

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RECUENCO,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF ARGUMENT

Arturo Recuenco challenges his conviction of second degree assault *with a firearm enhancement* contending it violates (1) the jury trial guarantee of the Sixth Amendment, (2) the requirement of the Fourteenth Amendments Due Process Clause of proof beyond a reasonable doubt, (3) the Double Jeopardy provisions of the Fifth Amendment, and (4) the jury trial guarantee Article I, § 21 and Article I, § 22 of the Washington Constitution. Mr. Recuenco further contends these errors require reversal without any consideration of prejudice because (1) any such consideration of the resulting prejudice would further violate double jeopardy provisions, (2) the denial of a jury finding beyond a reasonable doubt is structural error which can never be deemed harmless, and (3) because a denial of the right to a jury trial under the state constitution can never be harmless.

B. ISSUES PRESENTED

1. The Sixth Amendment right to a jury trial and the right to proof beyond a reasonable doubt guaranteed by the Due Process Clause of the Fourteenth Amendment prevent a judicial finding of any fact which increases the statutory maximum penalty. The relevant “statutory maximum” penalty is the standard range sentence permitted based solely on the jury’s verdict. Did the trial court violate Mr. Recuenco’s Sixth and Fourteenth Amendment rights where the maximum penalty permitted by the jury’s verdict that Mr. Recuenco was guilty of second degree assault with a deadly weapon, was 21

months, but the court made its own additional finding and entered a judgment for second degree assault with a firearm, with a minimum penalty of 39 months incarceration?

2. Factual findings which increase the statutory maximum penalty are elements of enhanced or greater offenses. The Double Jeopardy provisions of the Fifth Amendment bar the prosecution of a greater offense following a conviction for a lesser included offense. The Fifth Amendment also bars the entry of a judgment notwithstanding the verdict in criminal cases no matter how convincing the evidence of a defendant's guilt on greater offense. Where a jury has returned a verdict on the lesser offense of second degree assault with a deadly weapon finding, but the trial court enters a conviction of second degree assault with a firearm finding, does entry of a conviction for the greater offense violate the Double Jeopardy Clause?

3. Where there has been such a double jeopardy violation, can there be any remedy other than dismissal of the subsequent conviction for the greater offense and entry of a judgment on the jury's verdict?

4. The United States Supreme Court has concluded the denial of a jury verdict based on proof beyond a reasonable doubt is structural error which always requires the conviction be reversed. Where a trial court enters a conviction of a greater crime than that found by the jury, the conviction on the greater crime is not the product of a jury verdict based on proof beyond a reasonable doubt. Does the error automatically require reversal?

5. Article I, § 21 and Article I, § 22 of the Washington Constitution provide a broader jury trial right than that guaranteed by the Sixth Amendment. Can the denial of the jury right of the state constitution ever be deemed harmless?

C. SUMMARY OF CASE

Former RCW 9.94A.125, recodified as RCW 9.94A.602, required a special allegation that a person is armed with a deadly weapon, and a jury finding of that fact. Former RCW 9.94.310, recodified as RCW 9.94A.525, set forth the length of enhancements authorized based on an allegation and finding concerning a deadly weapon. That statute also sets forth provisions for firearm enhancements. See RCW 9.94A.525(3).

The Information in this case charged Mr. Recuenco with second degree assault with the additional allegation he was armed with a deadly weapon pursuant to former RCW 9.94A.125 and former RCW 9.94A.310. CP 159. The jury returned a special verdict finding Mr. Recuenco was armed with a deadly weapon during the commission of the second degree assault. CP 237. The Information did not contain an allegation that the firearm enhancement applied. The jury did not return a special verdict concluding Mr. Recuenco was armed with a firearm.

At sentencing, Mr. Recuenco argued the court was required to impose a deadly weapon enhancement as found in the jury's verdict rather than the firearm enhancement. 2/24/00 RP at 921. The trial court concluded it had

no discretion but to impose a 36 month firearm enhancement instead of the deadly weapon enhancement alleged in the Information and found by the jury in its special verdict form. *Id.* at 928; CP 397.

D. ARGUMENT

1. BECAUSE DEADLY WEAPON AND FIREARM “ENHANCEMENTS” INCREASE THE PENALTY A DEFENDANT IS EXPOSED TO BEYOND THAT PERMITTED BY THE JURY’S VERDICT ON THE SUBSTANTIVE CRIME, THE “ENHANCEMENTS” ARE ELEMENTS OF AGGRAVATED OR GREATER OFFENSES

a. Any fact which increases the range of penalties a criminal defendant is exposed to is the equivalent of an element of an enhanced crime which must be proven to a jury beyond a reasonable doubt. The Sixth Amendment guarantees a criminal defendant the right to a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.*, quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The Sixth Amendment does not allow a defendant to be “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” (Emphasis in original) Apprendi, 503 U.S. at 483, see also Ring v. Arizona, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Additionally, the Due Process Clause of the Fourteenth Amendment

compels any fact which increases a sentence to a term beyond the maximum be formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. See Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). The United States Supreme Court has noted:

[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Appendi, 530 U.S. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (opinion of Stevens, J.)).

A sentencing court's ability to impose a sentence is limited to the maximum for that offense reflected in the jury verdict alone. Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 2537, __ L.Ed.2d __ (2004). Blakely held

the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment."

(Italics in original.) Id., citing, 1 J. Bishop, Criminal Procedure, § 87, p.55 (2d ed. 1872)).

Applying this analytical framework to weapon enhancements it is clear that they are elements of aggravated versions of whatever substantive offense they arise from. By its language the additional time required by

former RCW 9.94A.310 is mandatory in all cases. The additional time is not subject to earned early release although the time attributable to the substantive offense may be. Additionally, courts have interpreted the statute's language as barring the imposition of an exceptional sentence below the mandatory term. State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999).

Former RCW 9.94A.310(3) does more than merely limit a judge's discretion within the pre-existing range. In this case, Mr. Recuenco's standard range without any enhancement, the "preexisting range," was three to nine months. CP 397. RCW 9.94A.310(3) required imposition of a minimum term of 36 months. The "relevant 'statutory maximum'" for purposes of Apprendi is the maximum sentence permitted by the jury's verdict alone. The jury's verdict in this case found Mr. Recunco guilty of second degree assault with a deadly weapon, thus the relevant "statutory maximum" was 21 months. The court's entry of a conviction of second degree assault with a firearm increased the maximum penalty to 45 months with a minimum sentence of 39 months. This additional finding increase the statutory maximum penalty and is the equivalent of an element of a crime.

b. The United States Supreme Court's decisions in *Harris* and *McMillan* do not permit a judicial finding of guilt on a greater offense merely because the finding is of the use of a weapon. In its briefing to the Court of Appeals the State relied on the Supreme Court's decision in Harris

v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003), for the proposition that the trial court's actions in this case were permissible. Harris relied on the Court's prior decision in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), which held that where a weapon finding made by a judge requires the imposition of a mandatory minimum within a preexisting range of punishment, without altering the statutory maximum, there was no violation of the rights to a jury trial and due process. Harris, 536 U.S. 567-68. Harris relied on language of Apprendi itself,

We do not overrule McMillan. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict--a limitation identified in the McMillan opinion itself." [Apprendi,] 530 U.S., at 487, n. 13, 120 S.Ct. 2348.

Harris, 536 U.S. at 563. Critical to the Court's holding in both McMillan and Harris was that the statutes at issue in those cases merely imposed a mandatory minimum within the preexisting range of punishments without altering the statutory maximum penalty. Harris 536 U.S. at 563-64.

In the Court of Appeals, the State claimed that because the maximum penalty for a Class B Felony such as second degree assault is 10 years, a weapons finding may be made by a judge so long as the total punishment does not exceed 10 years. After Blakely, this argument is completely without merit. Blakely held the

the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to punishment.”

124 S.Ct. at 2537. Addressing Washington’s Sentencing Reform Act, Blakley concluded the “statutory maximum” under the SRA for purposes of Apprendi is the standard range sentence authorized by the jury’s verdict. Id. at 2537-38.

Neither McMillan nor Harris stand for the proposition that all firearm or weapon “enhancements” may be found by a judge as opposed to a jury. The Supreme Court has refused to permit the attachment of simplistic tags to findings to guide the analysis under Apprendi. Regardless of what term a legislature gives a finding, “[t]he relevant inquiry is one not of form, but of effect - - does the required finding expose the defendant to greater punishment than that authorized by the jury’s guilty verdict?” Apprendi, 530 U.S. at 494. In simpler terms:

The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 122 S.Ct. at 2444 (Scalia concurring). Consistent with the insistence of Apprendi and Ring on effect not form, Harris and McMillan did not uphold the statutes at issue there because they merely involved a weapon

finding, but because that finding did not alter the preexisting maximum penalty permitted by the jury's verdict alone. Harris, 526 U.S. at 563-64.

The "statutory maximum" in this case was 21 months, the top of the standard range for second degree assault with a deadly weapon. As Harris, Apprendi, and McMillan held, if the weapon finding exceeds this "statutory maximum" it is an element to be determined by the jury. Because the firearm finding increases the maximum penalty beyond 21 months it is an element of an enhanced crime. Unlike the weapons statutes at issue in McMillan and Harris, RCW 9.94A.525(3) and (4) does more than merely impose a mandatory minimum within a preexisting standard range. Instead, the weapon findings under the Washington statute alter the maximum penalty and thus the required findings are elements.

Mr. Recuenco's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process were violated.

2. THE TRIAL COURT'S ACTION VIOLATED THE FIFTH AMENDMENT PROHIBITION OF DOUBLE JEOPARDY

As explained above, because a finding which increases the maximum punishment of an offense is an element, for purposes of this case there is a continuum of three relevant degrees or level of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding. Mr. Recuenco contends that any judicial finding which increases the crime of conviction along that

continuum not only violates the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double Jeopardy Clause.

The Fifth Amendment provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Fifth Amendment's double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Where a defendant is sentenced based on the jury's verdict plus a fact found by a judge, the defendant has been convicted of an aggravated version of the crime actually reflected in the jury's verdict. See e.g., Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as the functional equivalent of an element of a greater offense"), see also Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (Plurality decision).¹ Justice Scalia's plurality decision went beyond merely restating the Ring holding: "we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and

¹ This portion of Sattazahn was only joined in by four justices, as Justice O'Connor, consistent with her dissent in Apprendi and Ring, refused to join in this section of the opinion. See 537 U.S. at 117 (O'Connor, J., concurring in part and concurring in the judgment). It is nonetheless undoubtedly an accurate statement of the law in light of Apprendi and Ring, as the four-justice dissent in Sattazahn, although disagreeing with the majority's refusal to find a jury's inability to reach a unanimous verdict on whether to impose the death penalty was the equivalent of an acquittal, specifically relied on Ring for the point that aggravating factors in death penalty cases are the equivalent of elements. Sattazahn, 537 U.S. at 126 n.6 (Ginsburg, J., dissenting).

constitutes and ‘offense’ for purposes of the Fifth Amendment’s Double Jeopardy Clause.” Sattazahn, 537 U.S. at 111.

The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Double jeopardy protections begin where there has been an event, such as an acquittal or a conviction, which terminates original jeopardy. Richardson v. United States, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). The double jeopardy clause bars prosecution or conviction of a higher degree of a crime once a conviction or acquittal has been obtained on a lesser degree or included offense. See e.g., Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (prior conviction for the lesser included offense of joyriding prohibited prosecution of the greater offense of auto theft). This bar exists unless the conviction on the first offense is somehow vacated on appeal. Sattazahn, 537 U.S. at 110-11.

Double jeopardy principles do not permit the state to seek a judgment notwithstanding the verdict no matter how clear or strong the evidence of guilt. Standefer v. United States, 447 U.S. 10, 21-25, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). This Court has recently echoed this limitation noting “the prosecution in a criminal case cannot obtain a directed verdict or judgment notwithstanding the verdict, no matter how clear the evidence of

guilt.” State v. Mullins-Costin, 152 Wn.2d 107, 116, 95 P.3d 321 (2004); see also State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004) (refusing to strike plainly inconsistent verdicts of guilt based on “traditional approach of exercising restraint from interfering with jury verdicts.”) Thus, even if the evidence plainly established Mr. Recuenco was armed with a firearm, double jeopardy principles do not allow entry of a greater judgment. Thus his conviction on the greater offense must be reversed.

In addition, the double jeopardy principles outlined here bar any effort to uphold the greater conviction on appeal, or to permit the State to seek a verdict on the greater offense on remand. “Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.” Green v. United States, 355 U.S. 184, 193-94, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Put simply, where jeopardy has attached to one offense by means of a conviction or acquittal, an appeal of another offense as violating double jeopardy does not allow removing the jeopardy bar which attached to the first. Benton illustrates this point.

In Benton a defendant was acquitted of larceny but convicted of burglary. 395 U.S. at 785. Because both the grand and petit juries had been selected under an invalid procedure, a state court set aside his burglary conviction. Id. at 786. On remand the State again sought and obtained a conviction of both burglary and the larceny of which the defendant was

acquitted. Id. Before the Supreme Court, the state argued that because the larceny indictment was void due to a procedural defect, no jeopardy attached and thus he could be tried again for both. Id. at 796. The Court rejected this claim finding that even if the indictment was void

[p]etitioner was acquitted of larceny. He has, under Green a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside, over petitioner's objections, because of a defect. This it cannot do.

Benton, 395 U.S. at 797; see also United States v. Ball, 163 U.S. 662, 669-70, 16 S.Ct 1192, 41 L.Ed. 300 (1896) (concluding that even though acquittal stemmed from fatally defective indictment, the indictment was not void but merely voidable and government could not seek to set aside acquittal over defendant's objection). Because of state law questions of the interrelation of the larceny and burglary convictions, Benton remanded the matter to the state court to determine whether the burglary conviction as also barred by the jeopardy which attached to the larceny conviction. 395 U.S. at 798-99.²

Here a jury convicted Mr. Recuenco of second degree assault with a deadly weapon enhancement. That conviction is final, as the Court of Appeals and this Court have rejected all challenges to it. Besides barring the trial court from entering a conviction for a greater offense, that final

² Assuming that under Maryland law larceny was a lesser offense of burglary, the Court's subsequent decisions in cases dealing with lesser offenses, such Brown, would require the conclusion that the burglary conviction was also barred.

conviction prevented, and now bars any conviction for a greater or lesser offense. United States v. Dixon, 509 U.S. 688, 698, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Dixon explained that where a first offense results in a conviction, and proof of a second offense necessarily proves the first, the conviction on the first will bar prosecution on the second. In Dixon, the Court found that pursuant to the Blockburger³ test, a defendant could not be convicted of both contempt, for violating conditions of release by possessing drugs, and of the substantive offense of possession of drugs even though the defendant could commit contempt without possessing drugs, as the possession charge was “a species of lesser-included offense.” 509 U.S. at 98, citing, Illinois v. Vitale, 447 U.S. 410, 420-421, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980) (Double Jeopardy Clause would be violated if the state’s proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid accident of which the defendant has already been convicted); and Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980) (convictions of both rape and felony murder based on rape violated double jeopardy).

A “firearm” is by definition a deadly weapon. Thus, proof of firearm enhancement necessarily establishes the lesser deadly weapon enhancement, and second degree assault with a deadly weapon enhancement is a “a species of lesser-included offense” of second degree assault with a firearm. Dixon,

³ Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

509 U.S. at 698. Therefore, the jury's verdict on the lesser will bar any effort to seek a verdict or conviction on the greater. Id.

Decisions of the Washington Court of Appeals which have required entry of a judgment on the greater offense must be overturned. For instance, in State v. Meggyesy the court concluded the practice employed by the trial court here was a permissible exercise of the trial court's discretion. 90 Wn.App. 693, 707-10, 958 P.2d 319 (1998), review denied, 136 Wn.2d 1028 (1998). In State v. Rai, the court went further to conclude the unambiguous language of former RCW 9.94A.310(3) required the trial court to enter a verdict on the greater offense if the trial judge determined the evidence establishes the deadly weapon was a firearm. 97 Wn.App 307, 311-12, 983 P.2d 712 (1999).

If the statute in fact requires this result, the statute itself is unconstitutional as double jeopardy principles do not permit the state to seek a judgment notwithstanding the verdict no matter how clear or strong the evidence of guilt. Standefer, 447 U.S. at 21-25; Mullins-Costin, 152 Wn.2d at 116. The decisions of the Court of Appeals to the contrary must be overturned.

Moreover, because Mr. Recunco's appeal of the conviction of the greater offense of second degree assault with a firearm does not waive his claim of former jeopardy which arises from his final conviction of second degree assault with a deadly weapon, no further action can be taken to seek

or affirm the conviction of second degree assault with a firearm. See Green, 355 U.S. at 193-94; and Benton, 395 U.S. at 797. This necessarily includes any effort to apply a harmless error analysis to affirm the conviction on appeal or any effort by the State on remand to seek a verdict on second degree assault.

The State may respond that double jeopardy principles have no application as this matter merely involves the sentence imposed. However, such an argument completely miscomprehends Apprendi, Ring, and Blakely. This case is no more about sentencing than would a case where a jury convicts an individual of second degree robbery but the judge concludes the individual is guilty of first degree robbery. Apprendi, Ring, and Blakely merely make clear what is an element of a crime. Ring states any judicial finding which increases the maximum penalty is the functional equivalent of an element of a greater offense. Sattazahn establishes that elements for purposes of the Sixth Amendment are elements for purposes of double jeopardy. This case is not about sentencing at all. Instead the only question is whether a court, based on judicial findings which go beyond the jury's verdict, can enter a conviction of a greater offense than that found to have been committed by the jury in its verdict. In short, can the court enter a judgment notwithstanding the jury's verdict. The answer is of course no.

3. BECAUSE IT IS STRUCTURAL ERROR, THE ERROR IN THIS CASE REQUIRES REVERSAL

As set forth above, the trial court's entry for a verdict of a greater offense than that found in the jury's verdict denied Mr. Recuenco his Fifth Amendment right not to be held in double jeopardy, his Sixth Amendment right to a jury trial, and his Fourteenth Amendment due process right to proof beyond a reasonable doubt. For the reasons set forth above, the double jeopardy violation requires reversal and dismissal of the judgment of conviction for second degree assault with a firearm. But beyond that, the Sixth and Fourteenth Amendment errors require reversal as well.

An error regarding the burden of proof is structural and therefore is not subject to any form of harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). Sullivan, concluded

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

508 U.S. at 280 (citations omitted). The error in this case was not merely the denial of the right to a jury trial, but also the denial of a finding beyond a

reasonable doubt. As Sullivan concluded such error requires reversal whenever it arises.

This Court has reached the same conclusion. State v. Thomas, 150 Wn.2d 821, 847-49, 83 P.2d 970(2004). Thomas found that Apprendi and Ring prohibited any form of harmless error analysis when the jury was improperly instructed on aggravating factors in a first-degree murder case.

To do a harmless error analysis to uphold Thomas's death sentence and conviction for aggravated first degree murder would be to find facts (aside from prior convictions) that increase the penalty for the crime charged beyond the statutory maximum, here, life with the possibility of parole. Under Apprendi and Ring, the jury must decide whether the aggravating factors have been proved beyond a reasonable doubt for Thomas to be sentenced to either life in prison without the possibility of parole or death because both of these sentences are more severe than life with the possibility of parole.

150 Wn.2d at 849. Similarly, in this case the jury was only asked to determine if Mr. Recuenco committed second degree assault with a deadly weapon, and not whether he committed second degree assault with a firearm.

The error is prejudicial per se and reversal is required.

The State may respond that Mr. Recuenco's Sixth and Fourteenth Amendment claims are subject to harmless analysis. Because there is not a single class of "Apprendi error" there can be no blanket rule that all claims relying on Apprendi are subject to harmless error review. Such error may arise in a charging document which fails to include all essential elements, it may arise in jury instructions which fail to include all essential elements of

the crime, it may arise where the court imposes a sentence in excess of that permitted by an unchallenged verdict, or it might arise in some other circumstance. Because such errors may arise in a variety of contexts, whether or not harmless error analysis will apply depends upon the nature of the claim and constitutional right denied and not the mere citation to Apprendi.

For example in United States v. Cotton, the Supreme Court concluded a challenge to an indictment, raised for the first time on appeal, for failing to include an essential element where the evidence before the grand jury plainly established the missing element, would be barred by the plain error rule Federal Rule of Criminal Procedure 52(b). 535 U.S. 625, 633-34, 122 S.Ct. 1781, 151 L.Ed.2d 689 (2002). Federal Rule of Criminal Procedure 52(b) is in many respects the federal corollary RAP 2.5 as both rules address the address an appellant's ability to raise a claim on appeal which was not raised below. Thus, Cotton merely concludes that a challenge raised for the first time on appeal could be barred by the plain error rule. It did not hold that review of all unchallenged indictments would be barred, and it certainly did not address the question of whether any form of harmless error analysis could apply where an indictment was challenged below. And it most certainly did not address Apprendi error arising in any context other than a challenge to an indictment.

Any discussion of whether Apprendi error may be deemed harmless must depend on the context in which the error arises, and not merely with the citation to Apprendi.

If an individual is charged with first degree theft, but despite strong evidence to support the first degree theft charge a jury returns a verdict of the lesser offense of second degree theft, a court cannot enter conviction and sentence of first degree theft. To apply harmless error analysis in such a scenario would be to agree the court was wrong to enter the conviction of first degree theft but in light of the overwhelming evidence the error is harmless and the appellate court should affirm the first degree theft conviction. As Sullivan and Thomas recognize this cannot occur. Because it addressed only the question of waiver of a challenge to a faulty indictment, Cotton has not changed the outcome.

And as Sullivan recognized, the principle problem with applying any form of harmless error analysis to the denial a jury determination beyond a reasonable doubt is that it raises Double Jeopardy concerns – namely a directed verdict on appeal. 508 U.S. at 280. The error in this case requires reversal.

4. BECAUSE OF THE BROADER JURY TRIAL
GUARANTEE OF THE WASHINGTON
CONSTITUTION THE VIOLATION OF THE
RIGHT REQUIRES REVERSAL IN EVERY CASE

a. Washington constitutional provisions regarding the right to jury trial are the basis for the State's burden to prove every element of the crime to a jury. The most fundamental concepts of criminal procedure require the State prove to a jury every essential element of a crime beyond a reasonable doubt. State v. Cronin, 143 Wn.2d, 568, 580, 14 P.3d 752, 758 (2000) (citing inter alia In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, § 3 of the Washington Constitution⁴ and the Fourteenth Amendment of the federal constitution. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); Sandstrom v. Montana, 442 U.S. 510, 520, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

The more specific and detailed guarantees of the right to jury trial and due process of law in the Washington Constitution are the origin of this Court's traditional requirement of automatic reversal where the jury is instructed in a manner which relieves the prosecution of its burden of proving all the elements of the crime. As the federal constitution establishes a minimum level of protection, any time the federal constitution is violated corollary provisions of the state constitution are necessarily violated. Thus, a

⁴ Art. I, § 3 provides; "No person shall be deprived of life, liberty, or property, without due process of law."

separate analysis of the requirements of the state constitutional violation is appropriate.

i. Article I, § 21. The Washington Constitution provides “The right to trial by jury shall remain inviolate....” Const. Art. I, § 21 This includes the right to jury trial in criminal cases. State ex rel. Dep’t of Ecology v. Anderson, 94 Wn.2d 727, 728, 620 P.2d 76 (1980). In construing this provision this Court has held that it preserves the right as it existed at common law in the territory at the time of its adoption. Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The Court has further determined that the right to trial by jury which was kept “inviolable” under the state constitution was more extensive than that protected under the federal constitution when it was adopted in 1789. Id. at 99.

Having already determined that the right to jury trial guaranteed by the Washington Constitution is broader than that guaranteed by the federal constitution, the full analysis developed in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. See e.g. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Nevertheless, the Gunwall factors provide a useful tool for evaluating the application of the specific state constitutional provisions to the circumstances presented.⁵

⁵ The six factors are (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5)

This Court recognized almost 100 years ago that unique language providing the “right to trial by jury shall remain inviolate” results in a broader guarantee than that in the federal constitution. State v. Strasburg, 60 Wn. 106, 110 P. 1020 (1910). The differences are significant because the state constitution sought to preserve the right to jury trial as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution one hundred years later. Strasburg, 60 Wn. at 118; Mace, 98 Wn.2d at 99.

The jury trial guarantees of the state constitution, operating in conjunction with the due process provisions, give the accused the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Strasburg, 60 Wn. at 118 (defendant had right to present insanity defense to the jury which could not be legislatively abolished). The Court’s discussion in Strasburg of how the entire criminal process is grounded in the right to have all questions of fact going to the guilt or innocence of the accused submitted to the jury has carried from Strasburg through decisions to decisions such as Cronin. The absolute nature of these rights was addressed by the Court in the context of the removal of any element from the jury’s consideration.

differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

Now, this right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.

Strasburg, 60 Wn. at 116. The interrelationship between the state due process clause and the right to jury trial guaranteed by the state constitution was specifically worthy of comment.

The due process of law provision of our constitution above quoted probably does not, of itself, mean right of trial by jury; but it does mean, in connection with the provision "The right of trial by jury shall remain inviolate", that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our constitution.

60 Wn. at 117. The state constitutional jury right which the constitution preserves "inviolate" plainly encompassed the right to have every element submitted to the jury.

With regard to the third and fourth Gunwall factors, Strasburg makes clear that the state constitutional and common law history of the right to jury trial in Washington extends to every significant fact upon which guilt is determined. Id. at 117-18. Strasburg noted:

The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise this provision of our constitution, found, also, in varying language in all the constitutions of the Union, state and

Federal-treasured by a free people for generations as one of the principal safeguards of their liberties-would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

60 Wn. at 118 (emphasis added). Because preexisting state law required these issues be presented to the jury, removing from the consideration of the jury any fact or element necessary to determining guilt, “has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and is therefore unconstitutional.” 60 Wn. at 123-24.

The structure of the state constitution as a limitation on the otherwise plenary power of the state to do anything not expressly forbidden supports the rigorous enforcement of the jury trial guarantee against encroachment by the legislature or appellate courts on review of trial court proceedings. Gunwall, 106 Wn.2d at 66. Furthermore, because the state constitution, unlike the federal constitution, guarantees these fundamental rights rather than restricting them, the structural differences point toward the broader independent state constitutional protections. Id. at 62.

Finally, the conduct of criminal trials in state courts are matters of particularly state or local concern which do not warrant adherence to a national standard. Gunwall, 106 Wn.2d at 62; Young, 123 Wn.2d at 180; State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The long and independent history of the state constitutional right to jury trial provided by Article I, § 21, which is broader in scope and application than the federal provision, guarantees the right to a jury determination on every element. This guarantee ultimately supports the rigid requirements this Court has traditionally imposed where the instructions fail to ensure the jury renders a verdict encompassing every substantive fact going to the question of guilt or innocence.

ii. Article I, § 22. Article I, § 22 (amend. 10) of the Washington Constitution contains a separate provision guaranteeing the right to jury in a criminal trial and does so in conjunction with the provisions of rights of the accused including the right “to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed” When read in conjunction with the guarantee that the accused “shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof”, this provision of the Washington Constitution creates a very specific right to jury verdict on the elements of the crime charged. City of Seattle v. Norby, 88 Wn.App. 545, 561, 945 P.2d 269 (1997) (failure give unanimity instruction results in a violation of the right to a unanimous jury verdict under Article I, § 22).

Because of the several ways in which the right to a proper determination by the jury on each element arises from the state constitution, the right warrants rigorous enforcement. The integrity of the process and the

reliability of the result are both cast into doubt when the jury is erroneously instructed in a way which does not hold it to the constitutional burden. For that reason, failure to obtain a jury finding beyond a reasonable doubt on every element of a crime requires reversal of the conviction.

b. Failing to obtain a jury verdict on every element of a crime requires reversal. Instructing the jury in a manner which relieves the State of its burden to establish every element of guilt requires automatic reversal because the omission or misstatement is so fundamental that the verdicts upon which they are based are inherently unreliable. State v. Jackson, 87 Wn.App. 801, 813, 944 P.2d 403 (1997), affirmed 137 Wn.2d 712, 976 P.2d 1229 (1999) (citing Sullivan, 508 U.S. 275). Again Sullivan held:

there being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

508 U.S. at 280. Harmless error analysis is, therefore, incompatible with the absence of an actual verdict based on properly defined elements found beyond a reasonable doubt. Lacking a proper verdict, the appellate court would be infringing the right to a jury trial by holding that no reasonable jury would have found otherwise. Carella v. California, 491 U.S. 263, 269, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring); California v. Roy, 519 U.S. 2, 117 S.Ct. 337, 339-40, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring).

The Washington Constitution requires a per se rule of reversal for the denial of a jury trial. Because the jury was never asked to find Mr. Recuenco guilty of second degree assault with a firearm the conviction cannot stand.

c. Federal use of the constitutional harmless error test with respect to erroneous jury instructions is irrelevant to this case. Mr. Recuenco acknowledges this court has previously relied upon the analysis adopted by the United States Supreme Court in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), to conclude erroneous accomplice liability jury instruction could be subject to a harmless error analysis. State v. Brown, 147 Wash.2d 330, 340, 58 P.3d 889 (2002) However, Brown does not dictate the result here.

First, Sullivan remains the law with respect to the denial of a jury finding beyond a reasonable doubt. Second, Brown does not mention nor address the implications of the Washington jury trial right. The sum of the court's discussion of the issue was:

The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

[Neder, 527 U.S. at 9]. We find no compelling reason why

this Court should not follow the United States Supreme Court's holding in Neder.

Brown, 147 Wash.2d at 340. As such Brown offers little to this analysis.

In any event the logical flaw in the Neder decision was identified by Justice Scalia who began his dissenting opinion in Neder by noting that Sullivan reaffirmed the rule that it would be a structural error to “vitiating all the jury’s findings” with an inadequate reasonable doubt instruction.

The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away—since failure to prove one, no less than failure to prove all, utterly prevents conviction.

119 S.Ct. at 1845 (Scalia, J., dissenting). Moreover, the Court has never applied the Neder standard to any case arising from Apprendi.

As such there is no federal precedent for finding an error such as that in this case harmless.

5. THE DOCTRINE OF INVITED ERROR CANNOT APPLY IN THIS CASE

In a footnote, the Court of Appeals suggested Mr. Recuenco invited the error in this case as he proposed the deadly weapon special verdict. Opinion at 13, n.33. However, the court’s conclusions turns on the mistaken view that this case merely concerns erroneous jury instructions. Id.

Mr. Recuenco has never claimed the instructions were deficient. Nor does he suggest it was error to permit the jury to enter a verdict on the deadly

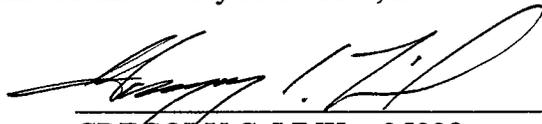
weapon allegation. In fact because the only special allegation made by the State in the Information was that Mr. Recuenco was armed with a deadly weapon, Mr. Recuenco argues this was the only allegation on which the jury could be ask to return a verdict.

The error was not in providing the instructions to the jury, nor its return of a verdict on the deadly weapon. The error was the trial court ignoring the jury's verdict to impose a greater conviction. Mr. Recuenco specifically objected to this. Thus, there can be no claim of invited error in this case.

E. CONCLUSION

For the reasons set forth above, this Court must reverse and dismiss Mr. Recuenco's conviction of second degree assault with a firearm, and remand for entry of a conviction of second degree assault with a deadly weapon.

Respectfully submitted this 8th day of October, 2004.



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Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name



OCT - 8 2004

Date

Done in Seattle, Washington