case because it applies only to convictions "for unlawful

possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both." RCW 9.94A.589(1)(c). Plainly, Mr. Suarez was not convicted of any of these crimes.

Further, the court did not impose an exceptional sentence under RCW 9.94A.535. That statute requires a court to follow certain mandatory steps before imposing an exceptional sentence, including 1) making a finding that "there are substantial and compelling reasons justifying an exceptional sentence" and 2) "setting forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. No exceptional sentence was imposed in this case.

For these reasons, the superior court erred in imposing consecutive sentences on the underlying convictions in this case. Mr. Suarez's sentence should have been 132 months for the assault and a sentence within the correct range for the attempted robbery, both to be served concurrently. For these reasons, this Court should vacate Mr. Suarez's sentence and remand for resentencing.

**B. The Court Erred in Sentencing Mr. Suarez for Attempted Robbery Within the Standard Sentence Range for the Completed Crime**

The 54-month sentence imposed for the attempted robbery conviction was also erroneous. The sentence range for an attempt is only seventy-five percent of the standard range for the completed crime:

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.

RCW 9.94A.533(2); RCW 9.94A.595 (same). In this case, the court calculated the range for the completed crime and erroneously made no adjustments to account for the fact that it was sentencing for an attempt. See 10RP. Thus, it mistakenly imposed a sentence outside the standard range.

Completed Robbery in the First Degree has a seriousness level of IX. RCW 9.94A.515. The parties agreed Mr. Suarez's offender score was 2, as he had no prior convictions. Accordingly, the standard

sentencing range for the completed crime was 41 to 54 months. RCW 9.94A.510. Seventy-five percent of that range is 30.75 months to 40.5 months. Thus, the standard sentencing range for attempted Robbery in the First Degree is 30.75 months to 40.5 months, the court's sentence of 54 months was illegal, and this Court should vacate the sentence and remand for resentencing.

#### V. CONCLUSION

For all of these reasons, Oziel Villear Suarez respectfully requests this Court to reverse his convictions or, in the alternative, to vacate his sentence enhancements and remand for resentencing.

Dated this 5th day of July, 2011.

Respectfully submitted,



Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that on this 5th day of July, 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail, postage prepaid, on:

Pierce County Prosecutor's Office  
Attention: Appellate Unit  
930 Tacoma Avenue South  
Tacoma, Washington 98402-2102; and

Mr. Oziel V. Suarez  
DOC No. 342531, B-H5  
Clallam Bay Corrections Center  
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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY  
11 JUL -7 PM 12:44  
CORRECTIONAL DIVISION II

  
\_\_\_\_\_  
Carol Elewski