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No. 51774-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERICK NATHAN CHAPMON,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Fearing that his wife and friends would be injured by a car backing towards them as it left a New Year's Eve party, Erick Chapmon fired several rounds from the handgun he carried, striking one of the three occupants in the leg. Mr. Chapmon was charged with three counts of first degree assault. The jury rejected Mr. Chapmon's self-defense and defense of others arguments, but acquitted him of first degree assault in favor of second degree assault convictions.

Over Mr. Chapmon's objection, the trial court, instructed the jury on transferred intent. The instructions improperly lowered the State's burden of proof and amounted to an impermissible comment on the evidence. Further, the trial court imposed firearm enhancements where the jury was instructed only on deadly weapon enhancements. Mr. Chapmon's convictions should be reversed, or the firearm enhancements stricken and deadly weapon enhancements imposed.

B. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Chapmon of due process in violation of the Fourteenth Amendment when the court instructed the jury in a manner which relieved the State of its burden of proving each element of the offense of second degree assault.

2. Because it relieved the State of its burden of proof, the trial court erred in providing Instruction 19 to the jury.

3. The court's Instruction 19 impermissibly commented on the evidence in violation of article IV, section 16.

4. The court erred in imposing firearm enhancements where the jury was instructed only on deadly weapon.

5. The trial court erred in imposing discretionary Legal Financial Obligations (LFOs).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This, in turn, requires a trial court to instruct the jury in manner which conveyed this requirement. Did Instruction 19 relieve the State of its burden of proving the elements of second degree assault?

2. Article IV, section 16 of the Washington Constitution bars the court from commenting on the evidence to a jury. A jury instruction which relieves the State of proving the elements of the charged offense is an impermissible comment on the evidence. The court in Mr. Chapmon's matter instructed the jury in to-convict instruction 19 on

transferred intent, which unconstitutionally reduced the State's burden of proof. Was the court's instruction an impermissible comment on the evidence entitling Mr. Chapmon to reversal of his conviction and remand for a new trial?

3. Under the United States and Washington Constitutions, sentence enhancements are limited to those where the jury is instructed and the jury makes a finding regarding the facts authorizing the increase. Here, the jury was instructed on the use of a deadly weapon but found use of a firearm. Did the resulting increased sentence violate the United States and Washington Constitutions requiring reversal of Mr. Chapmon's and remand for resentencing?

4. Recent amendments to the statutes authorizing imposition of Legal Financial Obligations (LFO) bar imposition of discretionary LFOs where the defendant is indigent. These amendments apply to all those whose appeal is pending at the time of the legislation's passage. Is this Court required to strike the \$200 in discretionary LFOs imposed by the trial court?

D. STATEMENT OF THE CASE

Three friends, Jessica Newman, Sasha Green, and Tonya Carroll, decided to attend a New Year's Eve 2016 party in Tacoma. 2/8/2018pmRP 51-55; RP 232-35, 350-54. Ms. Green agreed to be the "designated driver" and did not drink any alcohol at the party. 2/8/2018pmRP 57.

When the women arrived at the party, they saw appellant, Erick Chapmon, who was deejaying. 2/8/2018pmRP 62-65; 356-57. Ms. Green had met Mr. Chapmon earlier in 2016 and had a brief physical relationship with him. 2/8/2018pmRP 65.

Ms. Newman began drinking and became quite intoxicated. 2/8/2018pmRP 13, 72, 79. At some point, Ms. Newman lost a cherished bracelet and became inconsolable. 2/8/2018pmRP 13, 72-79. Ms. Green discovered Ms. Newman in the bathroom, where she had gone to cry. 2/8/2018pmRP 15, 74-75. When the two women left the bathroom to return to Ms. Green's car, the door struck Sydney Stovall in the lip causing it to bleed. RP 805-06, 1004. Ms. Stovall is Mr. Chapmon's wife. RP 802. Ms. Stovall claimed neither Ms. Newman nor Ms. Green said anything to her when they left. RP 805.

Planning to call it a night and leave the party, Ms. Green took Ms. Newman to her car. 2/8/2018pmRP 77-79. The women were followed outside by Ms. Stovall and her friend and a brief confrontation occurred. 2/8/2018pmRP 79; RP 807-12. Shortly thereafter, several other people from inside the party came outside to observe the commotion, including Mr. Chapmon. 2/8/2018pmRP 93; RP 923-25.

Ms. Green got Ms. Newman in the car and Ms. Carroll arrived shortly thereafter and got into the car. 2/8/2018pmRP 94; RP 365. Ms. Green backed the car up, briefly stopped, then began to back some more. RP 255, 1030. When the car began backing a second time, Mr. Chapmon, fearing for the safety of his wife and others, pulled a firearm he had been carrying and fired several shots at the car. RP 257, 934-38, 949.

As Ms. Green drove away, Ms. Newman cried out that she had been shot in the leg. 2/8/2018pmRP 22; RP 259, 375. Ms. Green stopped several blocks away and called 911. RP 260-61. Ms. Newman was treated at the scene for a gunshot wound, then transported to the hospital. RP 676-80. It was discovered Ms. Newman had suffered a fragmented fracture of the fibula caused by the gunshot. RP 689-90.

Mr. Chapmon was charged with three counts of First Degree Assault, each count containing a firearm enhancement. CP 34-35.¹

The trial court instructed the jury in the to-convict instructions, Instructions 23 and 25, on the elements of the lesser degree of second degree assault regarding Tonya Carroll and Sasha Green:

To convict the defendant of the crime of Assault in the Second Degree, the lesser included offense of the crime charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 1st day of January, 2017, the defendant assaulted Sasha Green [Tonya Carroll] with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have 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 the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 23, 25.

¹ Pursuant to Mr. Chapmon's request, the court instructed the jury on defense of self and others. CP 97-101.

The jury acquitted Mr. Chapmon of first degree assault but convicted him of the lesser degree offenses of second degree assault as to all three women. CP 107, 109-11, 113-14. The jury also returned special verdicts that Mr. Chapmon was armed with a firearm. CP 108, 112, 115.

At sentencing, the court imposed standard range sentences on the assault counts and imposed 36 months for each of the firearm enhancements. CP 145.

E. ARGUMENT

1. Instruction 19 misstated the law and relieved the State of its burden of proving each element of the assault.

Over defense objection, at the State's request, the court instructed the jury:

For purposes of Assault in the Second Degree, if a person acts with intent to assault another person, but the act harms an unintended person, the actor is also deemed to have acted with intent to assault the unintended person.

For purposes of this instruction, "harms" means:

- 1) causes a harmful or offensive touching, striking or shooting of the unintended person, and/or
- 2) creates in the intended person a reasonable apprehension and imminent fear of bodily injury.

CP 90 (Instruction 19); RP 1292-97 (A copy of Instruction 19 is in the Appendix).

- a. *Jury instructions must inform the jury that the State bears the burden of proving each element beyond a reasonable doubt.*

The Sixth and Fourteenth Amendments require the State prove each element to a jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995). Instructions must convey to the jury that the State must prove each element beyond a reasonable doubt. *State v. Schulze*, 116 Wn.2d 154, 167–68, 804 P.2d 566 (1991). An instruction which relieves the State of that burden of proof violates this constitutional protection. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Peters*, 163 Wn.App. 836, 847, 261 P.3d 199 (2011).

- b. *Instruction 19 relieved the State of its burden of proving the specific intent necessary to convict Mr. Chapmon of the assaults of Ms. Green and Ms. Carroll.*

Here there were specified victims in the to-convict instructions; Sasha Green and Tonya Carroll. The trial court instructed the jury that to convict Mr. Chapmon of second degree assault of Ms. Green and/or Ms. Carroll, the State had to prove Mr. Chapmon “assaulted Sasha Green” and “assaulted Tonya Carroll” with a deadly weapon. CP at

246, 239. When the jury instruction identified a specific victim, i.e., “Sasha Green,” it was the law of the case and there was no room for a transferred intent analysis. *See State v. Johnson*, 188 Wn.2d 742, 762, 399 P.3d 507 (2019) (“[O]ur ‘law of the case’ doctrine . . . requires the State to prove every element in the to-convict instruction beyond a reasonable doubt.”); *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (stating that “jury instructions not objected to become the law of the case”).

Thus the court erred in lowering the State’s burden of proof by instructing the jury on transferred intent.

c. The decision in State v. Elmi is inapplicable to second degree assault by a deadly weapon.

The State contended, and the trial court found, that the decision in *State v. Elmi* approved the use of this instruction regarding the doctrine of transferred intent. RP 1293-94, 1297; *State v. Elmi*, 166 Wn.2d 209, 213, 207 P.3d 439 (2009).

In *Elmi*, the Supreme Court recognized that under the *first degree* assault statute the specific intent to cause great bodily injury to a specific person could transfer to other unintended victims. 166 Wn.2d 209, 218, 207 P.3d 439 (2009). The Court recognized that transfer

occurs where the State establishes a specific intent to harm a specific person. *Id.*

However, the Supreme Court expressly declined to address whether it was appropriate to give such an instruction where the unintended victim did not suffer injury. The Court said:

Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

Elmi, 166 Wn.2d at 218. Indeed, the dissent chastised the majority's failure to address the instruction, "I respectfully cannot see how this court can grant *Elmi*'s 'petition for review on the issue of transferred intent' and refuse to discuss application of the doctrine under the statute." *Elmi*, 166 Wn.2d at 220 (Madsen, J., dissenting, joined by Sanders and Fairhurst, JJ).

The doctrine of transferred intent is inapplicable to second degree assault charged as "assault with a deadly weapon." *State v. Abuan*, 161 Wn.App. 135, 158, 257 P.3d 1 (2011).

[S]econd degree assault, as charged in this case and defined in the jury instructions, means that "[a] person is guilty of assault in the second degree if he or she ... [a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). It does not expressly codify specific "intent to inflict bodily harm" and, thus, *Elmi*'s analysis

of “statutory” transferred intent under the first degree assault statute is not controlling in cases involving only second degree assault under RCW 9A.36.021(1)(c).

Id.

The Court in *Abuan* cautioned that extending the *Elmi* transferred intent doctrine to second degree cases such as this would broaden its application to absurd heights:

[Applying the] transferred intent analysis from *Elmi*, arguably [would mean] anyone in the neighborhood who heard the gunshots could be a victim of an assault by *Abuan*. We are unwilling to extend *Elmi* this far.

Abuan, 161 Wn.App. at 158.

The theory of transferred intent approved in *Elmi* was that encompassed in the statutory language of first degree assault and was not a separate theory. 166 Wn.2d at 218 (the *mens rea* is “transferred under RCW 9A.36.011.”).

Elmi did not apply in this case. The trial court erred in assuming it did and, as a result, instructing the jury on transferred intent where it did not apply and effectively lowered the State’s burden of proof.

d. This Court must reverse Mr. Chapmon's assault convictions.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002), *citing Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). However, the Court held that “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339. In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005), *citing Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet that burden in this case.

Instruction 19 allowed the jury to ignore the clear requirements of the to-convict instructions and rely on transferred intent to find Mr. Chapmon guilty of the assaults of Ms. Green and Ms. Carroll. CP 90, 94, 96. Because Instruction 19 “relieve[ed] the State of its burden to prove every element of a crime [it] requires automatic reversal.” *Brown*, 147 Wn.2d at 339. Thus, this Court must reverse Mr. Chapmon's assault

convictions on counts II and III for Ms. Green and Ms. Carroll respectively.

2. Court’s Instruction 19 constituted an impermissible comment on the evidence contrary to the Washington Constitution.

a. The trial court is barred from commenting on the evidence to the jury.

Under article IV, section 16 of the Washington Constitution, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision prohibits a judge from “‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). “All remarks and observations as to the facts before the jury are positively prohibited.” *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (emphasis added), quoting *State v. Walters*, 7 Wn. 246, 250, 34 P. 938 (1893). A court may comment on the evidence when it

incorporates specific facts in a jury instruction. *State v. Levy*, 156 Wn.2d 709, 721-23, 132 P.3d 1076 (2006).

“A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” *Lane*, 125 Wn.2d at 838. While a trial court “may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence,” *State v. Young*, 48 Wn.App. 406, 415, 739 P.2d 1170 (1987), an instruction “improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury.” *Becker*, 132 Wn.2d at 64-65. Judicial comments in jury instructions are presumed prejudicial and the State has the burden to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725.

This Court reviews whether the instruction was a comment on the evidence *de novo*. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008); *State v. Johnson*, 152 Wn.App. 924, 935, 219 P.3d 958 (2009).

b. *Instruction 19 relieved the State of proving the specific intent to assault Ms. Green and/or Ms. Carroll with a deadly weapon as required by the to-convict instructions.*

A court comments on the evidence when a jury instruction states as a fact an issue to be determined by the jury. *See Levy*, 156 Wn.2d at 721 (instruction described a location as a building but whether it was a building was a question for the jury); *Becker*, 132 Wn.2d at 64-65 (instruction described program as a school but whether it was a school was a disputed issue of fact); *Jackman*, 156 Wn.2d at 744 (instruction stated the victims' birthdates but the State had the burden of proving the victims were minors).

It was for the jury that to determine whether Mr. Chapmon specifically intended to assault Sasha Green and/or Tonya Carroll. Instruction 19 removed this element from the jury, requiring them to find only that Mr. Chapmon specifically assaulted Jessica Newman and this intent was transferred to Ms. Green and/or Ms. Carroll. This relieved the State of its burden to prove all elements of the offense. *Becker*, 132 Wn.2d 65.

In *Becker*, the "to-wit" reference in the special verdict form expressly stated that the youth program *was a school*, a fact that was a

threshold issue that had to be established for there to be any crime at all. 132 Wn.2d at 64.

In *State v. Brush*, a jury instruction purporting to define “prolonged period of time” for the jury resolved a contested factual issue; whether the abuse occurred over a “prolonged period of time.” 183 Wn.2d 550, 557, 353 P.3d 213 (2015). As a consequence, the instruction constituted an improper comment on the evidence which effectively relieved the prosecution of its burden of establishing an element of the domestic violence aggravating factor. *Id.*

Here, the Court’s Instruction 19 resolved the contested issue of whether Mr. Chapmon specifically intended to assault Ms. Green and/or Ms. Carroll with a deadly weapon. This was an impermissible comment on the evidence.

c. The State cannot prove the court’s comment on the evidence did not prejudice Mr. Chapmon.

Where the trial court’s remarks constitute a comment on the evidence, prejudice is presumed. *Levy*, 156 Wn.2d at 725; *Lane*, 125 Wn.2d at 838-39. “The burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff’d in part*,

rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974).² “The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met.” *State v. Boss*, 167 Wn.2d 710, 721, 223 P.3d 506 (2009).

The State cannot make that showing here. Whether Mr. Chapmon intended to assault these young women was *the* issue at trial. By taking the issue of intent to assault Ms. Green and/or Ms. Carroll from the jury, the court substantially lowered the State’s burden of proof. Mr. Chapmon is entitled to reversal of his convictions.

3. The jury was instructed on use of a deadly weapon, thus imposition of the enhancement use of a firearm was erroneous.

The jury was instructed to return special verdicts if the State proved beyond a reasonable doubt that the defendant was “armed with a deadly weapon” when he committed the charged crime. CP 106. And the jury instructions for the special verdicts specified that “[t]he term ‘deadly weapon’ includes any firearm, whether loaded or not,” but the instructions for the special verdict did not define “firearm.” CP 106.

² This not to be confused with a harmless error analysis. *See State v. Boss*, 167 Wn.2d 710, 721, 223 P.3d 506 (2009) (“The harmless error analysis, however, does not apply to judicial comment claims.”).

The special verdict instruction, Instruction 34, stated:

For purposes of a special verdict for a particular count, the State must prove beyond a reasonable doubt that the defendant was *armed with a deadly weapon* at the time of the commission of the crime charged in that particular count, or of that crime's lesser included offense.

If one participant to a crime is *armed with a deadly weapon*, all accomplices to that participant are deemed to be so armed, even if only one *deadly weapon* is involved.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

CP 106 (A copy of Instruction 34 is in the Appendix)(emphasis added).

As a result, the court erred in imposing firearm enhancements where the jury was only instructed on deadly weapon.

a. Sentences above the statutory maximum are limited to those on which the jury is instructed and the jury finds facts authorizing the increase.

The United States Supreme Court in *Apprendi*, held that other than a prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Blakely*, the Court clarified “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the

facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an “element” of a greater offense than the one covered by the jury’s guilty verdict. *Apprendi*, 530 U.S. at 494 n. 19; *see also State v. Allen*, ___ Wn.2d ___, 431 P.3d 117, 123 (2018) (“It is clear that the RCW 10.95.020 aggravating circumstances are elements for Sixth Amendment purposes because they are not limited to proof of a prior conviction and, by law, they increase the minimum penalty for first degree murder).

Thus, based on *Blakely*, in *State v. Recuenco*, the Supreme Court reversed and vacated the defendant’s firearm enhancements on Sixth Amendment grounds where the jury found only that the defendant was armed with a deadly weapon. 154 Wn.2d 156, 160, 110 P.3d 188 (2005) (hereinafter *Recuenco I*).

On remand, in *State v. Recuenco*, the Supreme Court found that under the State Constitution, the failure to define a firearm for the jury, the failure to provide any facts supporting the firearm enhancement, and where the only instruction given to the jury regarding sentencing

enhancements was the special verdict for a deadly weapon, the court erred in imposing five year sentence enhancements for armed with a firearm instead of three year deadly weapon enhancements. 163 Wn.2d 428, 439, 180 P.3d 1276 (2008) (hereinafter *Recuenco III*). The Court ruled the sentencing judge then committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury. *Id.*

b. The jury here was instructed only on “deadly weapon.”

Where the jury is instructed only on the use of a deadly weapon and the jury returns a special verdict for the use of a firearm, the court may only impose the deadly weapon enhancement. *In re Personal Restraint of Delgado*, 149 Wn.App. 223, 237, 204 P.3d 936 (2009).

In *Delgado*, the jury was instructed regarding being armed with a deadly weapon, but the special verdicts asked the jury to find whether the defendant was armed with a firearm. 149 Wn.App. at 229-30. The jury found firearm enhancements and the court imposed firearm enhancements pursuant to the jury’s special verdicts. *Id.* at 230. Relying on *Recuenco III*, the Court of Appeals reversed the firearm enhancements, finding the court exceeded its authority in imposing the

enhancements where the jury was instructed only on deadly weapon.

Id. at 237.

Here, as in *Delgado*, the jury was instructed that it must find the defendant was armed with a “deadly weapon” in order to return the special verdicts. The jury was not instructed on the definition of “firearm” for sentencing enhancement purposes, but “deadly weapon” was defined. Thus, the special verdicts, although labeled “firearm,” necessarily reflected the jury’s findings that Mr. Chapmon was armed with a “deadly weapon.” *See State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982) (“Jurors are presumed to follow instructions.”), *cert. denied*, *Frazier v. Washington*, 459 U.S. 1211 (1983).

The court erred in imposing firearm enhancements where the jury was instructed only on deadly weapon.

c. The error in imposing firearm enhancements where the jury instructed only on deadly weapon can never be harmless and Mr. Chapmon is entitled to reversal and remand for imposition of 12-month deadly weapon enhancements.

The error in imposing a firearm enhancement where the jury is only instructed on deadly weapon can never be harmless and requires reversal. *Recuenco*, 163 Wn.2d at 432-33. Accordingly, the trial court here erred where it imposed firearm enhancements where only deadly

weapon enhancements were authorized. Mr. Chapmon is entitled to reversal of his sentence and remand for the imposition of 12-month deadly weapon enhancements.

Here, the court erroneously imposed firearm enhancements. Mr. Chapmon is entitled to reversal of his sentence and remand for imposition of 12 month deadly weapon enhancements. RCW 9.94A.533(4)(b).

4. Amendments to the law regarding legal financial obligations requires the \$200 in legal financial obligations against Mr. Chapmon be stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). Now, the previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h).

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714, (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly

imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Here, Mr. Chapmon was indigent at trial and the trial court found him indigent for the purpose of appeal. CP 3-5. The trial court imposed the \$200 filing fee against Mr. Chapmon. CP 20. As in *Ramirez*, the change in the law applies to Mr. Chapmon's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 filing fee. *Ramirez*, 191 Wn.2d at 747-48.

F. CONCLUSION

For the reasons stated, Mr. Chapmon asks this Court to reverse his convictions and remand for a new trial or reverse his sentence and remand for imposition of 12-month deadly weapon enhancements.

DATED this ___ day of February 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

0113

INSTRUCTION NO. 19

For purposes of Assault in the Second Degree, if a person acts with intent to assault another person, but the act harms an unintended person, the actor is also deemed to have acted with intent to assault the unintended person.

For purposes of this instruction, "harms" means:

- 1) causes a harmful or offensive touching, striking or shooting of the unintended person, and/or
- 2) creates in the unintended person a reasonable apprehension and imminent fear of bodily injury.

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INSTRUCTION NO. 34

For purposes of a special verdict for a particular count, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime charged in that particular count, or of that crime's lesser included offense.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 51774-4-II
v.)	
)	
ERICK CHAPMON,)	
)	
Appellant.)	

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