

NO. 66359-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SCOTT LATOURETTE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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STATE OF WASHINGTON

DANIEL T. SATTERBERG
King County Prosecuting Attorney

RANDI J. AUSTELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Whether the trial court properly rejected Latourette's motion for change of judge because it was untimely (filed after the court had already made discretionary rulings) and successive (the third such motion).
2. Whether the trial court properly declined recusal after Latourette failed to produce any evidence of actual or potential bias.
3. Whether the trial court was required to resentence Latourette according to this Court's mandate.
4. Whether the trial court properly denied Latourette's motion to continue the sentencing hearing after Latourette could not identify any specific issue not governed by the mandate.
5. Whether Latourette is barred from claiming ineffective assistance of counsel when he unequivocally demanded self-representation.
6. Whether the charging document was sufficient where it alleged each essential element of the charged offenses and provided Latourette with notice of the State's intent to seek deadly weapon enhancements.

7. Whether Latourette is barred from claiming any instructional error at trial when the trial court did not consider or rule upon any such alleged error on remand.

8. Whether Latourette waived any claim of instructional error where he failed to object to the trial court's proposed instructions and declined to submit any additional instructions.

9. Whether the trial court properly instructed the jury that unanimity was required for a special verdict finding.

B. STATEMENT OF THE CASE

This Court remanded King County cause number 04-1-01138-4 SEA to the superior court for resentencing. CP 1, 20. The State detailed the procedural history in its Motion to Dismiss Claims Pursuant to RAP 2.5(c)(1) and (2) (Motion to Dismiss), which is incorporated by reference herein.¹ Additional facts will be discussed in the sections to which they pertain.

¹ On January 3, 2012, after the State had filed its Motion to Dismiss, the Court filed another mandate, terminating review of the Court on December 30, 2011. The opinion itself (filed on August 9, 2010) did not change. The new mandate detailed additional procedural history. On January 5, 2012, the State filed a supplemental designation, asking the superior court to transmit the mandate.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REJECTED LATOURETTE'S AFFIDAVIT OF PREJUDICE.

a. Facts.

At the resentencing hearing on October 20, 2010, Latourette filed a motion for a change of judge and an affidavit of prejudice.² CP 28-31. Latourette alleged that the trial judge, the Honorable Sharon Armstrong, had violated state and federal constitutional provisions, the court rules and the rules of evidence when she denied Latourette, among other things, access to the courts, and his rights to be present, heard and defend in person. CP 29-31. Latourette had also filed complaints against Judge Armstrong with various oversight agencies, such as the Washington State Bar Association and the Commission of Judicial Conduct. CP 29-30. Latourette contended that to avoid an appearance of impropriety, another judge should be assigned for the resentencing. CP 29, 31. At the hearing, Latourette reiterated his claims of judicial impropriety and again requested a change of judge. 10/20/10

² Latourette had sent his motions to the superior court before the resentencing hearing, but the motions were filed in the court file on October 20, 2010.

RP 3. Latourette said, “[T]o date I have filed three affidavits of prejudice against [Judge Armstrong].”³ 10/20/10 RP 3.

Judge Armstrong denied the affidavit of prejudice. 10/20/10

RP 3. Judge Armstrong explained her ruling:

Sir, as you may know, the affidavit of prejudice need not be acknowledged by the court after the court has exercised discretion because I presided over your trial and for some extended period of time during the post trial period and during your sentencing, I am going to decline that affidavit.

10/20/10 RP 3.

b. Law And Argument.

Latourette claims that the trial court abused its discretion when it denied his latest motion for a change of judge and rejected his affidavit of prejudice. Br. of Appellant at 7. Latourette contends that he had established a record of decisions in which the trial court deliberately violated his state and federal constitutional rights. Br. of Appellant at 7. This Court should reject Latourette’s claim because it is untimely and successive.

³ To provide this Court with a full record, on January 3, 2012, the State designated the two prior motions to change judge and the minute entry from June 30, 2006, which reflects the trial court’s denial of one motion. CP 217-26.

This Court reviews for abuse of discretion a trial court's refusal to recuse in response to an affidavit of prejudice. In re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), rev. denied, 134 Wn.2d 1014 (1998). An abuse of discretion occurs "when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

A motion for a change of judge must be made in accordance with RCW 4.12.040 and RCW 4.12.050. RCW 4.12.040 is a mandatory, nondiscretionary rule allowing a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice under RCW 4.12.050. State v. Hansen, 107 Wn.2d 331, 333, 728 P.2d 593 (1986).

In relevant part, RCW 4.12.040 states,

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

RCW 4.12.040(1).

RCW 4.12.050 provides, in pertinent part:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such

prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *PROVIDED*, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion. . .⁴

AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

RCW 4.12.050(1).

Once a party has made a motion for a change of judge, neither party may make a subsequent motion for a change of judge.

State v. Dennison, 115 Wn.2d 609, 621-22, 801 P.2d 193 (1990).

An affidavit filed at or before a defendant's first appearance in the trial court following remand is untimely if the trial judge "shall have made any ruling whatsoever *in the case*." See State v. Belgarde, 62 Wn. App. 684, 690-91, 815 P.2d 812 (1991) (holding that the trial court did not err in denying Belgarde's motion for a change of judge because Belgarde's retrial following the reversal of

⁴ RCW 4.12.050 states that arraignment, fixing bail, or setting a trial date do not constitute discretionary actions.

his earlier conviction constitutes a further proceeding in the same case); see also State v. Clemons, 56 Wn. App. 57, 782 P.2d 219 (1989), rev. denied, 114 Wn.2d 1005 (1990).

In Clemons, the issue on appeal was whether Clemons was entitled to an affidavit of prejudice against the original trial judge on retrial following a mistrial. Clemons, 56 Wn. App. at 59. This Court observed that RCW 4.12.050 used the inclusive word “case,” and reasoned that a retrial was not a “new proceeding” for purposes of RCW 4.12.050 because it did not present “new issues arising out of new facts occurring since the trial.” Clemons, 56 Wn. App. at 60, 782 P.2d 219 (citing State ex rel. Mauerman v. Superior Court, 44 Wn.2d 828, 830, 271 P.2d 435 (1954)). The Court said,

Clemons did not choose to file an affidavit when the case was first assigned to the trial judge, presumably because he was satisfied that he would receive a fair trial. The only change of circumstance is that the judge has made discretionary rulings which Clemons presumably now feels to be unfavorable. This is exactly the “judge shopping” that the timeliness requirement [of RCW 4.12.050] is designed to prevent.

Clemons, at 61 (alteration in original).

i. Latourette's motion was untimely.

The trial court correctly denied Latourette's motion because the court had already made discretionary rulings in this case.⁵ See RCW 4.12.050(1) (to be timely, the party must file the affidavit of prejudice "before the judge presiding has made any order or ruling involving discretion."). On remand, Latourette acknowledged that the trial court had already made "numerous rulings." 10/20/10 RP 3; CP 7. Latourette has not claimed, nor could he, that his affidavit of prejudice was timely. The trial court did not err.

ii. Latourette's motion is successive.

As stated above, RCW 4.12.050 prohibits a party from making more than one application for a change of judge in "any action or proceeding." As in Belgarde and Clemons, the resentencing hearing following remand was not a new action or proceeding. Belgarde, 62 Wn. App. 684, 690-91; Clemons, 56 Wn. App. at 60.⁶

⁵ 10/20/10 RP 3.

⁶ Latourette has not appealed the new issue arising out of new facts – whether the trial court correctly calculated his offender score.

Although the trial court did not reject Latourette's affidavit of prejudice because it was a subsequent motion for a change of judge, this Court may affirm on any basis supported by the record. See Ertman v. City of Olympia, 95 Wn.2d 105, 107-08, 621 P.2d 724 (1980). At the October 20, 2010 resentencing hearing, Latourette said that he had filed a total of three affidavits of prejudice against Judge Armstrong. 10/20/10 RP 3; see also CP 217-26. The record demonstrates that Latourette's affidavit of prejudice should also have been denied as a subsequent motion for a change of judge.

- iii. Latourette has failed to demonstrate that the appearance of fairness doctrine was violated.

Finally, Latourette asserts that Judge Armstrong's rejection of his affidavit of prejudice violated the appearance of fairness doctrine. Br. of Appellant at 7. The Court should reject this claim because Latourette does not offer any argument on the issue. See State v. Johnson, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992) (appellate court will not review an issue raised in passing or unsupported by authority or persuasive argument).

Even if the Court considers the claim, it should be rejected because it is unsupported by any evidence of bias.

“A judicial proceeding is valid under the appearance of fairness doctrine ‘only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.’” State v. Tolias, 84 Wn. App. 696, 698-99, 929 P.2d 1178 (1997) (quoting State v. Ladenburg, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)), rev'd on other grounds, 135 Wn.2d 133 (1998). Due process and the appearance of fairness doctrine require a judge to disqualify herself if she is biased against a party or her impartiality may reasonably be questioned. State v. Madry, 8 Wn. App. 61, 68-70, 504 P.2d 1156 (1972); see also Code of Judicial Conduct, Canon 2.11⁷. A party claiming bias or prejudice must, however, support the claim; prejudice is not presumed as it is under RCW 4.12.050. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). “Without evidence of

⁷ Canon 2 of the Code of Judicial Conduct provides in part:

2.11 Disqualification.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

Latourette did not produce any evidence of actual or potential bias on Judge Armstrong’s part to implicate the appearance of fairness doctrine. Rather, Latourette merely asserted that he had an “established record” of bias. Br. of Appellant at 7; 10/20/10 RP 3; CP 28-31. Because there was no evidence of actual or potential bias, the claim is without merit and Judge Armstrong was not required to disqualify herself from the proceedings. See Post, 118 Wn.2d at 619.

2. THE TRIAL COURT DID NOT VIOLATE LATOURETTE’S RIGHT TO DUE PROCESS OR DENY HIS RIGHT TO COUNSEL.

Latourette claims that the trial court violated his right to due process and abused its discretion when it denied him (1) access to legal materials and resources, and (2) notice and an opportunity to be heard. Br. of Appellant at 8-9, 13-14. Specifically, Latourette contends that because he was denied the opportunity to “fully brief, present, and argue sentencing issues,” the trial court, in effect, denied him counsel at the October 20 and November 10, 2010

hearings and, as a result, his self-representation was ineffective.

Br. of Appellant at 9, 13-14.

These claims are without merit and should be denied. The record demonstrates that on multiple occasions the trial judge told Latourette that she was bound by this Court's mandate and would not re-litigate issues governed by the mandate. The record contradicts Latourette's claim that he was denied notice and an opportunity to be heard. The record also demonstrates that Latourette unequivocally asserted his right to proceed pro se.

a. The Trial Court Was Bound By The Mandate.

The scope of a hearing in superior court following remand is determined by the limiting language of the mandate issued on remand, the specific directions stated in the opinion and the Rules of Appellate Procedure. State v. Collicott, 118 Wn.2d 649, 663, 827 P.2d 263 (1992). The Rules of Appellate Procedure provides in part that:

Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in

rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

In this case, the mandate directed the trial court to “place this matter on the next available motion calendar for action consistent with the opinion.” CP 1. The Court remanded for resentencing “with the attempted kidnapping and the robbery constituting the same criminal conduct and the assault and the attempted kidnapping constituting the same criminal conduct.” CP 11. The Court also directed the trial court to strike the firearm enhancements and instead impose the deadly weapon enhancements. CP 13. That specific mandate governed “all subsequent proceedings in the action.” RAP 12.2.

Upon remand, the trial court said that it had reviewed this Court's decision and understood the limitations imposed by the mandate. 10/20/10 RP 4-5. The court then permitted Latourette to address the court. Latourette raised many, many issues⁸ – most had previously been litigated and are addressed in the State's Motion to Dismiss. The court tried to explain to Latourette that it

⁸ 10/20/10 RP 5-20.

could not address issues that had already been determined by the Court of Appeals, but Latourette continued to argue his claims. 10/20/10 RP 19-20. Twice the court said that it needed to proceed to sentencing. 10/20/10 RP 19-20. Latourette continued to argue with the court. 10/20/10 RP 19-21. Finally, the court said, "Sir, I am going to go forward with this re-sentencing today *pursuant to the mandate* and then you have whatever appeal rights you have from that sentence."⁹ 10/20/10 RP 21.

The court made abundantly clear that it would sentence Latourette pursuant to the mandate. Latourette was not entitled to access legal resources and materials so that he could argue matters that were governed by the mandate. RAP 12.2; Collicott, 118 Wn.2d at 663. Even if Latourette should have been granted access to legal resources and materials, he was unable to identify for the court any "issue of specificity" that warranted a continuance of the resentencing. 11/10/10 RP 8. The court did not err by resentencing Latourette pursuant to the mandate.

⁹ The court allowed Latourette to challenge his offender score upon remand. The ruling was within the trial court's discretion because it was not inconsistent with this Court's decision on appeal. See State v. Superior Court of State of Washington, for Spokane County, 150 Wash. 13, 272 P. 60 (1928). Latourette has not appealed the trial court's calculation of his offender score.

Latourette's reliance on Milton v. Morris, 767 F.2d 1443 (9th Cir. 1985) is misplaced. In Milton, the Ninth Circuit held that a pro se defendant must have reasonable access to the resources necessary to prepare for his trial defense. Id. at 1446. Here, there was no preparation necessary because the mandate governed the hearing upon remand. The Court should reject this claim.

b. Latourette Had Notice And An Opportunity To Be Heard.

The right to procedural due process is guaranteed under the Washington Constitution article I, section 3¹⁰ and the United States Constitution amendments V¹¹ and XIV, section 1.¹² The State may not deprive a defendant of a protected liberty interest without procedural safeguards, which at a minimum includes notice and an opportunity to be heard. In re Personal Restraint Petition of Bush, 164 Wn.2d 697, 704, 193 P.3d 103 (2008). Constitutional

¹⁰ "No person shall be deprived of life, liberty, or property, without due process of law."

¹¹ "No person shall ... be deprived of life, liberty, or property, without due process of law...."

¹² "No state shall ... deprive any person of life, liberty, or property, without due process of law...."

challenges are questions of law subject to de novo review. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

Latourette claims that his right to due process was violated because he had no notice that he was to be transported to the King County Jail for resentencing. Br. of Appellant at 13. Latourette is mistaken.

First, Latourette received a copy of the mandate. He thus knew that the trial court had to resentence him. CP 1. Second, on October 10, 2010, the State filed a notice of resentencing hearing scheduled for October 20, 2010. CP 22. Finally, on October 11, 2010, Latourette sent the superior court clerk a motion and a proposed order for transport to the King County Jail for a hearing scheduled before the superior court "on the 20th day of October 2010." CP 25-27.

The record amply demonstrates that Latourette had notice of the October 20, 2010 resentencing hearing.

Latourette also contends that he was not served with any sentencing memoranda by the State. Br. of Appellant at 13. This is inaccurate.

On October 20, 2010, the State orally made its sentencing recommendation. 10/20/10 RP 5. The trial court continued the

resentencing after permitting Latourette to challenge his offender score. 10/20/10 RP 23-34. On November 10, 2010, before the court resentenced Latourette, the State verified that Latourette had received the copies of his prior convictions and case law that had been left at the jail the previous night. 11/10/10 RP 3-4. During the sentencing, Latourette complained that he had not been given “any notice of what the State has been seeking.” 11/10/10 RP 11. The court disagreed and reminded Latourette that the State had read its sentencing recommendation into the record at the October 10th hearing. 11/10/10 RP 11.

Latourette next claims that he had no opportunity to prepare or present a defense. However, as addressed above, based on the mandate, Latourette did not need to prepare a defense; this Court had already advised the trial court of what needed to occur at the resentencing. And, the trial court was clear that it intended to sentence Latourette pursuant to the mandate. 10/20/10 RP 21.

With regard to the sole issue at the resentencing – Latourette’s offender score – Latourette said “I researched this quite thoroughly.” 10/20/10 RP 31. So, to the extent that Latourette needed to prepare or present a defense, he did so.

Finally, Latourette claims that he was denied access to resources that would have assisted him at the resentencing in arguing merger and same criminal conduct, among numerous other issues. Br. of Appellant at 14. As already stated, however, none of these issues would have properly been before the trial court, which was bound by this Court's mandate. See Br. of Respondent, section C.2.a, supra.

There was no violation of Latourette's right to due process.

c. Latourette Unequivocally Asserted His Right To Self-representation.

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). In general, a criminal defendant who exercises his constitutional right to self-representation cannot later claim ineffective assistance of counsel, because the defendant assumed complete responsibility for his own representation. State v. McDonald, 143 Wn.2d 506, 512, 22 P.3d 791 (2001); Faretta, 422 U.S. at 835-35 n.46.

Latourette unequivocally asserted his right to self-representation. At or before the October 20, 2010 hearing, Latourette filed a motion to proceed pro se. CP 33. Latourette wrote: "You and each of you, take notice: I am not surrendering my right to act as my own counsel. PERIOD!" CP 33. Then, at the hearing, Latourette told the court that he wanted to represent himself. 10/20/10 RP 2-4. The court asked Latourette, "Do you want an attorney here today?" Latourette responded, "No ma'am." 10/20/10 RP 4. The court then signed an order permitting Latourette to represent himself. CP 41. Latourette may not now claim that he was ineffective. See McDonald, 143 Wn.2d at 512; Faretta, 422 U.S. at 835-35 n.46.

3. THE TRIAL COURT PROPERLY IMPOSED DEADLY WEAPON ENHANCEMENTS AS REQUIRED BY THE MANDATE.

Latourette contends that the trial court abused its discretion and violated his right to due process when it imposed deadly weapon enhancements in lieu of firearm enhancements, because it permitted the court to sentence him on "uncharged

enhancements.”¹³ Br. of Appellant at 11-13, 14-15. This claim is without merit. Under the Washington Supreme Court’s decision in State v. Williams-Walker¹⁴ and this Court’s mandate, the trial court properly imposed the deadly weapon enhancements.¹⁵

Former RCW 9.94A.510(3) and (4) specified two separate sentence enhancements - five years when a firearm was used to perpetrate a class A felony (three years for a class B felony) and two years when a “deadly weapon other than a firearm” was used to commit a class A felony (one year for a class B felony).¹⁶ Former RCW 9.94A.602¹⁷ clarified that “deadly weapon” includes all firearms and requires a jury to find the defendant’s use of such a weapon by special verdict. Appendix A.

¹³ Latourette also argues that the deadly weapon enhancement – as opposed to the firearm enhancement charged in the information – permitted the jury to convict him of an “uncharged alternative means.” Br. of Appellant at 32. Latourette cites to no authority in support of his claim that a sentencing enhancement constitutes an alternative means of committing the underlying crime.

¹⁴ 167 Wn.2d 889, 225 P.3d 913 (2010).

¹⁵ The State does not concede that these arguments are properly before the Court. See RAP 2.5(c)(1). On remand, the trial court clarified – but did not consider anew – the scope of Williams-Walker or the deadly weapon enhancements.

¹⁶ The former statutes are attached as Appendix A. Each of the statutes was in effect at the time Latourette committed his crimes. CP 204-06. Latourette claims, “I was charged under an expired law....” 11/10/10 RP 14. Latourette is mistaken. In 2004, RCW 9.94A.510 was renumbered as RCW 9.94A.533, however, the new statute did not go into effect until July 1, 2004.

¹⁷ Recodified as RCW 9.94A.825. LAWS 2009, CH. 28, § 41.

In Williams-Walker, the Washington Supreme Court considered harmless error claims in three consolidated cases in which the trial court imposed a five-year firearm sentence enhancement after a jury found by special verdict that the defendant was armed with a deadly weapon. 167 Wn.2d at 898. In two of the cases, the defendants were convicted of crimes that included use or possession of a firearm as an element. Id. at 893-94. The court rejected the State's argument that any error was harmless because the error occurred during sentencing and not during the jury's determination of guilt. Id. at 900-02.

The court stated that when a jury finds by special verdict that a defendant used a deadly weapon in committing the crime, the trial court is bound by that determination to impose a deadly weapon enhancement, even if the weapon was a firearm. Williams-Walker, 167 Wn.2d at 898. The court said:

In the cases before us, the juries were given special verdict forms for a deadly weapon enhancement, and they returned answers in the affirmative. The fact that the State provided notice in the information to each of the defendants that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding.

Id. at 900. The court concluded that imposition of a firearm enhancement when the jury found by special verdict that the defendant was armed with a deadly weapon is an error that can never be harmless. Id. at 902.

As this Court recognized, the instant case “cannot be distinguished from Williams-Walker.” CP 13. Here, the State alleged that Latourette committed each of the charged crimes while armed with a firearm. CP 204-06. However, by special verdicts, the jury found that Latourette was armed with a deadly weapon at the time of the commission of each crime. CP 167-69.

Accordingly, the trial court only had statutory authority to impose the deadly weapon enhancements and not the longer firearm enhancements. Williams-Walker, 167 Wn.2d at 900; CP 13.

Latourette next claims that the State did not give him notice of the “specific enhancement penalty,” because the State alleged the longer firearm enhancement, yet the special verdict jury instruction that the trial court gave was the special verdict for a deadly weapon. Br. of Appellant at 11-13. However, it is clear under Williams-Walker and former RCW 9.94A.602 that no error occurred – all firearms are deadly weapons. See Appendix A.

At the resentencing hearing, the trial judge explained to Latourette that he had notice of the firearm enhancement, which is worse than a deadly weapon enhancement. 10/20/10 RP 18-20. Latourette said, "That's like charging me with a traffic ticket and citing me for a felony." 10/20/10 RP 19. The court responded, "No, it's the other way around. Charging you with a felony and then finding you guilty of a traffic ticket." 10/20/10 RP 19. The court then said that it would sentence Latourette "pursuant to the mandate." 10/20/10 RP 21.

There was no due process violation. Latourette had notice; he received a copy of the mandate. The trial court did not err in imposing the deadly weapon enhancements. The Court should accordingly reject Latourette's claim.

4. THE CHARGING DOCUMENT WAS SUFFICIENT.¹⁸

Latourette contends that the charging document was insufficient because it did not apprise him of the "aggravating factors." Br. of Appellant at 33. This claim fails. Latourette uses "aggravating circumstances" synonymously with "deadly weapon

¹⁸ Again, the State maintains that this claim is barred under RAP 2.5(c) because the trial court did not consider it on remand.

enhancement,” although the terms are not interchangeable.¹⁹ The charging document gave Latourette notice of each element of the crimes charged and that the State alleged the use of a firearm in each count. CP 204-06.

It is well-settled that “[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). In this context, “[a]n ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

When, as here, a charging document is challenged for the first time on appeal (and, in this case, challenged for the first time on a *second* appeal), the reviewing court liberally construes the document in favor of its validity. Kjorsvik, 117 Wn.2d at 102.

Under the liberal construction standard, the information is valid if it

¹⁹ Former RCW 9.94A.510(3) and (4) applied to firearm/deadly weapon enhancements and former RCW 9.94A.535(2) (2003) applied to aggravating circumstances that permitted a trial court to depart from a standard range sentence.

reasonably apprises the defendant of all the elements of the crime. Ward, 148 Wn.2d at 813. However, even if a charging document is sufficient when liberally construed, the defendant may still prevail if actual prejudice is shown. Kjorsvik, 117 Wn.2d at 106. The remedy for an insufficient charging document is dismissal without prejudice to the State's ability to refile charges. State v. Vangerpen, 125 Wn.2d 797, 805, 888 P.2d 1185 (1995).

As discussed extensively above, the charging document alleged the use of a firearm, a per se deadly weapon. RCW 9.94A.602 (Appendix A); CP 203. The information was sufficient. The Court should reject this claim.

5. THE COURT SHOULD DISMISS THE CLAIM OF INSTRUCTIONAL ERROR BECAUSE THE TRIAL COURT DID NOT RULE ON THE JURY INSTRUCTIONS AT THE RESENTENCING HEARING.

In this second appeal, Latourette challenges the jury instructions for the deadly weapon enhancement. However, this is Latourette's *second* appeal, and it is an appeal of his resentencing

hearing. Latourette cannot assert a new claim of *trial* error in this appeal because the trial court never addressed or ruled on the jury instructions at the resentencing hearing. This Court should dismiss this claim of error.²⁰

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993), controls Latourette's claim. In Barberio, the trial court imposed exceptional sentences on Barberio's two convictions. In his first appeal, Barberio succeeded in having one conviction reversed; however, he did not challenge the exceptional sentences imposed. Id. at 49. After the trial court again imposed an exceptional sentence on the remaining count, Barberio challenged the exceptional sentence in his second appeal. Id. at 49-50. The Washington Supreme Court upheld this Court's dismissal of the appeal. The court first cited RAP 2.5(c)(1), which provides: "If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and

²⁰ The State addresses this claim because the law is unsettled as to whether a party may raise an instructional error apropos State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), for the first time on appeal. However, for the reasons set forth below, the State believes that this claim is barred under RAP 2.5(c).

determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.” Id. at 50. However, the Court limited this rule as follows:

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Id. The Court held that Barberio could not raise challenges to the exceptional sentence in his second appeal because at the resentencing hearing the trial court did not independently reconsider the grounds for the exceptional sentence. Id. at 51-52.

The appellate courts have repeatedly reaffirmed the rule in Barberio. Most recently, the Washington Supreme Court has held that even an intervening change in the law does not allow an exception to this rule. State v. Kilgore, 167 Wn.2d 28, 35-43, 216 P.3d 393 (2009).

In this appeal of his 2010 resentencing hearing, Latourette cannot challenge the jury instructions given – or an instruction not given – in his 2004 trial. At the resentencing hearing, the trial court did not review or make any ruling about the jury instructions.

Because the propriety of the jury instructions was not before the trial court at the resentencing hearing, this Court should dismiss this claim.²¹

6. LATOURETTE HAS WAIVED ANY CHALLENGE ON APPEAL BECAUSE HE DID NOT OBJECT TO THE JURY INSTRUCTIONS.

Even if he could raise the issue in a second appeal, Latourette's claim is waived because the objection to the deadly weapon special instruction *at trial*, which was overruled, was based on a claim of insufficient evidence of a firearm as a deadly weapon. 12/8/05 RP 293-95. Defense counsel at trial had no other objections or exceptions to the court's proposed instructions. 12/8/05 RP 296. Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal 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

²¹ Though not necessary to dispose of Latourette's claim, the State would note that Latourette could have raised his challenge to these instructions in his first appeal. Latourette's first claim is based upon State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). In Bashaw, the Supreme Court stated that it was simply applying the rule set forth in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003): that a nonunanimous jury decision on a special verdict is a final determination that the State has failed to meet its burden of proof. Bashaw, 169 Wn.2d at 146. Goldberg was decided in 2003, two years before Latourette was convicted and well before his first appeal.

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).

In Bashaw, the Supreme Court held that an instruction was erroneous because it told the jury that it had to be unanimous to answer “no.” 169 Wn.2d at 145-47. However, the court further stated that the right to a non-unanimous “no” special verdict was not of constitutional dimension, but came from common law precedent. The court explained:

This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

169 Wn.2d at 146 n.7.

Currently, there is a split of authority in the Court of Appeals as to whether a Bashaw claim presents a constitutional issue that can be raised for the first time on appeal. Divisions II and III have held that a defendant may not assert a Bashaw claim for the first time on appeal. State v. Bertrand, 2011 WL 6097718 (No. 40403-6-II, filed Dec. 8, 2011); State v. Nunez, 160 Wn. App. 150, 157-63,

248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011). Judges in Division I are split on the issue. State v. Morgan, 163 Wn. App. 341, 350, 261 P.3d 167 (2011); State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). The Washington Supreme Court has accepted review of Nunez and Ryan, consolidated the two cases, and will likely resolve this split of authority.²² In the meantime, this Court should hold that Latourette cannot raise this issue for the first time on appeal.

Latourette also cannot raise the trial court's failure to give an instruction for the first time on appeal. State v. Scott, 93 Wn.2d 7, 14, 604 P.2d 943 (1980). In Scott, the Washington Supreme Court said, "In the absence of either a violation of a constitutional right or a request to instruct there can be no error assigned on appeal for failure to give an instruction." Id. at 14. In any event, the instruction that Latourette claims was necessary, is inapt. See Br. of Appellant at 32 (referring to Washington Pattern Jury Instructions – Criminal 2.07). Because a firearm is per se a deadly weapon, the trial court's definition of deadly weapon was correct. CP 203.

²² Oral arguments are scheduled for January 12, 2012.

7. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Even if the claim is not waived, Latourette has not shown that the jury instructions incorrectly stated the law. Unlike Bashaw, the instructions in this case did not tell the jurors that they must be unanimous in order to answer “no” to the special verdict.

The jury instructions in Latourette’s case do not contain the same error that was present in Bashaw. In Bashaw, the special verdict form for the sentencing enhancement affirmatively told the jury that it must be unanimous to answer no. It stated: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139.

In contrast, in Latourette’s case, the jury was not told that it had to be unanimous to answer “no.” The instruction on the deadly weapon enhancement was silent on that issue. Instead, it stated only that the jury needed to be unanimous to answer “yes.”

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 have a reasonable doubt as to the question, you must answer “no”.

CP 202. This was the same instruction given in Goldberg and held to not to be error.²³ Latourette has not shown that the instruction was in error.

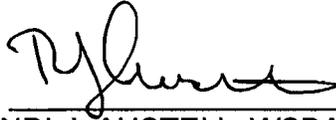
D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to deny Latourette's claims and affirm his sentence.

DATED this 11 day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

²³ 149 Wn.2d at 893.

Former RCW 9.94A.510(3) stated:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements....

(a) Five years for any felony defined under any law as a class A felony....

Former RCW 9.94A.510(4) stated:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements....

(a) Two years for any felony defined under any law as a class A felony....¹

Former RCW 9.94A.602² stated:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, ... if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: ... pistol, revolver, or any other firearm....

¹ Former RCW 9.94A.510(3), (4), were renumbered by Laws 2003, ch 53, § 1, which provides:

The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington.

² Recodified as § 9.94A.825 by Laws 2009, ch. 28, § 41, eff. August 1, 2009.

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 Michael Latourette, the appellant, DOC #284666, Monroe Corrections Complex, P.O. Box 777, Monroe, WA 98272, containing a copy of Brief of Respondent, in STATE V. MICHAEL LATOURETTE, Cause No. 66359-3-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.

U Brame
Name
Done in Seattle, Washington

1/11/12
Date

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