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Supreme Court No.  
Court of Appeals No. 82037-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent

v.

JEREMIAH WITTCOFF,  
Appellant

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PETITION FOR REVIEW

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SUZANNE LEE ELLIOTT  
Washington Appellate Project  
Suite 610, 1511 Third Ave.  
Seattle WA 98101  
206-587-2711

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## **I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION**

Jeremiah Wittcoff, seeks review of the unpublished opinion in *State v. Wittcoff*, #82037-1-I. See Appendix I.

## **II. ISSUES PRESENTED FOR REVIEW**

Do multiple RCW 9.94A.533(3) charges and consecutive sentences for using a single gun, fired only once, during a continuous criminal episode violate the state and federal double jeopardy clauses?

## **III. STATEMENT OF THE CASE**

On October 8, 2019 Mr. Wittcoff possessed one firearm and fired only once when he committed three crimes: first degree robbery, and two counts of second degree assault. The prison time for the three substantive counts was 66 months in jail. The sentence was increased by 132 months because the jury also found Mr.

Wittcoff was armed with the firearm during the robbery and assaults.  
RCW 9.94A.533(3).

On appeal, Mr. Wittcoff argued that, because the unit of prosecution for RCW 9.94A.533(3), was each gun possessed, double jeopardy principles forbid extending Mr. Wittcoff's sentence three times when he possessed only one gun and only fired it once. The Court of Appeals rejected his arguments and affirmed

#### **IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

A. RCW 9.94.533(3) is a separate crime.

RCW 9.94A.533(3) charges cannot be considered some species of independent sentencing consideration. The Court of Appeals incorrectly concluded the statute describes only an "adjustment" to standard sentences. But that Court failed to properly consider the impact of the decisions which have eliminated the distinction between "enhancements" and "elements."

In *State v. Allen*, 192 Wn. 2d 526, 534, 431 P.3d 117, 121 (2018), the Washington Supreme Court considered whether the "aggravating factors" in RCW 10.95.020 were simply "sentencing

factors.” The Court acknowledged that the United States Supreme Court has clarified that for Sixth Amendment purposes, “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” *Alleyne v. United States*, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (overruling *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)). The Washington Supreme Court said the United States Supreme Court has further indicated there is “no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury trial guarantee and what constitutes an ‘offence’ for purposes of the Fifth Amendment's Double Jeopardy Clause.” Quoting *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

In *Allen*, the Court found no logical or legal basis for holding that the elements of a crime for purposes of the Sixth Amendment’s right to trial by jury differ from the elements of a crime for purposes of the Fifth Amendment’s double jeopardy clause. For both, a fact other than proof of a prior conviction that increases the mandatory

minimum sentence is an element of the offense. Accordingly, the Court held that that RCW 10.95.020 aggravating circumstances, which increase the mandatory minimum penalty for first degree murder, are elements of the offense of aggravated first degree murder for purposes of the double jeopardy clause.

The .533(3) allegations at issue here are no different from the “aggravating factors” in *Allen*. Each .533(3) charge must be proved to the jury beyond a reasonable doubt. There are separate instructions regarding the allegation. CP 94. And there is a separate verdict form for each allegation. CP 55, 58. And, each allegation has a minimum mandatory increase in the penalty for the underlying crime. This minimum mandatory sentence must be consecutive to sentences for the other crimes charged and consecutive to any other .533 conviction. And, the sentence for a .533 conviction must be served in “total confinement.” RCW 9.94A.533(3)(e) and (4)(e).

It would make little sense to find that RCW 9.94A.533(3) adds a duplicative element to the eligible crimes. That is because, the State increased the degree of both the robbery and assaults by



alleging that Mr. Wittcoff committed the offenses while in possession of a firearm. Courts presume the legislature did not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity. *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010).

Rather, after *Allyne* and *Allen*, the firearms “enhancement” in RCW 9.94A.533(3) is more properly viewed as a separate crime with its own separate elements. Given that the statute describes an independent crime and is ambiguous, this Court must determine what the “unit of prosecution” is for each .533(3) allegation to avoid a double jeopardy issue.

B. Because the unit of prosecution for a .533(3) charge is each gun the defendant possesses, multiple .533(3) charges for using a single gun during a continuous criminal episode violates double jeopardy.

The United States and Washington Constitutions' double jeopardy clauses, Fifth Amendment and Const. Art. 1, §9, are “identical in thought, substance, and purpose.” *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). They both “protect against

multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Courts may not enter multiple convictions for the same offense without offending double jeopardy. See *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

The “unit of prosecution” analysis informs double jeopardy protections. While the issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers on a question of statutory interpretation and legislative intent. See *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. See *Adel*, 136 Wn.2d at 634. If the legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared that

the ambiguity should be construed in favor of lenity. See *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed.2d 905 (1955); *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005).

RCW 9.94A.533(3) is ambiguous when it comes to determining whether multiple firearm enhancements can be imposed when a defendant possesses only one gun during a continuous criminal episode. No case has ever determined how many .533(3) charges can be added to multiple eligible offenses arising from one continuous episode when the defendant possesses only one gun. The language of .533(3) provides no guidance. It simply states: “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 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.” But the statute is silent regarding the propriety of filing a .533(3) charge for

every eligible crime arising from the same criminal episode where the defendant alleged to have continuously possessed only one gun.

The statute is ambiguous in these circumstances. The rule of lenity applies to resolve statutory ambiguities in criminal cases in favor of the defendant, absent legislative intent to the contrary. See *State v. Lewis*, 35 Wn.2d 239, 249-50, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585-86, 817 P.2d 855 (1991). When a statute is ambiguous, the Court “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). Here relevant case law and the rule of lenity require this Court to conclude that where the defendant continuously possesses only one firearm during a criminal episode, only one .533(3) charge can be filed. Such a rule acknowledges the double jeopardy issues that arise when, as here, the state charges multiple crimes and seeks to enhance each eligible crime with a .533(3) allegation.

In *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003), this Court concluded that the previously codified version of this same statute allows the same offense to be enhanced more than once for each weapon used in that offense. Thus, the Court seems to have concluded that the “unit of prosecution” for each is each firearm possessed. *Id.* at 419-420.

This makes sense. First, the analogous statute, unlawful possession of a firearm, which criminalizes the possession of a firearm by a person previously convicted of a disqualifying crime provides that each firearm unlawfully possessed under this section shall be a separate offense. RCW 9.41.040(1)(a) and (7). But it is also a “course of conduct” rather than a discrete act. *State v. Mata*, 180 Wash. App. 108, 120, 321 P.3d 291, 297 (2014). As a result, any conviction or acquittal based on a portion of that course of action will bar a second prosecution on the remainder of the course of conduct. *Id.* at 120. In *Mata* the defendant was charged in both Pierce and Yakima counties for possession of the same gun on the same day during a “one-day, multicounty crime spree.” *Id.* at 110.

The jury in Pierce County acquitted him of possession. This Court held that the Pierce County acquittal barred Mata's conviction for unlawful possession in Pierce County.

This Court applied similar reasoning in *Adel*. There the defendant was charged with two counts of possession of marijuana when arresting officers found marijuana in both his car and his store at time of his arrest. The Court concluded that RCW 69.50.401(e) failed to indicate whether the legislature intended to punish a person multiple times for simple possession based upon the drug being stashed in multiple places. The Court concluded the legislature focused solely on the quantity of the drug, and did not reference the spatial or temporal aspects of possession. *Id.* at 636, 965 P.2d 1072, 1075 (1998). Thus, the "unit of prosecution" was limited to one count for all of the drugs found in Adel's dominion and control simultaneously. In so ruling, the Court rejected the claim that the defendant violated the possession statute multiple times simply because he constructively possessed the drug in two places and

emphasized that the State's argument rested “on a slippery slope of prosecutorial discretion to multiply charges.” 136 Wn.2d at 636.

Based upon these analogous cases this Court should find that .533(3) charges are actually separate criminal counts. The unit of prosecution for a .533(3) count is each gun the defendant was armed with during any uninterrupted criminal episode regardless of how many counts of “eligible” crimes are charged.

Mr. Wittcoff should have been sentenced to only the standard range for the robbery, assault and felon in possession counts – 66 months – and one .533(3) count for the first degree robbery – 60 months. His total sentence would be still be a lengthy one of 126 months.

This case also demonstrates how the Supreme Court’s concerns, expressed in *Adel* about the “slippery slope of prosecutorial discretion to multiply charges” has led to abusive charging practices. The statute’s failure to clearly define how many firearm “enhancements” can be added to multiple offenses arising from one continuous episode when the defendant possesses only one

gun has led to racial disparity in sentencing and over-incarceration. In this case, the prosecutor had unbridled discretion to use one gun to both support a higher degree of the charged count, an independent unlawful possession count and an increase the defendant's sentence in for multiple counts.

The State punished Mr. Wittcoff for exercising his right to a jury trial. Under the original indictment, had Mr. Wittcoff been convicted on all counts, his sentencing range would have been 66-75 months. But, when Mr. Wittcoff contested some of the State's allegations, the State retaliated by charging Mr. Wittcoff in a manner that could have resulted in a sentence of 306 months (over 25 years) – 240 of which would have been attributable to the four charged firearm “enhancements.”

This is the kind of charging that results in “over-incarceration.” The State sought almost 25 years in prison for one continuous criminal episode, during which a cell phone was stolen and the victims frightened. But no one was physically hurt. Yet the potential sentence the State was seeking with the multiple .533(3)



counts exceeded the average sentence - 300.52 months - for first degree murder in 2019. Fortunately, the jury did not convict Mr. Wittcoff on all counts as charged. But even now 132 months, almost 13 years of his sentence, are based upon the .533(3) firearm allegations. But this type of over-charging would compel many defendant's to plead guilty to counts, like Count 1 and 5 here, that are not supported by the evidence.

## **V. CONCLUSION**

This Court should grant review because the Court of Appeals' is a substantial constitutional question and a question of substantial public importance. RAP 13.4(b)(3) & (4).

This brief is complies with RAP 18.17 and contains 2,551 words.

RESPECTFULLY SUBMITTED this 5th day of April 2022.

/s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634  
Attorney for Jeremiah Wittcoff

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JEREMIAH ANDREW WITTCOFF,  
  
Appellant.

No. 82037-1-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

COBURN, J. — Jeremiah Wittcoff appeals his 198-month sentence for multiple successive crimes involving a firearm. First, Wittcoff contends that the trial court commented on the evidence by instructing the jury on voluntary intoxication. Applying the invited error doctrine, we decline to review this claim. Second, Wittcoff contends that the firearm enhancement statute is a separate crime and convicting him multiple times of that crime when he used a single gun violated double jeopardy. The firearm enhancement statute, RCW 9.94A.533(3), is not itself a crime. Imposing consecutive firearm enhancements for multiple different offenses does not violate double jeopardy. Accordingly, we affirm.

FACTS

On October 8, 2019, after days of no sleep and using methamphetamine, Jeremiah Wittcoff, while “high out of [his] mind,” took his father’s handgun from a

nightstand without permission. He then engaged in a series of acts that led to the State charging him, through an Amended Information, with multiple crimes totaling six counts. Because we address only raised legal issues and Wittcoff does not challenge the sufficiency of the evidence, we briefly summarize each count.

Count I – Attempted Robbery in the second degree: Wittcoff reached through a partially open driver’s side window and unsuccessfully directed the driver to let him in.

Count II – Robbery in the first degree while armed with a firearm: Later that same day, Wittcoff approached two elderly women on a walk with the gun raised and demanded their wallets and phones. One of the women gave him her phone.

Counts III and IV – Assault in the first degree while armed with a firearm: While Wittcoff was running away from the two women, he ran past a car containing two men and one of the men’s two-year-old son inside. Wittcoff fired his gun in their direction.

Count V – Attempted robbery in the first degree: About a week later, a police officer saw Wittcoff wearing a face covering near a gas station. Wittcoff’s text messages later uncovered that he was texting a friend about how he was “seriously debating knocking over a few gas stations.”

Count VI – Unlawful possession of a firearm in the first degree: Wittcoff was charged with possession of a firearm on the same date of the robbery and assaults.

On the day the State amended its Information, Wittcoff pleaded guilty to Counts II and VI and proceeded to trial on the remaining counts. At trial, Wittcoff requested a voluntary intoxication instruction. The trial court granted Wittcoff's request and instructed the jury:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent to inflict bodily injury or intent to create apprehension and fear of bodily injury.

The jury acquitted Wittcoff on Count I and deadlocked on Count V. The jury convicted Wittcoff of the lesser included offense of assault in the second degree on both Counts III and IV and found he was armed with a firearm at the time of the commission of the crimes.

The trial court sentenced Wittcoff on Counts II, III, IV, and VI. The court imposed 66 months on Count II, 29 months on Count III, 29 months on Count IV, and 41 months on Count VI. Wittcoff would serve that part of the sentence concurrently, meaning a maximum of 66 months. The court also applied statutory mandatory firearm enhancements to Counts II, III, and IV. See RCW 9.94A.533 (requiring firearm enhancements to be served in total confinement and to run consecutive to all other sentence provisions, including other firearm enhancements).<sup>1</sup> These enhancements increased Wittcoff's total sentence to 198 months.

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<sup>1</sup> Wittcoff contends that the weapons enhancement laws are particularly harsh because it requires the trial court to stack the enhancements for multiple counts regardless of the facts. Wittcoff is correct and not alone with that concern. As noted in a recent report for the state Criminal Sentencing Task Force, "[o]f particular concern are the firearm and deadly weapon enhancements which must be served consecutively to all other sentences and enhancements, in

## DISCUSSION

### Judicial Comment on Evidence

Wittcoff argues for the first time on appeal that the voluntary intoxication instruction constituted an impermissible judicial comment on the evidence. The State asserts that this jury instruction was invited error because defense counsel requested the instruction. We agree with the State.

At trial, defense counsel requested the following jury instruction:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent to inflict bodily injury or intent to create apprehension and fear of bodily injury.

The court instructed the jury as requested.

We review alleged jury instructional errors de novo. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Under the invited error doctrine, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Further,

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instances where a defendant is charged with multiple firearm or deadly weapons enhancements, the confinement time associated with the enhancements are 'stacked' on top of one another, creating the potential for large increases in sentence length above the standard range." WASH. STATE INST. FOR PUB. POLICY, EXAMINING WASHINGTON STATE'S SENTENCING GUIDELINES: A REPORT FOR THE CRIMINAL SENTENCING TASK FORCE 8 n.23 (May 2021) (Document No. 21-05-1901), Wsipp Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force\_Report.pdf. The legislature in 2019 created the task force. See ENGROSSED SUBSTITUTE H.B. 1109, 66th Leg., Reg. Sess. (Wash. 2019).

a party may not request an instruction and then later complain on appeal that the instruction was given, even if the error is of a constitutional magnitude. State v. Hood, 196 Wn. App. 127, 131, 382 P.3d 710 (2016); City of Seattle v. Patu, 108 Wn. App. 364, 374, 30 P.3d 522 (2001).

Here, Wittcoff proposed the very jury instruction he now asserts constituted a judicial comment on the evidence. Wittcoff's invited error precludes our review of his claim.

### Double Jeopardy

Wittcoff next contends that RCW 9.94A.533(3) constitutes a crime, and convicting him multiple times under that statute violates double jeopardy when he used a single firearm during a continuous criminal episode. We disagree.

Double jeopardy claims are questions of law that are reviewed de novo. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). The Fifth Amendment to the United States Constitution provides, "[n]o person shall . . . be subject to the same offence to be twice put in jeopardy of life or limb." Additionally, article I, section 9 of the Washington State Constitution provides, "[n]o person shall . . . be twice put in jeopardy for the same offense." Both clauses are " 'identical in thought, substance, and purpose.' " State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (quoting In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)). In addition, both clauses disallow a person from being prosecuted for the same offense after being convicted or receiving multiple punishments for the same offense. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Here, the issue is whether Wittcoff's multiple

consecutive firearm sentence enhancements constitute receiving multiple punishments for the same offense.

We first address whether “.533(3),” as Wittcoff prefers to call it, is a crime in and of itself. It is not. Subsection (3) of RCW 9.94A.533 states:

(3) 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 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;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be:

(i) Granted an extraordinary medical placement when authorized under RCW 9.94A.728(1)(c); or

(ii) Released under the provisions of RCW 9.94A.730;

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun or bump-fire stock, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun or bump-fire stock in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

We derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). “We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Issues of statutory construction are a question of law subject to de novo review. Evans, 177 Wn.2d at 191.



By its own title, RCW 9.94A.533 addresses “Adjustments to standard sentences.” It is not a crime defined by the legislature. The statute, in fact, explains how the adjustments are to be applied to “persons convicted . . . under chapter 9A.28 RCW” or when offenders are sentenced “for one of the crimes listed in this subsection.” RCW 9.94A.533(2), (3). Wittcoff was not charged with committing “.533(3).” The crimes he committed while armed with a firearm were robbery in the first degree under RCW 9A.56.200 and assault in the first degree under RCW 9A.36.011(1)(a) committed against two different people. The punishment he received, because he was armed with a firearm, constituted additional punishment for the crimes he committed.

“Unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.” State v. Nguyen, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006).

“A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct.” Kelley, 168 Wn.2d at 77. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). Where a defendant contends that his sole act has been punished twice under separate criminal statutes, the question is “whether, in light of legislative intent, the charged crimes constitute

the same offense.” In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). If the legislature intended to impose multiple punishments, its imposition does not violate the double jeopardy clause. Kelley, 168 Wn.2d at 77.

In Kelley, our Supreme Court held that the “imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm.” Id. at 84. It also concluded that the cumulative punishment of firearms enhancements of RCW 9.94A.533 was “clearly intended” by the legislature. Id. at 80.


Later, our Supreme Court decided State v. Allen, 192 Wn.2d 526, 534, 431 P.3d 117 (2018), which involved a retrial after the defendant was acquitted as to aggravating circumstances on multiple murder charges. In Allen, the defendant was convicted as an accomplice of four counts of murder in the first degree. Allen, 192 Wn.2d at 528. However, the jury unanimously acquitted the defendant of two aggravating circumstances under RCW 10.95.020 that were alleged on each murder count. Id. at 528-29. On appeal, the court vacated the murder convictions and remanded for a new trial. Id. at 529. The issue before the court was whether the defendant could be tried a second time on the aggravating circumstances, and the court held that retrial on the aggravating circumstances was barred by double jeopardy. Id. at 529. The court concluded that the aggravating circumstances under RCW 10.95.020 were “elements of the offense of aggravated first degree murder for purposes of the double jeopardy clause,” and thus barred. Id. at 534.

Wittcoff argues that the issue in Allen is similar to the instant case. We do not agree. The issue in the instant case is whether firearm enhancements are separate crimes, while the issue in Allen was whether the defendant could be tried a second time on aggravating circumstances after being acquitted. Allen, 192 Wn.2d at 529. Nowhere in Allen does the court state that aggravating circumstances are a separate crime.

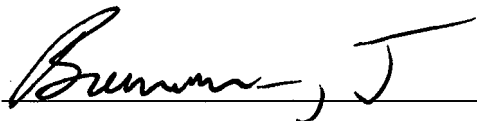
Further, the court has since clarified that aggravating circumstances are not separately charged crimes. In State v. Whitaker, 195 Wn.2d 333, 339, 459 P.3d 1074 (2020), our Supreme Court explained that in Allen, “We did not find . . . that aggravating circumstances are separately charged crimes.” Allen does not support Wittcoff’s argument.

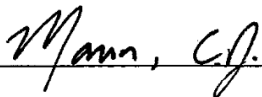
Wittcoff used a single firearm and committed multiple crimes while armed with that firearm on the same day against different victims. The fact that he received multiple firearm enhancements does not violate double jeopardy.

We affirm.

  
\_\_\_\_\_

WE CONCUR:

  
\_\_\_\_\_

  
\_\_\_\_\_

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82037-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Nathaniel Sugg  
[nathan.sugg@snoco.org]  
Snohomish County Prosecuting Attorney  
[Diane.Kremenich@co.snohomish.wa.us]

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal  
Washington Appellate Project

Date: April 5, 2022

# WASHINGTON APPELLATE PROJECT

April 05, 2022 - 4:29 PM

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**Appellate Court Case Number:** 82037-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Jeremiah Andrew Wittcoff, Appellant  
**Superior Court Case Number:** 19-1-02275-7

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