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NO. 51774-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERICK NATHAN CHAPMON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phillip K. Sorensen

No. 17-1-01431-3

Brief of Respondent

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

1. Did the trial court properly instruct the jury on the doctrine of transferred intent where defendant shot at multiple people sitting in the same car?
2. Did the trial court properly impose a firearm sentencing enhancement where the jury found beyond a reasonable doubt defendant was armed with a firearm after it was instructed on the definition of a firearm?
3. Should this Court remand to strike the \$200 criminal filing fee from defendant's judgment and sentence where defendant was found indigent?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On April 11, 2017, the State charged Erick Nathan Chapmon ("defendant") with three counts of second degree attempted murder. CP 1-3. On October 12, 2017, the State filed an amended information adding three additional charges of first degree assault. CP 10-13. Then, on February 3, 2018, the State filed a second amended information, charging defendant with only three counts of first degree assault. CP 34-35. The

charges in the second amended information specified that defendant committed assault

with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, as defined in RCW 9.41.010, and invoking provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

CP 34-35.

The case proceeded to jury trial on February 7, 2018. 2-7-18 RP 3.¹

The State presented 14 witnesses including the three victims, emergency medical personnel, and responding police officers. 2-8-18 RP (morning and afternoon session) 230; 2-12-18 RP 243, 349, 408; 2-13-18 RP 425, 444, 453, 482; 2-14-18 RP 535, 571, 588, 654; 2-15-18 RP 671, 684, 704; 2-20-18 RP 759. Defendant called five witnesses, and he testified on his own behalf. 2-20-18 RP 801, 917; 2-21-18 RP 993, 1084, 1143. The defense rested on February 22, 2018. 2-22-18 RP 1206.

In addition to instructions on first degree assault, the court also instructed the jury on the lesser included offense of second degree assault with regard to each of the three victims: Jessica Newman, Sasha Green,

¹ The Verbatim Report of Proceedings (RP) are contained in 13 separate files. Some of the files contain transcripts of proceedings that occurred on the same day. They are referred to as the morning session and afternoon session. All citations to the trial transcripts are referred to by date and page number.

and Tonya Carroll. CP 34-35, 69-106 (Instruction No. 14, 21, 23, 25). The jury was instructed that

A person commits the crime of Assault in the Second Degree when, under circumstances not amounting to Assault in the First Degree, he intentionally assaults another and thereby recklessly inflicts substantial bodily harm, or assaults another with a deadly weapon.

CP 69-106 (Instruction No. 14).

The to-convict instructions for the lesser included offense of second degree assault as charged in count I required the jury to find beyond a reasonable doubt:

(1) That on or about the 1st day of January, 2017, the defendant:

(a) intentionally assaulted Jessica Newman and thereby recklessly inflicted substantial bodily harm;
or

(b) assaulted Jessica Newman with a deadly weapon; and

(2) that this act occurred in the State of Washington.

CP 69-106 (Instruction No. 21). As for counts II and III, the jury was instructed that to find defendant guilty of the lesser included offense of second degree assault, it was required to find 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.

CP 69-106 (Instruction Nos. 23, 25). Over defense objection, the court further instructed the jury on the doctrine of transferred intent:

For the 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.

CP 69-106 (Instruction No. 19); CP 191-233 (Proposed Instruction No. 17); WPIC 10.01.01 (modified by *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009)); 2-22-18 RP 1292.

Defendant asserted the defense of self or others during closing argument, and the court instructed the jury accordingly. 2-23-18 RP 1369; CP 69-106 (Instruction Nos. 26-30). Finally, the court instructed the jury that

For the 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.

...

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

CP 69-106 (Instruction No. 34). Firearm was separately defined as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 69-106 (Instruction No. 12). And the jury was instructed that “[a] firearm, whether loaded or unloaded, is a deadly weapon.” CP 69-106 (Instruction No. 18).

On February 26, 2018, the jury found defendant guilty beyond a reasonable doubt of three counts of second degree assault. CP 107, 109-11, 113-14. The jury submitted special verdicts finding that defendant was armed with a firearm during the commission of the crimes in each count. CP 108, 112, 115. On April 6, 2018, the court sentenced defendant to 15 months concurrent for the assault convictions and an additional 36 months consecutive for the firearm enhancements. CP 139-52. In sum, the court sentenced defendant to a total of 123 months in prison. *Id.* The court also imposed legal financial obligations including a \$200 criminal filing fee. The court found defendant indigent. CP 185-86. This timely appeal followed. CP 153-67.

2. FACTS

On December 31, 2016, Jessica Newman, Sasha Green, and Tonya Carroll attended a New Year’s party at a Tacoma house. 2-8-18 (morning

session) RP 230, 232-34; 2-8-18 (afternoon session) RP 9, 11. Green drove them to the party in her car. 2-8-18 (afternoon session) RP 56-57. When the group arrived, they observed over 30 people in the house partying, drinking, and dancing to music provided by defendant, who was working as the DJ. 2-8-18 (afternoon session) RP 10-12, 62; 2-20-18 RP 805, 919. Newman, Green, and Carroll entered the home, and Newman and Carroll joined in drinking and dancing. 2-8-18 (afternoon session) RP 12-13. Green recognized defendant as they had had a physical relationship during the summer of 2016. 2-8-18 (afternoon session) RP 65. At some point during the party, Newman realized that she lost a special bracelet. 2-8-18 (afternoon session) RP 13-14. She backtracked her steps, checking the car and the bathroom, but when she realized the bracelet was gone, she went to the bathroom and wept. 2-8-18 (afternoon session) RP 14-15.

Newman eventually stumbled out of the bathroom and went to the car with Green. 2-8-18 (afternoon session) RP 15-16. However, as Newman exited the bathroom, the bathroom door hit Sydney Stovall in the face, causing her to bleed from her mouth. 2-20-18 RP 805-07. Stovall was defendant's wife. 2-20-18 RP 802. After being hit with the door, Stovall entered the bathroom and spat blood into the sink. 2-20-18 RP 806-07. A woman named Danielle went into the bathroom to help Stovall. *Id.* When Stovall left the bathroom, she did not see Newman in the living

room, so she went to show defendant what happened to her. 2-20-18 RP 807-08. She told defendant that “some girl hit me with the door.” *Id.* Defendant told Stovall to go outside and get some air. 2-20-18 RP 922.

Outside, Stovall and Danielle encountered Green and Newman. 2-8-18 (afternoon session) RP 17, 2-20-18 RP 808, 812. Green gave Newman her keys and told her to wait in the car with the doors locked while she spoke with Stovall and Danielle. *Id.* Green went back into the house while Newman stayed in the car. 2-8-18 (afternoon session) RP 18, 20. Shortly thereafter, Carroll arrived, and she and Green went to get into the car with Newman to leave. 2-8-18 (afternoon session) RP 20. As they were trying to get in Green’s car, Stovall, along with “bunch of people,” approached the car, and defendant joined them. 2-8-18 (afternoon session) RP 20, 2-12-18 RP 301-02, 2-20-18 RP 923-26.

As Green began driving away, the group started “yelling,” “kicking and banging on [the] car[.]” 2-8-18 (afternoon session) RP 20-21, 2-12-18 RP 367. Defendant observed Green back the car up and scrape the curb. 2-20-19 RP 934. Everyone surrounding the car quickly backed away. 2-20-18 RP 935. At that point, defendant drew his firearm and yelled, “Hey, stop.” *Id.* The car continued backing up, and defendant fired his gun at the car approximately 12 times. 2-20-18 RP 937-39.

Inside the car, Newman looked down at her leg, she cupped her hand around the area it was bleeding, and she saw a puddle of blood in her hand. 2-8-18 (afternoon session) RP 22. Newman suffered a fragmented fibula fracture from the bullet. 2-15-18 RP 689-91. Carroll testified that after the shots from the gun starting going off, she turned around and saw defendant pointing the gun toward the car. 2-12-18 RP 373-74. Defendant was still shooting. 2-12-18 RP 374. Carroll testified that at that point she “was scared for [her] life[.]” *Id.* Green, the driver, saw defendant shooting towards them, so she drove away. 2-12-18 RP 269. She testified she was “afraid” of “[a]nyone getting hurt[.]” including herself. *Id.*

Twelve empty shell casings were found at the scene. 2-15-18 RP 717, 723; 2-20-18 RP 939. Defendant admitted that he was the shooter. 2-20-18 RP 937-40.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT INSTRUCTED THE JURY ON TRANSFERRED INTENT WHERE DEFENDANT SHOT AT MULTIPLE PEOPLE SITTING IN THE SAME CAR.

Jury instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Challenged jury instructions are reviewed de novo in the context

of the jury instructions as a whole. *State v. Castillo*, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009).

By convicting defendant of the lesser included offenses of second degree assault, as charged in Counts II and III, the jury necessarily found

(1) That on or about the 1st day of January, 2017, the defendant assaulted Sasha Green [and Tonya Carroll] with a deadly weapon; and

(2) That this act occurred in the State of Washington.

CP 69-106 (Instruction Nos. 23, 25), 111, 114. The trial court also instructed the jury on the doctrine of transferred intent:

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.

CP 69-106 (Instruction No. 19); WPIC 10.01.01.

When the trial court instructed the jury with the to-convict instructions for second degree assault as stated above, it was the State’s burden to prove each element beyond a reasonable doubt. CP 69-106 (Instruction Nos. 23, 25); *State v. Johnson*, 188 Wn.2d 742, 751, 399 P.3d

507 (2017) (due process requires that the State prove each element of a crime beyond a reasonable doubt).

- a. The State met its burden of proving beyond a reasonable doubt each element of assault in the second degree.

The trial court properly applied *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009), when it instructed the jury on the doctrine of transferred intent. 2-22-18 RP 1292-97; CP 69-106 (Instruction No. 19). *Elmi* involved a defendant who fired gun shots into a building occupied by his wife, her two younger siblings, and the defendant's child. 166 Wn.2d at 212. The defendant was subsequently charged with one count of attempted murder and four counts of first degree assault. *Id.* at 212. The trial court instructed the jury on the doctrine of transferred intent, and the jury returned a general verdict finding defendant guilty as charged. *Id.* at 212-13. On appeal, Elmi contended that the State was required to prove he had the *specific intent* to assault each child and that the transferred intent instruction erroneously relieved the State of this burden. *Id.* at 214 (emphasis added).

Our Supreme Court rejected Elmi's claim. *Id.* at 219. While it was "undisputed that Elmi fired gunshots specifically intending to inflict great bodily harm upon" his wife, the Court held that "once the intent to inflict great bodily harm is established, usually by proving the defendant

intended to inflict great bodily harm on a specific person, the mens rea is transferred under” the first degree assault statute “to any unintended victim.” *Id.* at 216, 218. The Court further held that because the first degree assault statute encompassed transferred intent, it did not need to reach the issue of the transferred intent doctrine. *Id.* at 218.

In *State v. Frasquillo*, 161 Wn. App. 907, 916, 225 P.3d 813 (2011), this Court approved *Elmi*, concluding that it established “that the intent to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of harm.” This Court further concluded that “*Elmi* applies equally to second degree assault.” *Frasquillo*, 161 Wn. App. at 916 (n. 13).

Like the defendant in *Elmi*, defendant here argues that the to-convict instructions required the jury to find that defendant specifically intended to assault each victim and that the transferred intent instruction relieved the State of this burden. Brief of Appellant at 8-11. Defendant misstates the law. The transferred intent instruction properly allowed the jury to convict defendant of assault for each victim by a finding that defendant only *intended* to harm one of them and that this intent transferred to the remaining victims. *See, e.g., State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (“once the intent to inflict great bodily harm against an intended victim is established... the mens rea is

transferred under [the first degree assault statute] to any unintended victim”); *State v. Clinton*, 25 Wn. App. 400, 606 P.2d 1240 (1980) (recognizing that “the overwhelming weight of authority at common law approved the theory of transferring the intent of the defendant to harm one individual to another, but unintended, victim”); *Elmi*, 166 Wn.2d at 216 (holding that specific intent need not always match a specific victim).

b. The transferred intent doctrine was properly applied to second degree assault.

“[T]ransferred intent is applicable to second degree assault charges involving an accidental or unintended victim.” *State v. Wilson*, 113 Wn. App. 122, 131, 52 P.3d 545 (2002) (citing *State v. Clinton*, 25 Wn. App. 400, 606 P.2d 1240 (1980)); *State v. Aguilar*, 176 Wn. App. 264, 275, 308 P.3d 778 (2015); *see also, Frasquillo*, 161 Wn. App. at 916 (n. 13) (The *Elmi* court made clear that the first degree assault statute “encompasses transferred intent and decided the issue based on the statute, not on the common law doctrine of transferred intent.” 166 Wn.2d at 218. Because second degree assault contains the same wording with regard to intent, “*Elmi* applies equally to second degree assault.”)

Here, the to-convict instructions identified specific victims, *and* the trial court supplied the jury with an instruction on transferred intent. CP 69-106 (Instruction No. 19). The jury was instructed that intent only

transfers to unintended victims who were harmed. *Id.* The court defined harm as one that causes “a harmful or offensive touching, striking or shooting” and/or creates “reasonable apprehension and imminent fear of bodily injury.” *Id.* Evidence was adduced that each victim was harmed or placed in reasonable apprehension of bodily harm. Newman suffered physical injury. 2-8-18 (afternoon session) RP 22, 2-15-18 RP 689-91. Carroll testified that she was scared for her life. 2-12-18 RP 373-74. And Green testified that she was afraid of getting hurt. 2-12-18 RP 269.

Defendant relies on *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011), for his claim that transferred intent does not apply to second degree assault charged as assault with a deadly weapon. Brief of Appellant at 10. This claim fails because *Abuan* is distinguishable. There, in analyzing the issue of transferred intent for second degree assault, the court first observed that the State never offered a transferred intent instruction. *Abuan*, 161 Wn. App. at 156. Accordingly, the court held that where “the jury instruction identifies a specific victim... it is the law of the case and there is no room for a transferred intent analysis without a transferred intent jury instruction.” *Id.* Additionally, unlike in this case, in *Abuan*, the record was devoid of evidence that the victim was “placed in apprehension of bodily harm.” 161 Wn. App. at 157. The court even went on to hold that because of the victim’s position in the house, “he *could not*

have been placed in reasonable apprehension and imminent fear of bodily injury.” *Id.* at 154 (emphasis added).

Pursuant to *Frasquillo*, 161 Wn. App. at 916 (n. 13), the transferred intent doctrine was properly applied to second degree assault. This Court should affirm defendant’s convictions.

c. Jury Instruction 19 did not constitute an improper comment on the evidence.

A jury instruction that accurately states the law relevant to a case does not convey the court’s attitude toward the merits of a case and is not a comment on the evidence. *State v. Tili*, 139 Wn.2d 107, 126-27, 985 P.2d 365 (1999); *State v. Foster*, 91 Wn.2d 466, 481-82, 589 P.2d 789 (1979). Conversely, a definitional jury instruction that “essentially resolve[s] a contested factual issue” is an improper comment on the evidence because it “effectively relieve[s] the prosecution of its burden of establishing an element of the [crime].” *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). In other words, a court comments on the evidence when it instructs a jury that ““matters of fact have been established as a matter of law.”” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A judicial comment in a jury instruction is presumed prejudicial. *Levy*, 156 Wn.2d at 725. Absent an affirmative showing from

the record that no prejudice could have resulted, the burden is on the State to show that despite the error the defendant was not prejudiced. *Id.*

A claim of improper judicial comment on the evidence raises an issue involving a manifest constitutional error and may be raised for the first time on appeal. *Id.* at 719-20. Whether the trial court improperly commented on the evidence is reviewed de novo, and jury instructions are reviewed as a whole. *Id.* at 721.

In *Levy*, where the issue of whether a party's apartment qualified as a "building" was a contested matter of fact, a jury instruction that referenced the apartment as a "building" suggested to the jury that the apartment was in fact a building "as a matter of law" and constituted an impermissible comment on the evidence. 156 Wn.2d at 721. Similarly, in *Becker*, the "to-wit" reference in the special verdict form stated that the "youth program" was a "school," but whether the youth program was in fact a school was a highly contested issue and critical to the case. 132 Wn.2d at 64. The instruction therefore amounted to an impermissible comment. *Id.*

A similar issue was discussed in the unpublished Division III case, *State v. Johnson*, No. 32014-6-III, 2014 WL 6790170, at *3 (Wash. Ct.

App. December 2, 2014) (unpublished).² There, the court instructed the jury that “[i]f a person acts with intent to kill or assault another, but the act harms a third person, the actor is also deemed to have acted with intent to kill or assault the third person.” 2017 WL 6790170, at *3. On review, the appellate court held that because the transferred intent instruction used the word “if” and not “shall,” the instruction necessitated that there “first be a finding of the required mens rea and then that mens rea transfers to a third person[;]” thus the instruction did not create a mandatory presumption relieving the State of its burden to prove intent. *Id.*

Similarly, here, the transferred intent instruction included the language “if,” and not “shall.” CP 69-106 (Instruction No. 19). The instruction neither required the jury to find that defendant intended to assault a specific person nor mandated who that person was. *Id.* As the State argued in closing,

[defendant] may not necessarily have intended harmful contact to Jessica, and maybe it was meant for Sasha, and maybe it was meant for Tonya. It doesn't really matter, because one of the instructions you have talks about something that we call transferred intent... So, it doesn't matter who he's intending to shoot. If he's intending to shoot anyone in the car and Jessica happens to be the unfortunate one that got hit, he is intending to assault her.

² GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

RP 1335. The transferred intent instruction did not state as a fact any contested issue (e.g., whether defendant intended to assault a specific individual) and therefore did not constitute an improper comment on the evidence. *See Levy*, 156 Wn.2d at 721, 725.

Defendant claims that the transferred intent instruction relieved the State of its burden of proof. Brief of Appellant at 13. This claim fails because the instruction did not constitute an impermissible comment on the evidence as it did not establish any fact as a matter of law but rather left open to the jury the question of whether or not defendant intended to assault a specific person:

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.

CP 69-106 (Instruction No. 19) (emphasis added); WPIC 10.01.01.

Accordingly, defendant suffered no prejudice from the instruction, and this Court should affirm his convictions.

2. THE TRIAL COURT PROPERLY IMPOSED A FIREARM SENTENCING ENHANCEMENT BECAUSE THE JURY FOUND BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS ARMED WITH A FIREARM AFTER BEING INSTRUCTED ON THE DEFINITION OF A FIREARM.

Defendant was charged with three counts of first degree assault. CP 34-35. The second amended information alleged that in each of the three counts defendant

was armed with a firearm, as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533[.]

Id. WPIC 2.07.02 states the proper instruction to give a jury when a sentence enhancement is sought for use of a deadly weapon under RCW 9.94A.825 and RCW 9.94A.533 “and the only weapon allegedly used by the defendant is a firearm.” By contrast, WPIC 2.10.01 states the instruction to give a jury “when there is a special allegation that the defendant was armed with a firearm at the time of the commission of a crime pursuant to RCW 9.94A.533(3)[.]” Here, the jury was instructed that to find defendant guilty of the lesser included offense of second degree assault for Jessica Newman,³ the jury was required to find beyond a reasonable doubt

³ Trial testimony indicated that Jessica Newman was the only victim that was struck by a bullet from defendant’s gun. 2-8-18 (afternoon session) RP 22; 2-15-18 RP 689-91.

(1) That on or about the 1st day of January, 2017, the defendant:

(a) intentionally assaulted Jessica Newman and thereby recklessly inflicted substantial bodily harm; or

(b) assaulted Jessica Newman with a deadly weapon; and

(2) That this act occurred in the State of Washington.

...

CP 69-106 (Instruction No. 21).

To find defendant guilty of the lesser included offense of second degree assault for Sasha Green and/or Tonya Carroll, the jury was required to find 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.

...

CP 69-106 (Instruction Nos. 23, 25).

The special verdict instruction stated that

[f]or 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.

...

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

CP 69-106 (Instruction No. 34); WPIC 2.07.02. "Firearm" was separately defined as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 69-106 (Instruction No. 12); WPIC 2.10. Defendant raised no objection to either the special verdict or firearm instructions. 2-22-18 RP 1297.

On February 26, 2018, the jury returned three special verdict forms finding that defendant was armed with a firearm during the commission of the assaults. CP 108, 112, 115. The trial court imposed firearm sentencing enhancements in defendant's judgment and sentence. CP 139-52.

- a. Defendant waived his claim of error when he failed to object to the special verdict jury instruction at trial.

Defendant claims that the trial court erred by imposing a firearm sentencing enhancement where the jury found by special verdict that defendant was armed with a firearm but was instructed on deadly weapon under WPIC 2.07.02. Brief of Appellant at 17-18; CP 69-106 (Instruction No. 34). Defendant waived this claim when he failed to object to the inclusion of the WPIC 2.07.02 special verdict instruction at trial. RAP 2.5(a); CrR 6.15(c); 2-22-18 RP 1297.

The general rule that appellate courts do not entertain issues not raised in the trial court has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988) (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976) *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). Had defendant raised an objection below, the issue could have easily been resolved by altering the language of the special verdict jury instruction. The trial court was deprived of this opportunity, and defendant is not now entitled to raise the issue for the first time on appeal. RAP 2.5(a); CrR 6.15(c).

RAP 2.5(a)(3), however, provides an exception to this general rule where the claimed error is a “manifest error affecting a constitutional right.” For reasons explained below, defendant’s challenge does not rise to the level of manifest constitutional error. Accordingly, this Court should reject defendant’s claim of error and affirm his judgment and sentence. *See Scott*, 110 Wn.2d at 688 (Holding that “[i]f the asserted error is not a constitutional error, the court may refuse review on that ground.”)

- b. The imposition of the firearm sentencing enhancements did not result in a violation of defendant's constitutional rights.

As stated above, the second amended information specifically alleged that defendant was “armed with a firearm” during the commission of the crimes which added “additional time to the presumptive sentence as provided in RCW 9.94A.533[.]” CP 34-35. This allegation put defendant on notice that the State would seek a firearm sentencing enhancement. The trial testimony showed that defendant committed the crimes with a firearm and nothing else, the jury instructions defined “firearm,” and the jury returned special verdicts finding that defendant was armed with a firearm in each of the three counts. 2-8-18 (afternoon session) RP 22, 2-15-18 RP 717, 723, 2-20-18 RP 937-39; CP 69-106 (Instruction No. 12), 108, 112, 115). Thus, despite the fact that the court gave a special verdict instruction mirroring the language of WPIC 2.07.02 (deadly weapon—firearm) as opposed to WPIC 2.10.01 (firearm), the court properly sentenced defendant to firearm enhancements.

Defendant relies on *In re Personal Restraint of Delgado*, 149 Wn. App. 223, 204 P.3d 936 (2009), for the assertion that a court may only impose a deadly weapon sentence enhancement where the special verdict instruction instructs the jury on the use of a deadly weapon even if the jury nevertheless finds that the defendant was armed with a firearm and not a

deadly weapon. Brief of Appellant at 20. The *Delgado* decision was based on the seminal case, *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*).

Delgado and *Recuenco III* have nearly identical facts. In both cases, the State elected to charge the defendants with deadly weapon sentencing enhancements and not firearm enhancements. *Delgado*, 149 Wn. App. at 227-28; *Recuenco III*, 163 Wn.2d 435-36. The courts instructed the juries on deadly weapons for special verdict purposes, and neither jury was given an instruction on the definition of a firearm. *Delgado*, 149 Wn. App. at 229, 235, 237; *Recuenco III*, 163 Wn.2d at 431. In *Delgado*, the jury returned special verdicts finding a deadly weapon in one count and that defendant was armed with a firearm in all other counts. 149 Wn. App. at 236. In *Recuenco III*, the jury found only that the defendant was armed with a deadly weapon. 163 Wn.2d at 432. In both cases, the courts imposed firearm sentencing enhancements. *Delgado*, 149 Wn. App. at 230; *Receunco III*, 163 Wn.2d at 159.

Our Supreme Court held that where the State charged the defendants with only deadly weapons sentencing enhancements, imposing firearm sentencing enhancements deprived the defendants of their due process rights. *Delgado*, 149 Wn. App. at 237; *Recuenco III*, 163 Wn.2d at 440-41. The *Delgado* court further held that because the State did not

elect to charge the defendants with firearm enhancements, the jury instructions contained no error, and harmless error analysis could not apply. *Delgado*, 149 Wn. App. at 237.

However, *Recuenco III* addressed circumstances under which a firearm sentencing enhancement may be upheld. The court held that proper jury instructions would have allowed the jury to enter a firearm special verdict “if the State met its burden to prove that the weapon Recuenco used was a firearm under the statutory definition, which requires that the weapon was operable at the time of the commission of the offense.” *Recuenco III*, 163 Wn.2d at 437-39. In that particular case, however, the court noted that the evidence was insufficient to support a firearm enhancement anyway because “[t]he jury was not given facts supporting the firearm enhancements nor given instructions to determine if it was applicable to this case.” *Id.* at 439.

This case is distinguishable from *Delgado* and *Recuenco III* in two major ways. First, the State elected to charge defendant with a *firearm* sentencing enhancement, and defendant was notified of this in the second amended information. CP 34-35. Second, the jury was instructed on the definition of “firearm,” and the evidence adduced at trial supported the conclusion that the deadly weapon defendant used in the commission of his crimes was a firearm and nothing else. CP 69-106 (Instruction No. 12);

2-8-18 (afternoon session) RP 22, 2-15-18 RP 717, 723, 2-20-18 RP 937-39. Defendant admitted he shot his gun at the car. 2-20-18 RP 937-39.

Similar distinctions were upheld in light of both *Delgado*, 149 Wn. App. 223, and *Recuenco III*, 163 Wn.2d 428, in *In re Personal Restraint of Rivera*, 152 Wn. App. 794, 218 P.3d 638 (2009). There, the appellate court upheld a firearm sentence enhancement even though the jury was instructed only on a deadly weapon and found by special verdict that defendant was armed with a deadly weapon during the commission of the crime. *Rivera*, 152 Wn. App. at 797-97, 803-04. The court found the instructional error harmless because the to-convict instruction for first degree murder required the jury to find beyond a reasonable doubt that the defendant “shot Matthew Garza,” the only deadly weapon alleged to be involved was a handgun, and thus “the firearm enhancement was necessarily reflected in the jury’s general verdict” where the jury found the defendant guilty of murder. *Id.* at 803-05. Significantly, the defendant was also provided notice of the firearm enhancement in the information. *Id.* at 803.

Like *Rivera*, defendant here was given notice of the firearm enhancement in the information, and the evidence adduced at trial showed only that defendant committed the crimes with a firearm. CP 34-35; 2-8-18 (afternoon session) RP 22, 2-15-18 RP 717, 723, 2-20-18 RP 937-39.

This case is even more compelling than *Rivera*, however, because the jury was also instructed on the definition of a firearm, and it specifically found defendant was armed with a firearm, not a deadly weapon. CP 69-106 (Instruction No. 12), 108, 112, 115.

Recent cases out of Divisions I and III are on point. In the unpublished Division I case, *State v. Dunya*, No. 68915-1-I, 2015 WL 248708, at *13-14 (Wash. Ct. App. January 20, 2015) (unpublished),⁴ the appellate court affirmed a firearm sentencing enhancement where the jury was given the same special verdict instruction as the jury was given in this case.⁵ There, the jury found by special verdict that Dunya used a “firearm” in the commission of his crime, despite the court’s instruction that “[f]or purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon” rather than a “firearm.” 2015 WL 248708, at *14. However, the State charged Dunya with a firearm enhancement, “the instructions told the jury that a ‘deadly weapon’ includes a ‘firearm[,]’” and “firearm” was defined in a separate jury instruction. *Id.* The trial court imposed a firearm enhancement. *Id.* On

⁴ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

⁵ In this case, as in *Dunya*, 2015 WL 248708, at *13-14, the jury was instructed under WPIC 2.07.02. CP 69-106 (Instruction No. 34).

review, the appellate court affirmed the firearm enhancement holding that “[t]he instructions properly informed the jury of the applicable law and that in order to return this special verdict, it had to find beyond a reasonable doubt that Dunya committed his offenses while armed with a ‘firearm.’” *Id.*

Similarly, in *State v. Powers*, No. 34006-6-III, 2017 WL 3485450, at *5 (Wash. Ct. App. August 15, 2017) (unpublished),⁶ the special verdict instruction required the jury to find the defendant committed assault with a deadly weapon, defining deadly weapon as a firearm. The jury returned a special verdict finding that Powers was armed with a firearm, and the court imposed a firearm enhancement. *Id.* The issue, therefore, boiled down to a claim of instructional error, and “[t]he only flaw in the jury instructions” was that the special verdict instruction included WPIC 2.07.02 when it should have been WPIC 2.10.01 instead. *Id.* The appellate court ultimately declined to rule on the jury instruction issue due to counsel’s failure to raise the issue at trial. 2017 WL 3485450, at *5. However, the court briefly addressed the substance of the issue in a footnote which stated that sentence enhancements ““must be authorized by

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the jury in the form of a special verdict’ and ‘the sentencing judge can know which (if any) enhancement applies only by looking to the jury’s special findings.’” 2017 WL 3485450, at *5 (fn. 2) (citing *State v. Williams-Walker*, 167 Wn.2d 889, 900-02, 225 P.3d 913 (2010)). Thus, while the instructions could have been more consistent at trial, “the jury’s special verdict answer that Mr. Powers was armed with a firearm was clear[,]” and “[i]t would be wrong under *Williams-Walker* to look to the jury instructions to infer ambiguity in that answer.” *Id.*

Likewise, while it may have been prudent for the trial court here to have instructed the jury under WPIC 2.10.01 as opposed to WPIC 2.07.02 for purposes of a firearm special verdict, the trial court properly sentenced defendant to a firearm enhancement based on the jury’s finding that defendant was armed with a firearm. *See Williams-Walker*, 167 Wn.2d at 900-02. The State charged defendant with a firearm enhancement and thus afforded him the opportunity to defend against it. CP 34-35. The only weapon alleged to be used in the commission of defendant’s crimes was a firearm, the special verdict instruction defined “deadly weapon” as a firearm, and “firearm” was further defined for the jury. 2-8-18 (afternoon session) RP 22, 2-15-18 RP 717, 723, 2-20-18 RP 937-39; CP 34-35, CP 69-106 (Instruction Nos. 12, 34). Faced with an identical situation to

Dunya, 2015 WL 248708, and *Powers*, 2017 WL 3485450,⁷ this Court should follow the approach of Divisions I and III and affirm the firearm sentencing enhancements.

3. THE \$200 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM DEFENDANT'S JUDGMENT AND SENTENCE.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, prohibits the imposition of the \$200 criminal filing fee on defendants who were indigent at the time of sentencing. *See* RCW 36.18.020(2)(h). As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 applies to cases that are on appeal and not yet final.

Here, the trial court found defendant indigent, and it imposed a \$200 criminal filing fee in defendant's judgment and sentence. CP 185-86, 143. Therefore, the State agrees that this Court should remand to strike only the \$200 criminal filing fee from defendant's judgment and sentence in accordance with House Bill 1783 and RCW 36.18.020(2)(h).

⁷ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decisions cited above have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate.

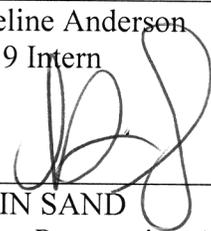
D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court affirm defendant's conviction and sentence and remand only to strike the \$200 criminal filing fee from defendant's judgment and sentence.

DATED: May 10, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney

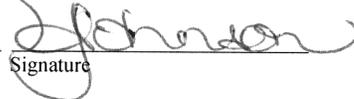
Madeline Anderson
Rule 9 Intern



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

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The undersigned certifies that on this day she delivered by ^{EFie} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/10/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 10, 2019 - 9:22 AM

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