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66610-0

No. 66610-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ARCHULETA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR KING COUNTY

BRIEF OF APPELLANT

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DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in declining jurisdiction.
2. The juvenile court's Findings and Conclusions on Declination Hearing are unsupported by substantial evidence.¹
3. The juvenile court's decline decision violates the Due Process Clause of the Fourteenth Amendment.
4. The juvenile court's decline decision deprived Andrew of his Sixth Amendment right to a jury trial.
5. The deputy prosecutor improperly disparaged defense counsel in violation of the Sixth and Fourteenth Amendments.
6. The trial court deprived Andrew of due process in violation of the Fourteenth Amendment when the court failed to instruct the jury on the elements of the offense of attempted first degree murder.
7. Instruction 17 omitted an essential element of the crime of attempted first degree murder.
8. Andrew's convictions for second degree unlawful possession of a firearm and attempted first degree murder while

¹ Because the court's findings are not individually numbered, Andrew cannot comply with the requirement of RAP 10.3(g) that he assign error by number. He is not, however, waiving any challenge to those findings.

armed with a firearm violate the Fifth Amendment's Double Jeopardy Clause.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The juvenile court has exclusive jurisdiction over 15-year-old alleged offenders unless the State proves that prosecuting the child as an adult would be in the best interest of the child or the public. Here, the court did not address Andrew's likelihood of rehabilitation in the juvenile system. Instead, the juvenile court based its decision on the fact that Andrew was charged with a premeditated and serious crime. Although the Legislature has not mandated decline for this class of serious offense, the court did not differentiate the facts of this case from others involving similar charges. Did the juvenile court err in declining jurisdiction?

2. The Sixth and Fourteenth Amendments require that every fact essential to punishment be proved to a jury beyond a reasonable doubt. The facts most essential Andrew's punishment – that declination of juvenile court jurisdiction would be in the best interest of Andrew or the public based on a consideration of various factors – were found by a judge by a preponderance of the evidence. Absent these findings, Andrew's maximum punishment was roughly 5 years. But following the juvenile court's findings, his

range of punishment was vastly expanded to include a potential life sentence, and an actual sentence of 35 years. Did the declination procedure violate Andrew's rights to due process and a jury?

3. The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. Further, the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Courts have long held that it is improper for a prosecutor to disparage the role of defense counsel before the jury. Do the deputy prosecutor's flagrant and improper comments regarding defense counsel require a new trial?

4. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. Premeditated intent is an essential element of the crime of attempted first degree murder. Instruction 17, the "to convict" instruction, omitted the element of premeditation. Did Instruction 17 relieve the State of its burden of proof?

5. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple

punishments for the same offense; offenses which are the same in law and fact. Because he was under the age of 18 at the time of the current offense, as a matter of fact and law Andrew could not be subject to a firearm enhancement without also being guilty of the offense of second degree possession of a firearm. Do the conviction and enhancements violate the Double Jeopardy Clause of the Fifth Amendment?

C. STATEMENT OF THE CASE

Andrew was raised in a home in which he routinely witnessed his father beating his mother. CP 324. Because of the severity of the abuse she suffered, Andrew's mother fled the State and withheld her whereabouts even from her children. CP 324. Andrew's father was the leader of a street gang known as Pee Wee Surenos in which Andrew's brother was also a member CP 324; 10/19/10 RP 44, 55. Abandoned by his mother, Andrew became increasingly involved with his father. CP 324.

Andrew was shot in a gang-related shooting in September 2008. 10/14/10 RP 64. Andrew was only 14 when he was shot.

The conventional wisdom in their Auburn neighborhood held that Isaac Garnica was the person who shot Andrew in September 2008. Isaac, however, denied shooting Andrew. 10/18/10 RP 156.

In February 2009, two people, Omar Gutierrez and Lionel Martinez-Perez, were unsuccessful in their efforts to shoot Isaac. 10/18/10 RP 130-32.

On July 6, 2009, Isaac and his brother David Garnica were skateboarding in the street. 10/21/10 RP 28-29. An individual with his head covered by a shirt or towel approached them. Id. When he neared the brothers, the individual shot Isaac several times. 10/21/10 RP 29. David attempted to wrestle the gun from the shooter but in the process was shot in the finger. 10/21/10 RP 32-33. The shooter then fled the scene.

Isaac never provided a description of the shooter and did not see his face. 10/18/10 RP 176,183. David initially assumed the shooter must have been Andrew and told the police as much. 10/21/10 RP 47-52, 82. However, when he later heard witness descriptions David realized it could not have been Andrew.

Witnesses in nearby apartments described the shooter as having either a bald head or closely-shaved hair. 10/13/10 RP 165; 10/20/10 RP 125. Andrew has a substantial amount of long black hair.

Omar Gutierrez, who was involved in a shooting attempt against Isaac, was seen immediately after the shooting running

from the area. 10/20/10 RP 114. Officers briefly detained Gutierrez but released him at the scene based upon a single witness's claim that Gutierrez was not the individual who shot Isaac on this occasion. 10/20/10 RP 20, 31-35.

Contrary to every other eyewitness, one witness, a friend of Isaac's named Dustin Moore, claimed he saw that the shooter had a ponytail as the shooter walked past him. 10/11/10 RP 117. Moore claimed he recognized Andrew from school. 10/11/10 RP 114. Despite this, when he spoke with police that night he did not tell them that it was Andrew. 10/11/10 RP Instead, he did not give police Andrew's name until April 2010. 10/11/10 RP 139; 10/25/10 RP 18-19; 58.

The State charged Andrew, who was 15 at the time the incident occurred, in juvenile court with a one count of attempted first degree murder committed while armed with a firearm; one count of first degree assault committed while armed with a firearm, and one count of second degree unlawful possession of a firearm. CP 123-24.

On the State's motion, and following a hearing, Judge Chris Washington declined jurisdiction and transferred the case to adult court.² CP 336-40.

After the matter was transferred to adult court, the State amended the information to allege that the attempted murder count was committed to benefit a gang. CP 31-33.

A jury convicted Andrew as charged. CP 34-40.

D. ARGUMENT

1. THE JUVENILE COURT ERRED IN DECLINING JURISDICTION.

a. Under Washington law, the State bears the burden of proving by a preponderance of the evidence that the declination of juvenile jurisdiction would be in the best interest of the child or the public. Juvenile courts have exclusive jurisdiction over all proceedings relating to children alleged to have committed offenses with few exceptions. RCW 13.04.030(1). One exception to the juvenile court's jurisdiction is where a juvenile court transfers jurisdiction of a particular child to adult criminal court pursuant to RCW 13.40.110. RCW 13.40.110(3) provides, "The court after a decline hearing may order the case transferred for adult criminal

² The facts before the court at the decline hearing are discussed in more detail in the arguments below.

prosecution upon a finding that the declination would be in the best interest of the juvenile or the public.” RCW 13.40.110(4) requires the court “shall set forth in writing its findings, which shall be supported by relevant facts and opinions produced at the hearing.”

Current law requires the State bear the burden of proving by a preponderance of the evidence that declination and transfer is appropriate. State v. Massey, 60 Wn.App. 131, 137, 803 P.2d 340 (1991). A juvenile court must consider the following eight criteria when determining whether to decline jurisdiction:

1. The seriousness of the alleged offense and whether the protection of the community requires waiver;
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
3. Whether the alleged offense was against persons or property, with greater weight given to offenses against persons especially if personal injury resulted;
4. The prosecutive merit of the complaint;
5. The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults;
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living;
7. The record and previous history of the juvenile, including previous contacts with law enforcement agencies and juvenile courts, or prior commitments to juvenile institutions; and

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

State v. Holland, 98 Wn.2d 507, 516 n.2, 656 P.2d 1056 (1983)

(quoting Kent v. United States, 383 U.S. 541, 566, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)).

This Court reviews a declination order for abuse of discretion and factual findings for substantial evidence. State v. M. A., 106 Wn.App. 493, 498, 23 P.3d 508 (2001). But the trial court's exercise of discretion in a juvenile declination hearing is "uniquely limited." State v. Foltz, 27 Wn.App. 554, 556, 619 P.2d 702 (1980).

[T]he court's exercise of discretion must be consonant with the purposes of the Juvenile Justice Act of 1977 which are, broadly, to provide for the handling of juvenile offenders through a separate and independent system providing both punishment and treatment where necessary.

Id.

b. The State failed to prove declination was in either Andrew's or the public's best interest. The juvenile court erred in concluding the State proved transfer to adult court would be in the best interest of Andrew or the public. The juvenile court engaged in no analysis of Andrew's best interest. The court's written findings

are silent on this consideration. Judge Washington's oral comments centered on other concerns. Judge Washington said:

I certainly don't want to be responsible in four or five years for someone who bides his time and gets out and reups, if you will, with the philosophies has had up to now and decides to shoot somebody. You know my name will be attached to that. . . . I'm not saying it is Mr. Archuleta's fault, but its reality.

1/19/10 RP 140. A judge's desire to avoid potential publicity may be in the judge's best interest but simply cannot be a legitimate factor in the court's decline decision as it has no connection to either Andrew's or the public's best interest. That is an untenable basis and is an abuse of discretion.

It cannot be reasonably argued that sending a child to adult court to face a prison term of 35 years is in his best interest. That is especially so for a crime which the juvenile court recognized was a product of Andrew's "unfortunate upbringing." Id

Nor did the State prove transferring Andrew to adult court would be in the public's best interest. At bottom, the court's decision rested solely upon the seriousness of the offenses. The court found "the offenses of which the respondent is accused requires[sic] trial and disposition within the adult criminal court." CP 339. But while the offenses are indisputably serious, that is true of

every attempted first degree murder and first degree assault. The only crime more serious would be a completed murder. Yet the Legislature has nonetheless determined that neither attempted murder nor first degree assault mandate decline when committed by a 15 year-old. RCW 13.04.030. Nor has the Legislature mandated declination even if those crimes are accompanied by firearm enhancements and gang aggravating factors. Thus, there must be something unique to Andrew and his crimes that justifies the court's conclusion that it "requires" decline as it cannot be the charges themselves.

In M. A. the juvenile court concluded seriousness of the charge of assault supported declination. M. A., 106 Wn.App. at 499. On appeal, the juvenile argued that this factor could not support declination because it would be present whenever first-degree assault charges are filed. Id. But this Court recognized that the particular assault charged in that case was more brutal than the mine-run first-degree assault: "the assault as alleged, which resulted in severe, life-threatening, and permanently debilitating injuries to the victim, exhibited extreme cruelty and was indeed gravely serious." Id.

There is nothing in the record that suggests Andrew's offenses, with the firearm enhancements and gang aggravator, are anything more than a mine-run attempted first-degree murder with a gang aggravator and firearm enhancement. Thus, the seriousness of the offenses does not support, much less "require," decline.

Equally lacking support is the juvenile court's conclusion that public safety required decline. CP 339; 1/25/10 RP 148. Again, the court pointed to nothing more than the charges to support its conclusion that the juvenile court could not "effectively deal[] with" the offense. 1/25/10 RP 148. Again, the Legislature did not include these offenses within the class of offenses for which decline is mandatory and automatic, and the State made no effort to differentiate these charges from other cases with similar charges. Plainly the Legislature has determined these types of offenses can be effectively dealt with in juvenile court. RCW 13.04.030.

The report prepared by King County Juvenile Probation Officer Gabrielle Pagano, in which the probation office recommended the juvenile court retain jurisdiction, demonstrates the short-sighted nature of the juvenile court's conclusion. The probation officer predicted that prison will result in one of two

outcomes for Andrew. First, he may fall under the wings of his father and fellow gang members and he will lose all “positive rehabilitative lessons that he has learned.” CP 333. Second, he may become a target of retribution for his father’s gang activity - i.e., that he will suffer yet again for the sins of his father. Id. But the probation officer made clear, that when Andrew is released following a lengthy prison term he will be “hardened and more gang entrenched than he is at this time.” Id.

The Court’s written findings state Andrew “manifests a sophistication and maturity requiring” the court to decline jurisdiction. RP 339. But the court’s findings do not point to any evidence to support that conclusion. The court’s oral ruling consists of the court’s observation that “you seem to be pretty sharp, pretty mature.” RP 146. But again the court does not point to any evidence supporting that conclusion. Not that the Court should be faulted, as the State offered no evidence to support the finding. Indeed, the only evidence of maturity before the court was to the contrary.

Dr. Mark Whitehill’s report notes Andrew’s description of his life “suggests uneven levels of maturity,” and notes Andrew has

fallen several years behind academically. CP 317. The report prepared by Mr. Pagano summarized Andrew's life as follows:

Andrew. . . grew up in a dysfunctional angry home environment that was filled with chaos, drugs/alcohol. And extensive abuse of his mother that he witnessed. Andrew has only known a life of violence and gang affiliation. . . . He has never participated in any kind of counseling to help him deal with the abuse of his mother he witnessed while growing up. Because Andrew chose to protect his mother while growing up, his relationship with his father and older siblings suffered and then his mother left the state in 2008. Even though Andrew made the choice to remain in Washington because of friends, he still perceived his mother leaving as abandonment. Once [his mother] left, this opened the door for [his father] to repair his relationship with Andrew and this was not a positive influential path for Andrew.

CP 332.

Mr. Pagano made clear it was his belief that confinement until age 21 together with the rehabilitation available in the juvenile system would effectively rehabilitate Andrew and protect the community. RP 331-32. Dr. Whitehill shared the conclusion that Andrew would benefit from such rehabilitation. The State offered no evidence to rebut that conclusion.

The court recognized that Andrew had minimal prior contacts with the justice system. 1/25/10 RP 146. The court recognized this was particularly remarkable in light of Andrew's upbringing in a

home surrounded by violence. Id. Yet the court failed to consider this evidence or any evidence indicating the likelihood of rehabilitation.

Recent Supreme Court cases hold that because juveniles are both categorically less culpable and more amenable to rehabilitation they must be treated differently by the justice system. See Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentence of life without possibility of parole unconstitutional as applied to juveniles); Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (death penalty unconstitutional as applied to juveniles). The Court recognized juveniles “have a lack of maturity and an underdeveloped sense of responsibility,” they are “more vulnerable or susceptible to negative influences,” and “their characters are not as well formed” as those of adults. Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 569-70). Thus, “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 573). Judges cannot, “with sufficient accuracy, distinguish the few incorrigible juvenile

offenders from the many that have the capacity for change.”

Graham, 130 S.Ct. at 2032.

The Supreme Court gave great weight to findings by doctors and psychologists that “parts of the brain involved in behavior control continue to mature through late adolescence.” Graham, 130 S.Ct. at 2026. “Juveniles are more capable of change than are adults.” Id. Thus, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” Id. at 2026-27.

In sum, scientific studies and Supreme Court caselaw are unanimous in concluding that most juvenile offenders can be rehabilitated and that neither psychologists nor judges are capable of predicting which juveniles represent the small minority who are not amenable to treatment and are likely to reoffend as adults.

The trial court never moved beyond the charges against Andrew in its analysis. Rather than recognize that Andrew as a juvenile was not mentally equal to an adult, the court sought to hold him equivalently culpable for his crimes. Rather than recognize the increased probability of successful rehabilitation, Judge Washington noted his unwillingness to have his name attached to the possible failure.

The court's findings are not supported by substantial evidence. The State failed to prove by a preponderance of the evidence that transfer was appropriate, and this Court should reverse.

c. Reversal is required. As explained above, the juvenile court abused its discretion in declining jurisdiction because the State failed to prove declination was in the best interest of either Andrew or the public. The State offered no evidence at all that declination was in Andrew's best interest, and the evidence relied upon for the "best interest of the public" determination was limited to the nature of the charges. This Court must reverse the order declining jurisdiction. Foltz, 27 Wn.App. at 558.

2. THE DECLINATION PROCEDURE VIOLATED ANDREW'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE WAS SUBJECTED TO A SIGNIFICANT INCREASE IN PUNISHMENT BASED ON FACTS FOUND BY A JUDGE BY A PREPONDERANCE OF THE EVIDENCE.

a. The Constitution requires that every fact essential to punishment be proved to a jury beyond a reasonable doubt. The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397

U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment guarantees the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment – whether or not the fact is labeled an “element.” Apprendi v. New Jersey, 530 U.S. 466, 476, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

It 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.

Id. at 490 (internal citations omitted).

b. Andrew’s maximum punishment was increased from roughly 5 years to life. Andrew’s Sixth and Fourteenth Amendment rights were violated because the facts most essential to his punishment were found by a judge by only a preponderance of the evidence. In Washington, a 15-year-old charged with attempted first degree murder with a firearm enhancement and gang aggravator as a well as counts of first degree assault with a

firearm enhancement, and unlawful possession of a firearm could not be exposed to a potential life sentence unless the State proved:

- (1) that the necessary elements of the Kent analysis indicate it is in his or the community's best interest to try him in adult court;
- (2) that with premeditated intent he took a substantial step towards causing another's death in King County
- (3) that at the time of the offense he was armed with a firearm; and,
- (4) committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership.

RCW 9A.28.020; RCW 9A.32.030; 9.94A.533(3); 9.94A.535(3)(aa);

RCW 13.04.030(1)(e)(i); RCW 13.40.110(3).³

While the last three elements must be proved to a jury beyond a reasonable doubt, current law permits the first element to be proven to a judge by a mere preponderance of the evidence. This is so despite the fact that first element has the most significant impact upon the range of punishment. Absent the first element Andrew's range of punishment extended to his twenty-first birthday,

³ Because it is the gang aggravator, charged in conjunction with the attempted murder charge, that exposed Andrew to the maximum penalty of life rather than simply the standard range for the attempted murder with the two consecutive firearm enhancements, it was not strictly necessary for the State to prove the remaining two charges in order to expose Andrew to a potential life sentence.

about 5 years.⁴ But based upon the judicial finding, by a mere preponderance of the evidence, Andrew was exposed to a potential sentence of life, and actually received a sentence of 35 years. CP 115,117. Thus Andrew's sentence increased by more than 600% based on facts found by a judge by a preponderance of the evidence, a clear constitutional violation.

This Court addressed a similar argument in State v. H. O., 119 Wn.App. 549, 81 P.3d 883 (2003), and concluded that because the facts found by a judge by a preponderance of the evidence determined only the appropriate "forum," they did not have to be proved to a jury beyond a reasonable doubt.⁵ Id. at 554. H.O., however, was decided without the benefit of subsequent Supreme Court opinions which significantly altered the preexisting analysis of the Sixth and Fourteenth Amendments. See e.g. Blakely, 542 U.S. 296; United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

⁴ Andrew's standard range disposition for the offenses as charged was 342 weeks or 6.57 years. RCW 13.40.0357; RCW13.40.180; 13.40.193(2). Because the sentence would extend beyond his twenty-first birthday that date represents the maximum sentence. RCW 13.40.300,

⁵ Division Two followed H.O. in In re Personal Restraint of Hegney, 138 Wn.App. 511, 158 P.3d 1193 (2007).

Blakely held the Sixth and Fourteenth Amendments were violated when a court imposed a 90-month sentence based on a judicial finding by a preponderance of the evidence that the defendant acted with “deliberate cruelty.” Blakely, 542 U.S. at 298. Absent that finding, the maximum possible punishment was 53 months. Id.

Booker held a sentencing court violated the Sixth and Fourteenth Amendments when it imposed a 360 month sentence based on a judicial finding by a preponderance of the evidence that the defendant possessed a certain amount of drugs. Booker, 543 U.S. at 227. Absent that finding, the maximum possible punishment was 262 months. Id.

Cunningham found the sentencing court violated the Sixth and Fourteenth Amendments when it imposed an “upper term” sentence based on a judicial finding by a preponderance of the evidence that certain aggravating factors existed and outweighed the mitigating factors. Cunningham, 549 U.S. at 275-76. The trial judge found by a preponderance of the evidence that the victim was particularly vulnerable, that the defendant’s conduct was violent, and that the defendant was a serious danger to the community. Id. at 275. The judge weighed those facts against the mitigating factor

of minimal criminal history, and determined that an upper-term sentence should be imposed. Id. at 275-76. Absent these findings, only a lesser “middle term” sentence was available. Id. at 288. Because the facts necessary to impose an upper term sentence were not proved to a jury beyond a reasonable doubt, the sentence was unconstitutional. Id. at 288-89.

The facts necessary to subject Andrew to a more than 600% in the range of punishment are remarkably similar to those necessary to impose an upper term sentence in Cunningham. Indeed, the Kent factors are strikingly similar to traditional “aggravating” and “mitigating” factors. The juvenile court’s decline decision here was based on factors which mirror the factors considered in Cunningham - that Andrew committed a violent crime with premeditation and presented a danger to the community. Those findings transformed Andrew’s range of punishment from about five years to 35, and exposed him to the potential for a life sentence.

The Supreme Court has made clear that regardless of what one calls a fact – an “element,” a “sentencing factor,” a “forum factor,” or something else – an individual has a right to have “all

facts legally essential to the punishment” proved to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 313 (emphasis added).

The Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. Cunningham, 549 U.S. at 281. But here, the facts exposing Andrew to a vastly greater potential sentence were found by a judge by a mere preponderance of the evidence. That procedure violated Andrew’s Sixth and Fourteenth Amendment rights.

c. Even if facts supporting declination need not be found by a jury, they must be proved beyond a reasonable doubt. The State may argue that a juvenile has no right to jury findings in a declination hearing because juveniles have no right to a jury at the adjudicatory stage. See McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion). This argument should be rejected in light of the authority above.

In any event, it cannot be denied that juveniles, like adults, have a Fourteenth Amendment right to proof beyond a reasonable doubt. Winship, 397 U.S. at 364-65. This standard of proof is an

essential component of due process and fair treatment. Id. at 359. It makes no sense to say that this standard applies to the elements that supported a sentence of five years, but does not apply to the elements that made available a sentence of 35 years.

And again, to label the former “elements” but the latter “forum factors” misses the point. The “relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” Apprendi, 530 U.S. at 494 (emphasis added). The effect of juvenile declination – indeed its very purpose – is to expose juveniles to the possibility of a much greater sentence for the same offense than they otherwise would receive. It was precisely because decline would increase the punishment that State urged the court to decline jurisdiction of Andrew. The deputy prosecutor argued “So basically the difference . . . between retention and declination is whether your Honor thinks that that basically four and half years until he’s 21 . . . is an appropriate sanction.” 1/19/10 RP 127.

The standard of proof employed in the court’s decline decision violates due process. A juvenile court may not decline jurisdiction unless the State proves beyond a reasonable doubt that

the “aggravating” Kent factors outweigh the “mitigating” Kent factors such that it would be in the best interest of the child or the public for the juvenile to be tried as an adult. This Court must reverse the juvenile court’s decision.

3. THE DEPUTY PROSECUTOR’S FLAGRANT MISCONDUCT IN CLOSING REQUIRES REVERSAL OF ANDREW’S CONVICTIONS.

a. Prosecutorial misconduct deprives a defendant his due process right to a fair trial. A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Even where a defendant does not object in the trial court to improper acts by the prosecutor, this Court may review them where they are flagrant and ill-intentioned. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). That is the case here.

b. The deputy prosecutor engaged in flagrant misconduct in her closing argument. The Sixth Amendment guarantees a defendant the effective assistance of counsel. It is improper for the prosecution to comment on the role of counsel or disparage defense counsel. State v. Thorgerson, __ Wn.2d __, 285 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); State v. Gonzales, 111 Wn.App. 276, 283-84, 45 P.3d 205 (2002).

Thorgerson found the prosecutor plainly committed misconduct where in closing argument he told the jury that the defense presentation was “bogus” and involved “sleight of hand.” 258 P.3d at 30. The Court found the “sleight of hand” statement particularly problematic as it suggested “wrongful deception” by defense counsel. Id.

Similarly, deputy prosecutor Karissa Taylor argued in this case that Andrew’s defense was “smoke and mirrors” and insinuated the defense has actively tried to deceive the jury. 10/27/10 RP 103. But the State’s improper comments did not stop at suggesting only that present defense counsel was deceiving the jury, rather Ms. Taylor went further and said “that’s the job.” Id. Ms. Taylor’s comments regarding the requirements of the Sixth

Amendment tells the jury to negatively view the exercise of that right. Ms. Taylor's suggestion that defense counsel's role was to deceive the jury violated Andrew's Sixth Amendment right to counsel.

But, Ms. Taylor's did not stop there. Instead, she then immediately contrasted her own role saying "My job is different . . . my job is the put the evidence on the stand that I believe is relevant in this case." 10/27/10 RP 103. This Court has previously held such a false comparison is both incorrect and improper. Gonzales, 111 Wn.App. at 283. "This is an improper statement; it seeks to draw the cloak of righteousness around the prosecutor in his personal status as government attorney and impugns the integrity of defense counsel." Id. (quoting United States v. Frascone, 747 F.2d 953 (5th Cir.1984)).

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1018 (1996); review denied, 131 Wn.2d 1018 (1997). Ms. Taylor's arguments were plainly improper.

c. This Court must reverse Mr. Archuleta's convictions and remand so that he may have a constitutionally sufficient trial. Where a prosecutor commits misconduct but does not violate the defendant's constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. See, e.g., Fisher, 165 Wn.2d at 747 (defendant bore burden of proving prejudice where prosecutor committed misconduct by violating evidentiary ruling); State v. Jones, 144 Wn.App. 284, 300, 183 P.3d 307 (2008) (defendant bore burden of proving prejudice where prosecutor committed misconduct by bolstering witness's credibility and arguing facts not in evidence).

But where a prosecutor violates a defendant's constitutional rights reversal is required unless State proves beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. See, e.g., Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); Monday, 171 Wn.2d at 680 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial

stereotyping in violation of constitutional right to impartial jury); State v. Moreno, 132 Wn.App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se).

Here, the deputy prosecutor's statements were a direct comment on Andrew's Sixth Amendment rights to the effective assistance of counsel and to present a defense. The State's case ultimately turned on a single witness' claim that Andrew committed the offense, a witness who did not provide a detailed statement until several months after the offense. That witness provided a description of the shooter which substantially contradicted the description provided by neutral witnesses. In short, this was a close case. In that context, the State cannot prove beyond a reasonable doubt that Ms. Taylor's flagrant misconduct did not affect the verdict. This Court must reverse Andrew's convictions.

4. INSTRUCTION 17 OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPTED FIRST DEGREE MURDER.

a. The state must prove and a jury must find each element of an offense beyond a reasonable doubt. The jury-trial guarantees of the Sixth Amendment and Article I, section 22 of the

Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, section 3 of the Washington Constitution, require the State prove each element to a jury beyond a reasonable doubt. Winship, 397 U.S. at 364; Apprendi, 530 U.S. at 476-77; State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

b. The court failed to instruct the jury on the necessary elements of attempted first degree child molestation as charged in Count I. Premeditated intent is an essential element of the crime of attempted first degree murder. State v. Vangerpen, 125 Wn2d 782, 791, 888 P.2d 1177 (1995). In Vangerpen, the information alleged the defendant "with intent to cause the death of another person did attempt to cause the death of . . . a human being." State v. Vangerpen, 71 Wn.App. 94, 97, n.1, 856 P.2d 1106 (1993), review granted, 123 Wash.2d 1025 (1994). At the close of the State's case, the defendant objected to the information's omission of premeditation. Vangerpen, 125 Wn2d at 785. Over a defense objection the trial court permitted the State to

amend the information to include the element of premeditation. Id. at 786. On appeal there was no question that premeditation was an essential element of attempted first degree murder. Id. at 789-90. Rather the only issue was whether the trial court erred in allowing amendment of the information to add that element. Id. In fact the State contended that because it was an essential element the amendment was proper.

Thus premeditated intent is an essential element of the offense of attempted first degree murder. Indeed, the information in this case properly alleges Andrew “with premeditated intent to cause the death of another, did attempt to cause the death of Isaac Garnica.” CP 31. But Instruction 17, the “to convict” instruction, provided only:

To convict the defendant of the crime of Attempted Murder in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on July 6, 2009, the defendant did an act which is a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit the crime of murder in the first degree;
- (3) That the acts occurred in the State of Washington. . . .

CP 63. There can be no dispute that the essential element of premeditation is absent from this instruction. Instruction 12, which

purports to define the crime of attempted first degree murder, similarly omits the premeditation element. CP 58.

“[B]ecause it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence, ” generally the “to convict” instruction must contain all elements of the charged crime. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (internal quotation marks omitted) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Where the State alleges a defendant has committed an attempted crime the jury must find he formed the necessary intent to commit the completed crime and took a substantial towards doing so. DeRyke, 149 Wn.2d at 910 (citing RCW 9A.28.020(1); State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996)).

An attempt generally requires that the jury find the person formed the intent necessary to the commit the crime and took a substantial step. DeRyke, 149 Wn.2d at 910 First degree murder is unique in that in that it requires a heightened intent - premeditated intent. As Vangerpen made clear premeditated intent is an essential element of the offense of attempted first degree murder. The to-convict instruction in this case mirrors the initial information in Vangerpen in that like that defective information the

instruction omits the requirement that Andrew had premeditated the intent prior to attempting to commit the crime. If premeditation is an essential element which must be included in the information it is an essential element which must be included in the to convict instruction. If a jury need not find the person acted with premeditated intent, the distinction between attempted first degree murder and attempt second degree murder disappears. Instruction 17 omitted an essential element of the crime.

c. This Court must reverse Andrew's conviction. The Supreme Court has applied a harmless-error test to erroneous jury instructions. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). However, the Court held "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." Brown, 147 Wn.2d at 339 (citing Smith, 131 Wn.2d at, 265). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. Mills, 154 Wn.2d at 15 n.7, (citing Neder, 527 U.S. at 1; Chapman, 386 U.S. at 24).

The jury had no reason to know that it must find Andrew premeditated the intent to cause another's death before he took a substantial step towards doing so. Neither the purported definition of attempted first degree murder in Instruction 12, nor Instruction 17 contained that requirement. CP 58, 63. That omission is not cured by the fact that two other instructions defining first degree murder, Instructions 14 and 15, contained the necessary element. CP 60-61. Instead, the inclusion of premeditation in the instruction for the completed offense while omitting it from the attempt instruction exacerbates the error by telling the jury the heightened intent is required only for the completed offense. Because the instructions, even read as a whole, omit an essential element of the offense, reversal is required. Brown, 147 Wn.2d at 339.

5. ANDREW'S CONVICTION OF UNLAWFUL POSSESSION AND THE INCREASE IN HIS FIREARM ENHANCEMENTS BASED UPON HIS PRIOR ENHANCEMENT VIOLATE DOUBLE JEOPARDY.

Andrew was charged and convicted of possessing a firearm while being under the age of 18. CP 32; 35. Andrew was also charged and found to have been armed with a firearm in the commission of the attempted murder and assault. CP 31-32; 36-39. As a matter of law and fact, Andrew could not be subject to the

firearm enhancements without also committing the crime of unlawful possession of a firearm. Therefore, the Double Jeopardy provision of the Fifth Amendment, as incorporated by the Fourteenth Amendment, was violated.

a. The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments for the same offense. The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. V; Const. Art. I, § 9. 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). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple

punishments for the same offense. 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); Gocken, 127 Wn.2d at 100.

The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. In re the Personal Restraint Petition of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of an additional fact which the other does not*.

Blockburger, 284 U.S. at 304 (emphasis added). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

To withstand a double jeopardy challenge, the federal cases require an express statement of legislative intent for separate punishments. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Blockburger test is simply “a rule of statutory construction” which seeks to determine the legislative intent. Albernez v. United States, 450 U.S. 333, 340, 102 S.Ct. 1137, 67 L.Ed.2d 275 (1981). If there is doubt as to the legislative intent for multiple punishments, principals of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. Application of the Blockburger test leads to the conclusion that Andrew’s possession conviction and enhancement placed him in Double Jeopardy. There is no expression of legislative intent permitting the multiple punishments imposed upon Andrew. RCW 9.41.040(2) provides a person

. . . is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the

crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm
. (iii) If the person is under eighteen years of age. . . .

RCW 9.94A.533(3) provides in part:

The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a 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 based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. 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 an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection

Neither statute contains any language statute expressing legislative intent to permit the multiple punishments imposed on Andrew. Moreover, application of the Blockburger tests leads to the conclusion that the statutes impose multiple punishments for the

same act. Anyone under the age of 18 who commits an offense while armed with a firearm will be subject to both provisions. Thus, proof of the enhancement does not require proof of an additional fact and the imposition of both violates double jeopardy.

Blockburger, 284 U.S. at 304.

c. The decision in *Kelley* does not lead to a different outcome. In *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), the Supreme Court rejected a claim that the element of a firearm enhancement violated double jeopardy when added to an offense for which use of a firearm was already an element. But that result logically stems from the fact that elements of a single offense don't violate double jeopardy as the person is only being held to account for a single punishment. Here, the challenged elements are elements of separate offenses, second degree unlawful possession of a firearm and the attempted first degree murder while armed with a firearm and first degree assault while armed with a firearm. Because *Kelley* did not address the issue presented in this case, it does not control.

Admittedly, *Kelley* suggests that the Double Jeopardy Clause does not apply to enhancements. But a firearm enhancement is an "essential element" of an offense. *State v.*

Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Thus, as with any other element the double protections must apply.

But Kelley resists this inescapable conclusion by incorrectly stating that the only constitutional change mandated by Apprendi and Blakely was that an enhancement requires a jury verdict before a court may impose it. Kelley, 168 Wn.2d at 81-82. But both Apprendi and Blakely explicitly said more, and recognized that other constitutional protections apply as well. Thus the Fourteenth Amendment Due Process Clause requires the State prove the additional element beyond a reasonable doubt. Apprendi, 520 U.S. at 490.⁶ Too, the Sixth Amendment requires the State provide notice of the enhancement in the charging document. State v. Powell, 167 Wash.2d 672, 689-90, 223 P.3d 493 (2009) (Stephens,

⁶ Kelley acknowledges that Apprendi and its progeny require the fact be proved beyond a reasonable doubt. Kelley, 168 Wn.2d at 80. But Kelley suggests that standard of proof is demanded by the Sixth Amendment. 168 Wn.2d at 80. But Winship made clear that standard of proof is a necessary component of due process and thus is required by the Fifth and Fourteenth Amendments. Winship said

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. 361-62.

J. concurring), 694 (Owens, J. dissenting);⁷ Recuenco III, 163 Wn.2d at 434. Thus it is clear that other rights beyond the jury-trial right apply to the “functional equivalent” of an element.

Presumably too, the Fourth Amendment and Article I, section 7 would preclude the use of unlawfully obtained evidence to prove the enhancement. Seemingly, the Fifth Amendment would bar the State from forcing a defendant to testify regarding an enhancement. The Confrontation Clause of the Sixth Amendment and Article I, section 22 would entitle a defendant to confront witnesses testifying regarding evidence of the enhancement. In short, the full panoply of constitutional rights, save one, applies to a sentencing factor. There is no principled basis for that result.

Moreover, whether a court wishes to refer to the enhancement as an element or the functional equivalent of an element is irrelevant.

Equivalent: **1**: equal in force or amount. . . : equal in area or volume but not admitting of superposition. . . **2 a** : like in signification or import **b**: *logic: having* equivalence: implying each other **3a**: equal in value: COMPENSATIVE, CONVERTIBLE . . . **b**: corresponding or virtually identical especially in effect or function . . . **c**:

⁷ While they are labeled the concurrence and dissent, because they together garnered 5 votes on the question of whether aggravating factors are elements which must be alleged in the charging document, these two opinions represent the majority opinion.

capable of being placed in one-to-on correspondence

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Webster's Third New International Dictionary, p769 (1993).

Because an "equivalent" of an element is virtually identical in effect or function there is again no principled basis to afford one a lesser constitutional protection.

In any event, the United State Supreme Court has clarified that the "those facts setting the outer limits of a sentence and of the judicial power to impose it [i.e., those at issue in Apprendi], are the elements of the crime for the purposes of the constitutional analysis." Harris v. United States, 536 U.S. 545, 567, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). The Court has recently reiterated this notion.

Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); Jones v. United States, 526 U.S. 227, 232, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. See McMillan v. Pennsylvania, 477 U.S. 79, 91-92, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

United States v. O'Brien, __ U.S. __, 130 S.Ct. 2169, 2174, 176

L.Ed.2d 979 (2010). In other words, a fact cannot be deemed a

sentencing factor if it must constitutionally be proved beyond a reasonable doubt.

Regardless of what Kelley may have held, “When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings.” State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250, 253-53 (2008) (citing In re Habeas Corpus of Scruggs, 70 Wn.2d 755, 760, 425 P.2d 364 (1967)). Because an enhancement increases the sentence otherwise available it is an element and must be treated as an element.

No matter what description a court chooses to employ, the constitutional analysis is precisely the same. Imposition of multiple punishments based upon proof of a single fact violates Double Jeopardy absent an express statement of legislative intent. This Court must dismiss either his unlawful possession conviction or his firearm enhancements.

3. THE DEPUTY PROSECUTOR'S FLAGRANT MISCONDUCT IN CLOSING REQUIRES REVERSAL OF ANDREW'S CONVICTIONS.

a. Prosecutorial misconduct deprives a defendant his due process right to a fair trial. A prosecuting attorney is the representative of the sovereign and the community; therefore it is

the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Even where a defendant does not object in the trial court to improper acts by the prosecutor, this Court may review them where they are flagrant and ill-intentioned. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). That is the case here.

b. The deputy prosecutor engaged in flagrant misconduct in her closing argument. The Sixth Amendment guarantees a defendant the effective assistance of counsel. It is improper for the prosecution to comment on the role of counsel or disparage defense counsel. State v. Thorgerson, __ Wn.2d __, 285 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); State v. Gonzales, 111 Wn.App. 276, 283-84 45 P.3d 205 (2002).

Thorgerson found the prosecutor plainly committed misconduct where in closing argument he told the jury that the defense presentation was “bogus” and involved “sleight of hand.” 258 P.3d at 30. The Court found the “sleight of hand” statement particularly problematic as it suggested “wrongful deception” by defense counsel. Id.

Similarly, deputy prosecutor Karissa Taylor argued in this case that Andrew’s defense was “smoke and mirrors” and insinuated the defense has actively tried to deceive the jury. 10/27/10 RP 103. But the State’s improper comments did not stop at suggesting only that present defense counsel was deceiving the jury, rather Ms. Taylor went further and said “that’s the job.” Id. Ms. Taylor’s comments regarding the requirements of the Sixth

Amendment tells the jury to negatively view the exercise of that right. Ms. Taylor's suggestion that defense counsel's role was to deceive the jury violated Andrew's Sixth Amendment right to counsel.

But, Ms. Taylor's did not stop there. Instead, she then immediately contrasted her own role saying "My job is different . . . my job is the put the evidence on the stand that I believe is relevant in this case." 10/27/10 RP 103. This Court has previously held such a false comparison is both incorrect and improper. State v. Gonzales, 111 Wn.App. 276, 283, 45 P.3d 205 (2002). "This is an improper statement; it seeks to draw the cloak of righteousness around the prosecutor in his personal status as government attorney and impugns the integrity of defense counsel." Id. (quoting United States v. Frascone, 747 F.2d 953 (5th Cir.1984)).

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1018 (1996); review denied, 131 Wn.2d 1018 (1997). Ms. Taylor's arguments were plainly improper.

c. This Court must reverse Mr. Archuleta's convictions and remand so that he may have a constitutionally sufficient trial. Where a prosecutor commits misconduct but does not violate the defendant's constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. See, e.g., Fisher, 165 Wn.2d at 747 (defendant bore burden of proving prejudice where prosecutor committed misconduct by violating evidentiary ruling); State v. Jones, 144 Wn.App. 284, 300, 183 P.3d 307 (2008) (defendant bore burden of proving prejudice where prosecutor committed misconduct by bolstering witness's credibility and arguing facts not in evidence).

But where a prosecutor violates a defendant's constitutional rights reversal is required unless State proves beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. See, e.g., Chapman, 386 U.S. at 24 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); Monday, 171 Wn.2d at 680 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping in violation of constitutional right to

impartial jury); State v. Moreno, 132 Wn.App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se).

Here, the deputy prosecutor's statements were a direct comment on Andrew's Sixth Amendment rights to the effective assistance of counsel and to present a defense. The State's case ultimately turned on a single witness' claim that Andrew committed the offense, a witness who did not provide a detailed statement until several months after the offense. That witness provided a description of the shooter which substantially contradicted the description provided by neutral witnesses. In short, this was a close case. In that context, the State cannot prove beyond a reasonable doubt that Ms. Taylor's flagrant misconduct did not affect the verdict. This Court must reverse Andrew's convictions.

E. CONCLUSION

Because the juvenile erroneously declined jurisdiction of Andrew's case his convictions must be reversed. The court's omission of an essential element from its jury instructions requires reversal of Andrew's convictions of attempted first degree murder. Further the deputy prosecutor's flagrant misconduct requires

reversal of Andrew's convictions. Finally, because they are duplicative, the court must reverse and dismiss either the two firearm enhancements or Andrew's conviction of unlawful possession of a firearm.

Respectfully submitted this 15th day of November, 2011.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66610-0-I
v.)	
)	
ANDREW ARCHULETA,)	
)	
Appellant.)	

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