

NO. 65699-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS GUSWALTER PARKER,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

---

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. Washington law provides that a person who has committed a felony is not qualified to serve as a juror unless that person has obtained restoration of his or her rights. Based on the facts and law presented to the court, Juror 12 had been convicted of a felony, had taken no action to have his rights restored and did not believe his rights had been restored. The defense presented no authority to the trial court that the juror's rights had been restored. Did the trial court properly exercise its discretion in excusing Juror 12 because he was not qualified?

2. A claim of prosecutorial misconduct is waived if no objection was made below, unless the misconduct was flagrant and ill-intentioned. It is not flagrant or ill-intentioned misconduct to point out the origins of the word "verdict" by simply stating that the word means "to speak the truth." Doing so does not misstate the burden of proof or the jury's role. Should the defendant's claim of misconduct be deemed waived?

3. The state supreme court has held that a special verdict instruction that informs the jury they must be unanimous to answer in the negative is an incorrect statement of law based on Washington's common law. May this issue be raised for the first

time on appeal where it has no constitutional basis? And if so, should it be deemed harmless where the jury's general verdicts conclusively show that the jury unanimously found that the defendant was armed with a firearm?

4. The scoring statute plainly states that prior convictions for anticipatory offenses are to be scored in the same way as a completed offense. Did the trial court properly score the defendant's prior adjudication for attempted robbery in the second degree the same as robbery in the second degree?

5. Double jeopardy principles are not violated when a jury reaches a verdict on two crimes that are the same for double jeopardy purposes but reference is made to only one of the crimes in the judgment and sentence. In this case, the judgment and sentence makes no reference to Count II, felony murder. Is it unnecessary to also enter an order vacating that conviction?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Louis Guswalter Parker was found guilty by jury verdict of the crimes of intentional murder in the second degree (Count I), felony murder in the second degree (Count II), and unlawful

possession of a firearm (Count III). CP 199, 201, 203. The jury also found that Parker was armed with a firearm at the time of commission of Counts I and II. CP 200, 202. Parker received standard range sentences for Counts I and III, plus a 60-month firearm enhancement, for a period of total confinement of 457 months. CP 250. The trial court did not impose sentence on Count II and there is no reference to that count in the judgment and sentence. CP 250. The court declined to vacate Count II. RP 7/2/10 19.

## 2. FACTS OF THE CRIME.

Parker and the victim, 19-year-old Markasha Monroe, known to her friends as K.K., were dating at the time of K.K.'s death. Their relationship was punctuated by the defendant's jealousy, threats and violence. For example, a few months before the murder, Parker called one of K.K.'s friends and stated, "Come and get her or on my mom I'll fucking kill her." RP 6/2/10 59, 64; RP 6/8/10 35. When her friends arrived to pick her up, they found K.K. crying and saw Parker punching and hitting her repeatedly. RP 6/2/10 67-69; RP 6/8/10 38, 41-43. On another occasion shortly before the murder, Parker shot at K.K. and her friends, apparently angry that

she had visited her ex-boyfriend in jail. RP 6/7/10 115-20, 133;  
RP 6/14/10 69-80.

On August 6, 2009, K.K. lived in a house with Lakaia Dade, Layloni Hooker, Tiffany Anderson and Steve Monroe. RP 6/3/10 8-10; RP 6/14/10 5. Parker had spent the night there with her. RP 6/3/10 17-18. At approximately noon, the other people in the house heard wrestling or thumping sounds coming from K.K.'s room. RP 6/3/10 26-28; RP 6/7/10 31-32; RP 6/14/10 12. Shortly after that, they heard K.K. say, "Don't, Bart, stop." RP 6/3/10 32; RP 6/14/10 13, 19. This statement was immediately followed by a gunshot. RP 6/3/10 32; RP 6/14/10 13, 19. Parker's friends called him "Bart." RP 6/7/10 27.

Upon hearing the gunshot, Dade, Hooker and Anderson tried to open the door to K.K.'s room but it was locked. RP 6/3/10 38; RP 6/7/10 87; RP 6/14/10 20. They looked out a window and saw that Parker had crawled out the bedroom window and was running from the house. RP 6/3/10 35-36; RP 6/14/10 13. A few minutes later, Parker ran back to the house and climbed back through the window. RP 6/3/10 40; RP 6/7/10 89-91; RP 6/14/10 28. He then opened the locked door and allowed the others to enter the room. RP 6/3/10 40; RP 6/7/10 93; RP 6/14/10 29. They found K.K. lying

on the bed motionless making loud guttural noises. RP 6/3/10 44-47; RP 6/7/10 95; RP 6/14/10 29-30.

When the police were called, Parker ran from the house. RP 6/3/10 42, 50; RP 6/7/10 101; RP 6/14/10 33-34. Before leaving, he told Dade, Hooker and Anderson that "I didn't do it." RP 6/3/10 49; RP 6/7/10 94; RP 6/14/10 29. Soon after, he called a mutual friend, Ariana Wyndon, and claimed that he was playing with the gun and the gun discharged when K.K. tried to take it from him. RP 6/2/10 49.

K.K. was transported to the hospital and treated for a single gunshot wound that entered her head above her left ear. RP 6/8/10 103. She died four days later. RP 6/9/10 23-24. She never regained consciousness, and was likely rendered brain dead as soon as the bullet perforated her brain. RP 6/8/10 12, 20.

Parker was not arrested until three days after the murder, when he surrendered to authorities. RP 6/9/10 56. The weapon was never found. RP 6/2/10 98; RP 6/9/10 57. The clothes that Parker was wearing when the shooting occurred were never found. RP 6/9/10 58. Parker did not testify at trial. RP 6/14/10 119. Parker had a prior conviction that made it unlawful for him to possess a firearm. RP 6/14/10 118.

Parker had been arrested for an unrelated incident involving a firearm on April 27, 2009. RP 6/14/10 87-88, 91. In that incident, he gave a statement to the police in which he similarly claimed that the gun "went off by accident." RP 6/14/10 97-98. He also admitted to hiding the gun before the police arrived. RP 6/14/10 97-98.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING JUROR 12 BASED ON THE INFORMATION PRESENTED TO THE COURT.

Parker contends that the trial court erred in excusing one of the potential jurors, Juror 12, when that juror advised the court that he had been convicted of a felony in another state and did not believe his rights had been restored. For the first time on appeal, Parker cites to a Wisconsin statute in support of his argument that the juror's rights were restored as soon as he completed his sentence. However, the trial court did not abuse its discretion in excusing the juror based on the facts and law presented to the court at the time. Even if the trial court did make an error of law, prejudice should not be presumed and Parker cannot establish prejudice.

RCW 2.36.070 is the statute that sets forth who is competent to serve as a juror. RCW 2.36.070(5) provides that a person who has been convicted of a felony and has not had his or her rights restored may not serve on a jury. In this case, Juror 12 advised the court and the parties that he had pled guilty to armed robbery many years ago in Wisconsin and had served three years of confinement. RP 6/1/10 2-9. When asked if his rights had been restored, he replied that he did not know, that he had not taken any action to have his rights restored and that he understood that he had lost the privilege to vote. RP 6/1/10 2-3. Neither of the parties could advise the court as to the law of Wisconsin regarding restoration of rights. RP 6/1/10 6-7. The court ruled that, "Based on the record before me, I can find by a preponderance of the evidence that this juror's civil rights were not restored." RP 6/1/10 7. The court excused the juror. RP 6/1/10 8. Parker objected. RP 6/1/10 8.

For the first time on appeal, Parker cites to a Wisconsin statute to assert that Juror 12's civil rights were restored under Wisconsin law when he completed his term of imprisonment. Wis. Stat. 304.078(2) provides that "every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or

her sentence." Thus, it now appears that Juror 12's rights had been restored by operation of law as soon as he completed his imprisonment. Parker claims the trial court therefore erred in excusing Juror 12.

When an error in jury selection is alleged, the appellate court reviews fact-based rulings for abuse of discretion. State v. Nemitz, 105 Wn. App. 205, 19 P.3d 480 (2001). If the trial court's ruling is based on an interpretation of the law, the decision is reviewed de novo. Id.

The error alleged here was a factual determination. Moreover, it was not an erroneous factual determination in light of the facts and law *that were presented to the trial court*. Juror 12 represented to the court that he did not believe that his rights had been restored and did not vote for that reason. The defense did not provide any information to the trial court as to the law in Wisconsin regarding restoration of rights.

RCW 5.24.010 provides that a court may take judicial notice of the laws of other states. However, a court is not required to take judicial notice of the law of another state if the party relying on it did not call attention to the pertinent statute. Axess Intern. Ltd. v. Intercargo Ins. Co., 107 Wn. App. 713, 719, 30 P.3d 1 (2001);

In re Marriage of Abel, 76 Wn. App. 536, 539, 886 P.2d 1139 (1995). When a litigant fails to present the law of another state to the trial court, the trial court may presume that the law is the same as Washington law. In re Marriage of Landry, 103 Wn.2d 807, 811, 699 P.2d 214 (1985); Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wn.2d 692, 698, 649 P.2d 827 (1982).

Because Parker did not present the Wisconsin statute to the trial court, it was proper for the trial court to presume that the requirements for restoration of rights were the same under Wisconsin law as under Washington law. As such, the court properly assumed that because Juror 12 had taken no affirmative action to have his rights restored and received no notice of restoration, they had not been restored. See 9.96.010; 9.94A.637; Madison v. State, 161 Wn.2d 85, 91, 163 P.3d 757 (2007). Based on the facts presented to the trial court, and the only law known to the court, it did not abuse its discretion in finding that Juror 12 was not qualified to serve on the jury pursuant to RCW 2.36.070.

Even if the claim here could be characterized as an error of law that is reviewed de novo and was incorrect, Parker is not entitled to reversal of his conviction. If the jury selection process is in substantial compliance with the statutes, the defendant must

show prejudice from an error. State v. Tingdale, 117 Wn.2d 595, 598, 817 P.2d 850 (1991). Only when the process is a material departure from the statutory procedure is prejudice presumed. Id.

State v. Tingdale, supra, provides an example of a material departure from the statutory procedure. In that case, the trial court allowed the court clerk to excuse all potential jurors who were acquainted with the defendant, which resulted in the excusal of three jurors. Id. at 597. The state supreme court found that this procedure was a material departure from the statutory process because only the judge, not the clerk, has authority to excuse jurors, and because a juror's mere acquaintance with a party is not grounds for a challenge for cause. Id. at 601.

In the present case, the trial court made, at most, a single error of law in excusing Juror 12 based on its lack of knowledge of the law of the state of Wisconsin. A single mistake of law is not a material departure from the statutory process.

State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993), is instructive. In that death penalty case, the defendant claimed on appeal that the trial court had erroneously excused jurors for reasons not listed in the statute. In rejecting Rice's claim, the state supreme court stated, "Although Rice notes a few isolated excuses

of potential jurors that appear questionable, he has not demonstrated that there was a gross departure from the statute or the county's guidelines." Id. at 562. The court refused to presume prejudice and affirmed the conviction. Id. The Rice court relied on long-standing Washington precedent, citing State v. Finlayson, 69 Wn.2d 155, 417 P.2d 624 (1966), which explained that the purpose of jury selection is to "provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity." Finlayson, 69 Wn.2d at 157 (quoting State v. Rholeder, 82 Wash. 618, 620, 144 P. 914 (1914)).

As in Rice, prejudice should not be presumed in this case. Parker must show prejudice. It is a burden he cannot meet. A defendant does not have the right to be tried by a particular juror. State v. Williamson, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000). Parker cannot show any prejudice from the loss of Juror 12 and the substitution of another. Id. There is no claim that the jury selected was not a fair and impartial one.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Parker argues that the prosecutor committed flagrant and ill-intentioned misconduct in closing argument by briefly referring to the origins of the word "verdict." Trial counsel did not object to the statement that Parker alleges was misconduct. The prosecutor's argument did not misstate the burden of proof or the jury's role and was not misconduct, let alone flagrant and ill-intentioned.

This Court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the defense does not make a timely objection and request a curative instruction, the misconduct is waived unless the comment was so flagrant and ill-intentioned that no instruction could have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Parker argues that the prosecutor committed misconduct when she uttered the following sentence during rebuttal argument: "The word verdict means to speak the truth." RP 7/2/10 45. This statement was followed by the prosecutor urging the jury to hold the defendant accountable for his behavior and find him guilty of murder in the second degree. RP 7/2/10 45.

The word "verdict" is, in fact, derived from the Latin word "verdictum," which literally means "to say the truth." See <http://en.wikipedia.org/wiki/Verdict>. See also United States v. Luisi, 568 F. Supp.2d 106, 122 (D.Mass. 2008). There is no support for Parker's claim that it is misconduct to briefly state the origin of the word "verdict." The truth plays a central role in the trial process. All criminal juries are instructed both at the beginning and the end of trial that, "It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the trial." WPIC 1.01, 1.02. They are also instructed that, "You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." WPIC 1.02. The jury's job is to decide the facts by deciding what evidence is true and what evidence is not. The truth is not

irrelevant in a criminal trial, or the verdict, as Parker seems to believe.

Parker's claim of misconduct is based on a misinterpretation of two recent cases: State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), and State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). In Warren, the prosecutor repeatedly misstated the burden of proof in closing argument over the defense objections by telling the jury that the defendant should not receive "the benefit of the doubt." 165 Wn.2d at 23-24. Nonetheless, the supreme court affirmed the defendant's convictions, finding misconduct, but also finding that the error was cured by a court instruction. Id. at 28. Significantly, the court did not find that the prosecutor's statement that "this entire trial has been a search for the truth" was improper. Id. at 25, 27-28. Unlike in Warren, the prosecutor in the present case did not misstate the burden of proof.

In Anderson, the prosecutor argued that "by your verdict you will declare the truth about what happened" and made repeated requests that the jury "declare the truth." 153 Wn. App. at 424. Division Two held that the prosecutor's argument was improper because it misstated the jury's role; the jury's job was not to solve the case or declare what happened, but to determine if the

allegations were proved beyond a reasonable doubt. Id. at 429.

Nonetheless, the court found that the argument was not so prejudicial as to require reversal where there was no objection at the time. Id. at 432.

In the present case, the prosecutor simply stated that the word verdict means "to speak the truth." The jury could not make a proper determination of whether the allegations were proved beyond a reasonable doubt without making a determination as to whether the evidence presented to them was true. The single statement made in the present case was not like the arguments that were disapproved in Warren or Anderson, and was not misconduct.

Even if misconduct, it was not flagrant and ill-intentioned misconduct causing prejudice that no curative instruction could have alleviated. Parker's failure to object strongly suggests that the comment did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Parker's claim of misconduct was waived when he did not object to the argument at trial.

3. PARKER'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL, AND THE ERROR WAS HARMLESS WHERE THERE IS NO DOUBT THAT THE JURY UNANIMOUSLY DETERMINED HE WAS ARMED WITH A FIREARM IN DECIDING THE GENERAL VERDICTS.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Parker challenges the jury instruction for the firearm enhancement allegation, arguing that the jury should not have been told that it had to be unanimous to answer in the negative. However, Parker did not object to this instruction below. The claimed error is not of constitutional magnitude, and he may not raise it for the first time on appeal. Even if the error could be raised for the first time on appeal, there is no doubt that the error was harmless in this case, because the jury unanimously determined that Parker was armed with a firearm in reaching its guilty verdicts on Count I, II and III.

The trial court provided the jury with a special verdict form for the firearm enhancements. The instruction for the special verdict form stated, in pertinent part:

In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 198 (Instruction No. 32). The court asked whether Parker had any objection to the instructions, and his attorney replied that he did not. RP 6/15/10 (transcribed by Salveson) 11.

Pursuant to RAP 2.5(a), the appellate court may consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2010).

In Bashaw, the supreme court indicated that the claimed error is not of constitutional dimension. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. The court appears to have acknowledged that this rule was not of constitutional dimension, stating that "[t]his rule is not compelled by constitutional protections against double jeopardy,

but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw, 169 Wn.2d at 146 n.7 (citations omitted). The court then discussed the policy justifications for this common law rule. Id. at 146-47. See State v. Nunez, 160 Wn. App. 150, 159, 248 P.3d 103 (2011) (holding the error is not of constitutional magnitude). But see State v. Ryan, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 1239796 (April 4, 2011) (holding the error is of constitutional magnitude).

Even if this issue could be raised for the first time on appeal, the error was harmless. A jury instruction is harmless if the appellate court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147. In Bashaw, the court held that it could not find the error in the special verdict instruction harmless because of a "flawed deliberative process." Id. at 147. However, in Bashaw the special verdict at issue related to the location of the crime in relation to the school bus stop and the distance from the school bus stop was a disputed issue, with the defense objecting to the State's measurements. Id. at 138.

In the present case, the evidence was undisputed that the victim was shot with a gun, and thus if Parker was responsible for

the murder, he was armed with a firearm. Moreover, the jury also found Parker guilty of unlawful possession of a firearm. In rendering a guilty verdict to the underlying charges, particularly Count III, there is no question that the jury unanimously found that Parker was armed with a firearm. Thus here, unlike in Bashaw, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent any error in the special verdict instruction.

Finally, while this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect, and offers the following argument in order to preserve the issue. The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22 and includes the right to a twelve person jury and the right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). A defendant cannot waive the unanimity requirement. State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the requirement of jury unanimity. The legislature has explicitly given force to a non-unanimous verdict in only one sentencing

statute: aggravated first-degree murder. See RCW 10.95.080(2).

For all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered.

4. THE TRIAL COURT CORRECTLY CALCULATED PARKER'S OFFENDER SCORE.

Parker contends that his prior juvenile adjudication for attempted robbery in the second degree was improperly counted as two points, and thus his offender score was miscalculated. His claim is without merit. The attempted robbery in the second degree was properly scored the same as a completed robbery in the second degree, pursuant to the relevant statutes.

The trial court determined that Parker's offender score was ten for Count I. CP 248. This calculation was based in part on six prior juvenile adjudications. CP 253. The State submitted certified copies of those adjudications. CP 204-43. The certified copy of King County Cause No. 04-8-05014-8 shows that Parker was adjudicated guilty of attempted robbery in the second degree in that matter. CP 229.

In calculating Parker's offender score for Count I, the State counted each of Parker's four prior violent juvenile felony adjudications as two points each, his two prior nonviolent juvenile felony adjudications as one-half point each, and the other current offense as one point, for a total of ten points. Supp. CP \_\_\_ (sub 83).

RCW 9.94A.525 sets forth the rules to be employed in calculating a defendant's offender score. RCW 9.94A.525(9) provides that if the present conviction is a serious violent offense, such as murder in the second degree, each juvenile prior violent felony conviction counts two points and each juvenile prior nonviolent felony conviction counts one-half point. In addition, RCW 9.94A.525(4) states, "Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses." RCW 9.94A.030(53)(a) defines "violent offenses" for purposes of the Sentencing Reform Act. The definition includes robbery in the second degree. RCW 9.94A.030(53)(a)(xi).

Applying these statutes, Parker's prior attempted robbery in the second degree adjudication was properly scored the same as a robbery in the second degree adjudication. Robbery in the second

degree is a violent offense. As a violent juvenile felony conviction, it counted two points. Parker's offender score was not miscalculated.

Parker's reliance on RCW 9.94A.030(53)(a)(i) to reach a different result is misplaced. That provision defines violent offenses, and includes attempts to commit class A felonies in the definition, but does not mention other attempts. The definition of violent offense in RCW 9.94A.030(53)(a)(i) is not a scoring statute, and does not supersede the clear dictates of RCW 9.94A.525(4).<sup>1</sup>

Two divisions of this Court have previously concluded that pursuant to the plain meaning of RCW 9.94A.525(4), attempted crimes are scored in the same manner as if they were convictions for the completed offense. State v. Knight, 134 Wn. App. 103, 109, 138 P.3d 1114 (2006), affirmed on other grounds, 162 Wn.2d 806, 174 P.3d 1167 (2008); State v. Becker, 59 Wn. App. 848, 854,

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<sup>1</sup> The definition of violent offenses set forth in RCW 9.94A.030(53)(a)(i) has application far beyond scoring. Conviction of a violent offense precludes vacation of the offender's record of conviction pursuant to former RCW 9.94A.640. It also precludes imposition of work ethic camp pursuant to former RCW 9.94A.690, an alien offender's release subject to deportation pursuant to former RCW 9.94A.685, imposition of a first offender waiver pursuant to RCW 9.94A.650(1)(a) and imposition of a drug offender sentencing alternative pursuant to RCW 9.94A.660(1)(a). It also affects the availability of a certificate of discharge upon completion of sentence pursuant to RCW 9.94A.637(4), and the length of community custody imposed pursuant to RCW 9.94A.702.

801 P.2d 1015 (1990). No court has held to the contrary. Parker's offender score was not miscalculated.

5. VACATION OF COUNT II IS NOT REQUIRED.

Parker contends that an order vacating the jury verdict finding him guilty of felony murder in Count II must be entered based on double jeopardy principles. Because the judgment and sentence makes no reference to Count II, and that conviction had no effect on Parker's sentence, vacation of Count II is not required by State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010).

In Turner, the state supreme court addressed the question of how a defendant should be sentenced when the jury has returned guilty verdicts for two crimes that are the same for double jeopardy purposes. Id. at 464-65. The court cited the guidelines set forth by the Ninth Circuit. Id. at 459. Those guidelines explain that while a jury may find the defendant guilty of two offenses that are the same for double jeopardy purposes, the court should not enter judgment of conviction on both offenses, and even if sentence is not imposed on the other conviction, "the bare existence of the other conviction

may have potentially adverse collateral consequences." Id. (quoting United States v. Jose, 425 F.3d 1237 (9<sup>th</sup> Cir. 2005)). The Ninth Circuit advises that final judgment should be entered on one offense and the other offense vacated. Id.

However, relying on state law, the supreme court held that double jeopardy is not violated as long as judgment is entered on only one of the convictions and the other conviction is not referenced in the sentencing document. Id. at 464-65. The conditional order vacating the second conviction appended to the judgment and sentence in Turner was not in compliance with this rule. Id. at 465. The court remanded for entry of a corrected judgment and sentence removing the appended conditional vacation order. Id. at 466. It did not require a separate order vacating the second conviction.

Applying Turner to the present case, no reference is made to Count II in the judgment and sentence. As such, the requirements of Turner have been met, and there is no need to remand for an order vacating Count II.

D. CONCLUSION.

Parker's convictions and sentence should be affirmed.

DATED this 23<sup>rd</sup> day of May, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PARKER, Cause No. 65699-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

5/23/11

Date