

31053-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MELINDA R. BARRERA, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

(cross-appeal withdrawn)

---

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**INDEX**

APPELLANT/CROSS-RESPONDENT’S ASSIGNMENTS OF ERROR.....1

RESPONDENT/CROSS-APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT .....3

    A.    DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3) .....3

    B.    THE TRIAL COURT PROPERLY INSTRUCTED THE JURY .....4

        1.    The Court Properly Instructed The Jury On Second Degree Assault As The Predicate Felony Upon Which The Charge Of Second Degree Was Based .....4

        2.    Murder In The Second Degree That Occurs While The Defendant Is Committing Or Attempting To Commit A Felony Is An Independent Crime That Does Not Require A Separate Conviction Of The Named Felony To Be Valid.....6

        3.    The Trial Court Properly Instructed The Jury Regarding The Firearm And Deadly Weapon Special Verdicts .....9

    C.    THE TRIAL COURT PROPERLY IMPOSED BOTH SENTENCING ENHANCEMENTS BASED UPON THE EVIDENCE PRODUCED AND THE SPECIAL VERDICT INSTRUCTIONS GIVEN.....12

D.	THE TRIAL COURT PROPERLY IMPOSED SEPARATE SENTENCING ENHANCEMENTS FOR THE DEFENDANT’S AND/OR ACCOMPLICE’S USE OF THE HAMMER, THE BASEBALL BAT, AND THE FIREARM .....	14
	CONCLUSION.....	17

## TABLE OF AUTHORITIES

### WASHINGTON CASES

BLOCKBURGER V. U.S., 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	9
STATE V. BRETT, 126 Wn.2d 136, 892 P.2d 29 (1995).....	6, 7
STATE V. IRIZARRY, 111 Wn.2d 591, 763 P.2d 432 (1988).....	7
STATE V. JOHNSON, 124 Wn.2d 57, 873 P.2d 514 (1994).....	15
STATE V. JOHNSON, 60 Wn.2d 21, 371 P.2d 611 (1962).....	8, 12
STATE V. KINCAID, 103 Wn.2d 304, 692 P.2d 823 (1985).....	7
STATE V. KOSEWICZ, 174 Wn.2d 683, 278 P.3d 184 (2012).....	8
STATE V. KRONICH, 160 Wn.2d 893, 161 P.3d 982 (2007).....	3
STATE V. MILLS, 154 Wn.2d 1, 109 P.3d 415 (2005).....	4
STATE V. NUNEZ, 174 Wn.2d 707, 285 P.3d 21 (2012).....	9
STATE V. O'DONNELL, 142 Wn. App. 314, 174 P.3d 1205 (2007).....	4, 6
STATE V. PETRICH, 101 Wn.2d 566, 686 P.2d 173 (1984).....	9
STATE V. PRADO, 144 Wn. App. 227, 181 P.3d 901 (2008).....	4

STATE V. SCOTT, 110 Wn.2d 682, 757 P.2d 492 (1988).....	3
STATE V. STEIN, 144 Wn.2d 236, 27 P.3d 184 (2001).....	3
STATE V. WILLIAMS-WALKER, 167 Wn.2d 889, 225 P.3d 913 (2010).....	15

**SUPREME COURT CASES**

CHAPMAN V. CALIFORNIA, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	17
--	----

**STATUTES**

RCW 9.94A.533(3).....	16
RCW 9.94A.533(4).....	14, 15, 16
RCW 9A.32.050(1)(b).....	7
RCW 10.95.020(11)(c).....	6

**COURT RULES**

RAP 2.5(a).....	2
RAP 2.5(a)(3).....	3

I.

APPELLANT/CROSS-RESPONDENT'S ASSIGNMENTS OF ERROR

1. The trial court failed to instruct the jury that it had to be unanimous regarding the manner in which the second degree assault predicate felony was committed to find defendant guilty of felony murder.
2. The trial court failed to give a *Petrich* instruction to ensure jury unanimity regarding the special verdicts for the firearm and deadly weapon sentencing enhancements.
3. The trial court erred imposing separate consecutive sentences for the sentencing enhancements because the verdict was unclear whether both enhancements penalized the same criminal act.
4. The trial court erroneously exceeded its statutory authority imposing consecutive two year sentencing enhancements under RCW 9.94A.533(4) where the jury did not find that defendant used a deadly weapon other than a firearm.

II.

RESPONDENT/CROSS-APPELLANT'S ASSIGNMENT OF ERROR

Upon review of the final record, the State hereby withdraws its cross-appeal.

### III.

#### ISSUES PRESENTED

1. Does defendant qualify for review pursuant to RAP 2.5(a) when defendant failed to object to the now alleged improper instructions and special verdict forms at trial?
2. Was defendant deprived of due process by the inclusion of an uncharged alternative means of committing second degree assault in the elements instruction?
3. Did the trial court erroneously impose separate consecutive sentencing enhancements based upon the evidence and the special verdicts returned?
4. Did the trial court exceed its statutory authority imposing a deadly weapon sentencing enhancement and a firearm sentencing enhancement based upon the evidence produced at trial?

### IV.

#### STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal only.

V.

ARGUMENT

- A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instructions that she now contends were erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by whether: (1) the alleged error is truly constitutional, and (2) is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added).

Defendant claims the court committed a constitutional error by failing to instruct the jury that it had to be unanimous regarding (1) how the predicate felony second degree assault was committed before it qualified as a basis for the finding that defendant committed second degree felony murder; and (2) the firearm and deadly weapon sentencing enhancements special verdict forms. Jury instructions satisfy the constitutional demands of a fair trial, when read as a

whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). Erroneous jury instructions are reviewed *de novo* on appeal. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* directly attributable to the alleged error. Defendant has not established that the court committed a manifest error. Hence, defendant is not entitled to appellate review thereof.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

1. The Court Properly Instructed The Jury On Second Degree Assault As The Predicate Felony Upon Which The Charge Of Second Degree Was Based.

Defendant contends that she was deprived of due process by the court providing the jury the means to find her guilty based upon multiple charged alternatives of second degree assault. The United States and Washington State constitutions mandate that the jury be instructed on the essential elements of the crime charged. *State v. O'Donnell*, 142 Wn. App. at 322. Here, the court instructed the jury on the definition and elements of second degree assault based on the charging language in the second amended information. The second amended information charged the defendant with second degree murder,

including that “the murder was committed in the course of, in furtherance of or in immediate flight from the crime of Second Assault.” CP 24-25. The court was legally obligated to instruct the jury on the law to be applied based upon the charged offenses and the evidence produced.

The evidence before the jury was sufficient for the jury to conclude that the defendant had acted “as an actor and/or accomplice” in a manner that satisfied all the alternative means of committing second degree assault as defined in instructions #25 and #27. Specifically, court’s instruction #25 provided that “a person commits the crime of assault in the second degree when...she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.” RP 1340; CP 70-112. Court’s instruction #27 provided that:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive. An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it, and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted. An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

RP 1341; CP 70-112.

The record before the jury included evidence that Mr. Nelson died after defendant and/or her accomplices struck him with a hammer, a baseball bat, and shot him with a firearm. RP 452, 546-581, 905, 967-978, 1017-1058, and 1201-1278. To convict defendant of murder in the second degree, the State must prove that defendant caused the death of a human being, and that the murder was committed in the course of, or furtherance of or immediate flight from the crime of a statutorily designed specific felony. RCW 9A.32.030(1)(a) and RCW 10.95.020(11)(c). Accordingly, the evidence before the jury legally obligated the court to define the alternative means of committing second degree assault for purposes of resolving the murder in the second degree as charged in Count II of the Amended Information. CP 24-25.

2. Murder In The Second Degree That Occurs While The Defendant Is Committing Or Attempting To Commit A Felony Is An Independent Crime That Does Not Require A Separate Conviction Of The Named Felony To Be Valid.

In *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), the Supreme Court noted:

The felony murder statute...provides that when a death occurs in the course of robbery...or attempted robbery, the participants are guilty of felony murder. In contrast, under RCW 10.95.020(9)(a), only premeditated murders committed during the course of the robbery are within the scope of the statute... Whether the death

penalty may be imposed depends upon whether the murder occurs 'in the course of' the robbery, not whether the robbery was completed.

*Id.*, at 163.

The same analysis holds true for murder in the second degree as defined in RCW 9A.32.050(1)(b) which provides that a person is guilty thereof when she commits or attempts to commit any felony, including assault. The crime of Murder in the second degree based upon RCW 9A.32.050(1)(b) does not list the elements of the named felony because in that context the defendant is not actually charged with the named crime. Rather, the underlying crime functions as a statutory aggravator for purpose of sentencing not adjudicating guilt. *State v. Brett*, 126 Wn.2d at 170; *State v. Irizarry*, 111 Wn.2d 591, 594, 763 P.2d 432 (1988). Accordingly, the State can prove the named felony by alternative means at trial. Nevertheless, the State must prove the elements of the named felony beyond a reasonable doubt. *State v. Kincaid*, 103 Wn.2d 304, 310-312, 692 P.2d 823 (1985). Here, the court properly instructed the jury on second degree assault for purposes of rendering a verdict regarding the charge of murder in the second degree because there was sufficient evidence to support the jury's verdict thereon.

Defendant was charged with murder based upon the commission of a felony whether by her hand or that of an accomplice. The elements of the predicate felony are not essential elements of felony murder. *State v. Kosewicz*,

174 Wn.2d 683, 692, 278 P.3d 184 (2012). Whether the assault was completed by one or all the alternative means enumerated is of no moment since the predicate felony supplies the mental (intent) element for the murder charge. *State v. Kosewicz*, 174 Wn.2d at 691-692. Accordingly, the trial court was not required to instruct the jury that it must unanimously find that the defendant and or an accomplice committed second degree assault by one alternatives means versus another.

Nevertheless, the trial court ensured that there was no unanimity issue by asking the jury to answer two special interrogatories. Finally, the trial court instructed the jury in instruction number 39 that:

You will also be given a special verdict form on the alternative elements of the crime charged in count II. Fill in the blanks on the special verdict form with the answer “yes”, “no”, or “not unanimous”, according to the decision you reach. In order to answer “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer to that question. If you unanimously have a reasonable doubt as to this question, you must answer “no”. If, after fully deliberating, you are unable to reach a unanimous verdict, you should answer “not unanimous”.

CP 70-112.

Clearly, the trial court’s instructions were designed to specifically avoid any potential confusion by the jury with regard to rendering a verdict on Count II – second degree felony murder. This court should presume that the jury followed the trial court’s instructions. *State v. Johnson*, 60 Wn.2d 21, 371 P.2d 611 (1962).

3. The Trial Court Properly Instructed The Jury Regarding The Firearm And Deadly Weapon Special Verdicts.

The defendant contends that the trial court committed instructional error by not giving the jury a unanimity instruction with regard to the deadly weapon and firearm sentencing enhancements pursuant to *State v. Petrich*, 101 Wn.2d 566, 686 P.2d 173 (1984). The defendant analyzes the issue by asking this Court to apply the “same evidence” test that was established by the decision in *Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Respectfully, reliance upon the “same evidence” test applies to whether multiple offenses, not sentencing enhancements, are the same and merge. Such is not the circumstance that faced the trial court herein.

The resolution of this issue must focus on whether the trial court’s instructions, as a whole, properly advised the jury that it had to be unanimous regarding the sentencing enhancements. A jury must unanimously agree that the State has proved beyond a reasonable doubt the facts required to impose a sentencing enhancement. *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012).

Here, jury instruction number 36 provided, in pertinent part, that:

...Because this is a criminal case, each of you must agree for you to return a verdict. If all of you have so agreed, fill in the verdict forms to express your decision...You will also be given special verdict forms for the crimes charged in counts I and II. If you find the defendants not guilty of these crimes do not use the special

verdict forms. If you find either defendant found guilty of either of these crimes, you will then use the special verdict forms for the defendant found guilty and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously agree that the answer to the question is “no,” or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer “no.”

CP 70-112.

The trial court’s instruction number 37 pertaining to the special interrogatory regarding the use of a deadly weapon provided, in pertinent part that:

For purposes of a special verdict 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...The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant...between the weapon and the crime...If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved...

CP 70-112.

The trial court’s instruction number 38 pertaining to the special interrogatory regarding the use of a firearm provided, in pertinent part:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with *a firearm* at the time of the commission of the crime...The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime...If one participant in a crime is armed with a

firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved...A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 70-112.

The trial court provided the jury with special verdict forms that asked the jury to answer special interrogatories. CP 70-112.

The trial court provided the jury with two separate and distinct instructions that distinguished the deadly weapon special verdict from that for the firearm special verdict. CP 70-112. The special verdict forms presented the specific interrogatories to be resolved. The special verdict forms regarding the defendant and Count II were specifically designated as “SPECIAL VERDICT FORM – COUNT II DEADLY WEAPON” and “SPECIAL VERDICT FORM – COUNT II FIREARM.” CP 70-112. Finally, the trial court instructed the jury in instruction number 39 that:

You will also be given a special verdict form on the alternative elements of the crime charged in count II. Fill in the blanks on the special verdict form with the answer “yes”, “no”, or “not unanimous”, according to the decision you reach. In order to answer “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer to that question. If you unanimously have a reasonable doubt as to this question, you must answer “no”. If, after fully deliberating, you are unable to reach a unanimous verdict, you should answer “not unanimous”.

CP 70-112.

Clearly, the special verdict instructions and forms were designed to avoid any confusion that the jury might have regarding the process. As noted, a jury is presumed to follow the court's instructions. *State v. Johnson, supra*.

C. THE TRIAL COURT PROPERLY IMPOSED BOTH SENTENCING ENHANCEMENTS BASED UPON THE EVIDENCE PRODUCED AND THE SPECIAL VERDICT INSTRUCTIONS GIVEN.

Defendant contends that the trial court committed error when it imposed separate sentencing enhancements for the use of the firearm, hammer, and bat in the commission of the second degree murder. Defendant argues that the error is based upon the fact that the enhancements are predicated upon a single act. The record reflects that the autopsy performed by Dr. Howard, the Medical Examiner, found that the victim suffered injuries as a result of being struck with an item like a hammer, and/or a baseball bat, not the butt or barrel of a handgun. RP 735-744. Additionally, the record reflects that the victim was shot with a firearm which was the cause of death. RP 744-752, 759. Clearly, there was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant and/or her accomplice were armed with a deadly weapon (*i.e* the hammer and baseball bat) during the commission of the assault separate from the firearm. The record also provides sufficient evidence that the defendant was armed with a firearm. Defendant's co-defendant Mr. McLaughlin freely, knowingly, and voluntarily

admitted to striking the victim with a baseball bat in the chest. RP 973-974, 977-978.

Defendant freely, knowingly, and voluntarily admitted in interviews with officers that she had struck Mr. Nelson in the face with a hammer and shot, but did not intend to kill, Mr. Nelson. RP 905, 967, 1017-1058, 1201-1278. Defendant admitted under oath that the injuries to the victim were perpetrated by more than a single act. RP 1201-1278. Defendant corroborated her separate assaults of Mr. Nelson with a hammer and then the firearm. RP 1017-1058, 1201-1278. Defendant also testified to her co-defendant/accomplice in the incident, Mr. McLaughlin, striking Mr. Nelson with a baseball bat entirely separately from her own acts. RP 1201-1278. Finally, the record reflects that the defendant freely, knowingly, and voluntarily admitted in her written statement that she both assaulted Mr. Nelson with a hammer and then shot him with the firearm. RP 1035-1038.

The general and special verdicts returned by the jury reflect careful consideration of the parties' arguments in light of the evidence and the court's instructions. Such is especially the circumstance when the very same jury that returned the general and special verdicts at issue herein returned not guilty verdicts regarding the co-defendant McLaughlin.

There was no question that the murder in the second degree began with the second degree assault based upon the evidence that the defendant as an actor

and/or accomplice assaulted the victim by means of a baseball bat, a hammer that defendant brought to the scene, and a firearm that defendant used to shoot the victim. There is no question that the evidence supports the verdict that the murder was committed “in the course of, in furtherance of or in immediate flight from the crime of assault in the second degree.”

D. THE TRIAL COURT PROPERLY IMPOSED SEPARATE SENTENCING ENHANCEMENTS FOR THE DEFENDANT’S AND/OR ACCOMPLICE’S USE OF THE HAMMER, THE BASEBALL BAT, AND THE FIREARM.

Defendant claims that the special verdicts should be vacated because the trial court lacked the authority to impose separate consecutive sentencing enhancements because the jury did not find that the defendant used a “deadly weapon other than a firearm.” Defendant contends that the special verdict instructions permitted the jury to find that the defendant’s use of the gun satisfied both the firearm and deadly weapon interrogatories because the WPIC generic definition of “deadly weapon” includes a gun. Defendant thus maintains that the special verdict found and imposed for the deadly weapon sentencing enhancement should be vacated.

RCW 9.94A.533(4) provides, in pertinent part:

The following additional times shall be added to the standard sentence range for felony crimes...if the offender or an accomplice was armed with a deadly weapon other than a firearm...and the offender is being sentenced for one of the crimes listed in this

subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime...the following additional times shall be added to the standard sentence range...based on the felony crime of conviction...:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both...;

...

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter...;

RCW 9.94A.533(4).

By incorporating, the presumption that the jury follows the law as instructed by the court into the process, *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), a defendant cannot face a sentencing enhancement unless the jury returns a special verdict finding that the defendant committed the enhancing factor beyond a reasonable doubt while committing the charged offense. If the court committed an instructional error with regard to the special interrogatory and verdict, it was harmless in light of the presumption that the jury follows the law as instructed.

Defendant contends that the alleged error created by the court's special verdict form instruction was not harmless based upon the reasoning in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010), that there was no way to discern how the jury would have answered the special interrogatory had it

been properly instructed. However, the issue in *Williams-Walker* addressed whether the court's special verdict interrogatory matched the language of the charging document. Here, the second amended information in count II charged defendant with murder in the second degree based upon the predicate felony of second degree assault. CP 24-25. The charging document also notified the defendant that the State was alleging a firearm and deadly weapon enhancements pursuant to the provisions of RCW 9.94A.533(3) and (4). The trial court's general verdict and special verdict instructions exactly mirrored the language in the second amended information, so there is no issue herein governed by *Williams-Walker*.

The unchallenged testimony of the Medical Examiner was that Mr. Nelson died as a result of a gunshot wound to his chest which pierced his heart. Additionally, the unchallenged testimony of the Medical Examiner was that Mr. Nelson had also incurred several blunt force traumas to his head and body which corresponded to the defendant's confession that she struck him in the face with the hammer and shot him with the gun. Assuming that the jury followed the court's instructions, the jury properly returned the general and special verdicts at issue herein.

The standard of review requires the appellate court inquire whether it can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *See Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824,

17 L. Ed. 2d 705 (1967). Here, there should be no reasonable doubt that the jury, having already unanimously agreed that defendant had not intentionally murdered Mr. Nelson, but had intended to assault him, for purposes of the general verdict, would thereafter apply the same care to answering to the interrogatories posed by the special verdicts. Accordingly, assuming, arguendo, that the trial court committed an instructional error in the wording of its special interrogatories, it was harmless beyond a reasonable doubt based upon the evidence before the jury that included defendant's confession that she assaulted Mr. Nelson with both a hammer and a firearm.

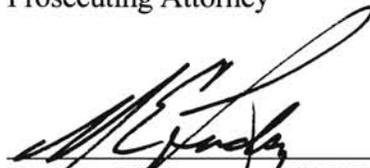
VI.

CONCLUSION

For the reasons stated, the conviction, special verdicts, and sentence should be affirmed.

Respectfully submitted this 16<sup>TH</sup> day of May, 2013.

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