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FILED  
STATE OF WASHINGTON  
2009 AUG -3 PM 4:47  
No. 61377-4-I

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
DAVID LAVON MELTON,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY  
The Honorable Cheryl Carey

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APPELLANT'S AMENDED OPENING BRIEF

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MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. SUMMARY OF ARGUMENT

David Melton was convicted of four counts of second degree assault with a deadly weapon after bullets were fired from a car containing several young men. The trial court abused its discretion in permitting detectives to testify that several witnesses were reluctant to testify because they feared retaliation, and that several witnesses had identified Melton as the shooter. Also, the court commented on the evidence in violation of article IV, section 16 of the Washington Constitution when it directed the jury to re-read the accomplice liability instruction in response to a jury inquiry. Because these errors individually were prejudicial and in combination denied Melton a fair trial, the convictions must be reversed.

In addition, Melton's four separate convictions of second degree assault with a deadly weapon are based on his possession of only one gun. His possession of the gun elevated the degree of the four charges for which he was convicted and also was the basis for four consecutive 36-month firearm enhancements. This sentence violated Melton's right to be free from double jeopardy.

## B. ASSIGNMENTS OF ERROR

1. The court abused its discretion in admitting testimony that several witnesses were reluctant to testify because they feared retaliation.

2. The court abused its discretion in admitting hearsay statements of several witnesses identifying Melton as the shooter.

3. The court violated Melton's constitutional right to confrontation by admitting "testimonial" hearsay statements of witnesses who did not testify.

4. The court commented on the evidence in violation of article IV, section 16 of the Washington Constitution by directing the jury to re-read the accomplice liability instruction in response to a jury inquiry.

5. The cumulative effect of the above errors violated Melton's constitutional right to a fair trial.

6. The court's imposition of multiple consecutive firearm enhancements for possession of a single firearm in a single incident violates double jeopardy and was predicated on an incorrect unit of prosecution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State may not present evidence or argue that witnesses are reluctant to testify due to fear of retaliation, unless the State shows the defendant caused the witnesses' fear. Did the court abuse its discretion in admitting evidence the witnesses feared retaliation, where there was no evidence that Melton caused the witnesses' fear?

2. The court may not admit out-of-court statements of identification, unless the declarant testifies and the statements are admitted through the testimony of either the declarant or a person who heard or saw the identification. Did the court abuse its discretion in admitting the hearsay statements of identification, where some of the declarants did not testify and the statements were admitted through the testimony of a person who did not hear or see the identifications?

3. The Confrontation Clause prohibits admission of "testimonial" hearsay unless the declarant testifies or the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. Did admission of the out-of-court testimonial statements of identification of two witnesses who did not testify

violate the Confrontation Clause, where Melton had no prior opportunity to cross-examine them?

4. A party does not "open the door" to otherwise inadmissible testimony where the testimony is unresponsive and beyond the scope of the party's question during the witness's examination. Did the court abuse its discretion in concluding Melton opened the door to the otherwise inadmissible testimony, where the testimony was unresponsive and beyond the scope of defense counsel's question?

5. The trial court comments on the evidence in violation of article IV, section 16 of the Washington Constitution, where the judge implicitly conveys her opinion about the credibility, weight, or sufficiency of any of the evidence. Did the court impermissibly comment on the evidence of accomplice liability where, in response to a jury inquiry, the court inadvertently instructed the jury to re-read the accomplice liability instruction?

6. Reversal of a conviction may be required due to the cumulative effect of several trial court errors. Where several trial errors occurred that cumulatively deprived Melton of a fair trial, is reversal required?

7. The unit of prosecution defines the legislative intent for punishing certain acts for double jeopardy purposes. Where Melton was convicted of possessing a single firearm on one occasion used for the single purpose of committing an assault, does the unit of prosecution mandate a single punishment for possession of the firearm rather than four consecutive three-year terms?

8. Based on the Washington Supreme Court's grant of review in several cases, should this Court reconsider its ruling that double jeopardy does not bar multiple punishments for the same act of possessing a single firearm on a single occasion used to accomplish a single objective?

**D. STATEMENT OF THE CASE**

1. Substantive facts. On the evening of March 31, 2006, 19-year-old David Melton went to a dance at Franklin High School in Seattle, with his friends Dimitris Tinsley, Marcus Holmes, Daniel Degtjar, Jaron Cox, Jeffrey Harris, and Michael Jeffries.

12/17/07RP 727-29. Tinsley had borrowed his mother's Ford Expedition, which Holmes was driving. 12/16/07RP 40, 42; 12/17/07RP 667.

After the dance, at around midnight, the boys stood near the car in the parking lot outside the school, minding their own

business. 12/06/07RP 42-43; 12/17/07RP 668, 730. While Melton was talking to his girlfriend by her car, he heard gunshots and concluded someone was shooting at the Expedition, although he did not see who fired the shots. 12/17/07RP 730. Holmes also heard the shots and believed some of them hit the Expedition. 12/17/07RP 668. Holmes assumed the shooter was from the "South End" neighborhood, because he and the other young men in their group were from the "CD" neighborhood, and there was a long-time rivalry between the two neighborhoods. 12/07/07RP 671-72. At around the same time, another witness saw some people flashing South End gang signs and fights breaking out near the high school. 12/06/07RP 120-22.

All of the young men who rode in the Expedition were angry and together they decided to drive to the South End to see if they could find out who had shot at them. 12/17/07RP 672-74, 685, 691, 731. Holmes drove the Expedition, Tinsley sat in the front passenger seat, Melton sat in the right rear passenger seat, Degtjar sat next to Melton in the middle of the back seat, Harris sat in the left rear passenger seat, and Cox and Jeffries sat in the back cargo area. 12/06/07RP 44-45.

The young men drove to the intersection of Henderson and South Rainier. 12/06/07RP 46; 12/17/07RP 731. The intersection was an area frequented by gang members and Melton knew it was a South End gang hangout. 12/17/07RP 743; 12/06/07RP 6. On the way there, Holmes heard Melton say, "I'm not going to let people shoot at me and get away with it." 12/17/07RP 691. When the young men got to the intersection, they saw a group of people at a bus stop. 12/17/07RP 686, 732. Melton said, "let's see who that is," so Holmes turned the car around and drove by the bus stop again. 12/17/07RP 686.

Another group of young men, Jeremiah Butler, Joseph Williams, Shawn Webster, Jesse Baker, and Carlos Pace, had just gotten off the bus at Henderson and South Rainier and were walking together away from the bus stop. 12/06/07RP 102, 105-06, 124, 126; 12/13/07RP 569, 577. They had all been at the dance at Franklin and taken the bus from there. 12/06/07RP 102, 120-21; 12/13/07RP 566. The group at the bus stop were not members of a gang and were not involved in the fights that had broken out at Franklin after the dance. 12/06/07RP 122; 12/13/07RP 577.

As the Expedition drove past the bus stop, David Melton grabbed a gun that belonged to another occupant of the car and

shot it one or two times out the right rear passenger window.

12/17/07RP 733, 747. He and some of the other men in the car had heard gunshots fired from outside the car and thought they were being shot at. 12/06/07RP 50; 12/12/07RP 434-35;

12/17/07RP 679, 700-01, 732, 749. Melton testified he fired the gun in the air and did not point it at anyone or intend to hit anyone.

12/17/07RP 733, 736. He did not know any of the people at the bus stop. 12/17/07RP 735.

The evidence suggested more than one occupant of the Expedition fired a gun out the window. Witnesses at the scene told police that shots were fired from both the front and rear passenger windows of the Expedition although they could not see who fired the shots. 12/06/07RP 106-07, 111; 12/11/07RP 349, 357. The other young men riding in the car who testified said they did not see who fired a gun. 12/06/07RP 49-50, 57-58; 12/12/07RP 416, 434; 12/17/07RP 676-77. Melton heard other shots fired from inside the car but did not know who fired them. 12/17/07RP 747, 750.

Witnesses at the scene and in the car testified they heard from two to six shots in total. 12/06/07RP 50, 109, 119, 130; 12/12/07RP 416; 12/13/07RP 575; 12/17/07RP 676, 679, 700-01, 751.

Witnesses that police brought to the site of the arrest identified two

men as the possible shooters; neither one of them was Melton.

12/04/07RP 35; 12/05/07RP 24; 12/06/07RP 67, 94-96.

One of the shots fired from the Expedition hit a lamp post, then ricocheted and hit Shawn Webster in the head. 12/13/07RP 575. Joseph Williams's sweatshirt had a hole in it that had not been there before. 12/06/07RP 135-37. Nobody else at the bus stop was hit by a bullet.

The Expedition drove away and police stopped the car soon afterward. 12/04/07RP 15. As the Expedition pulled over, Harris and Melton each threw a gun to Cox in the rear cargo area.

12/12/07RP 417, 437. Cox put Melton's gun in the pant leg of a pair of jeans. 12/12/07RP 418, 437-38.

Officers arrested and took each of the occupants of the car into custody. 12/04/07RP 31. Police transported them all to the police station for interviews where Melton and the others gave statements. 12/05/07RP 24. Following a CrR 3.5 hearing, the trial court admitted Melton's custodial statement. Melton told police that he grabbed a gun while riding in the Expedition. 11/29/07RP 16.

He also told police:

When the group at Henderson saw us, they shot at us. I was scared so I shot back at them. I was trying to protect myself and the others that were with me. They were my family and friends.

Exhibit 31; 11/29/07RP 18; CP 130.

Melton's entire statement was admitted at trial. Exhibit 31; 12/06/07RP 29-30.

Police searched the Expedition and found three guns inside. 12/13/07RP 521. One handgun and an empty holster were under the rear passenger seat. 12/05/07RP 5, 26; 12/10/07RP 224. Two semiautomatic handguns were in the rear cargo area, one inside the pant leg of a pair of jeans. 12/10/07RP 225-27, 241. All of the guns were loaded and had missing rounds of ammunition. 12/10/07RP 235-37. Police found only one shell casing, on the right floor of the rear passenger area. 12/06/07RP 24; 12/10/07RP 233-34. The shell casing was determined to have been fired by the gun hidden inside the pant leg of the jeans. 12/10/07RP 235; 12/13/07RP 528. Police tested the guns, magazines, rounds, and holsters for fingerprints but found none that could be matched to any of the suspects. 12/11/07RP 302-13, 316.

2. Criminal charges and jury trial. Melton was charged with one count of first degree assault of Shawn Webster, the boy who was hit in the head with the ricocheting bullet. CP 15. He was also charged with three counts of second degree assault of Joseph Williams, Jesse Baker, and Jeremiah Butler. CP 15-18. All of the

assault charges included firearm enhancement allegations. CP 15-18. Finally, Melton was charged with one count of second degree unlawful possession of a firearm. CP 15-18.

Shortly after trial began, the State moved for a mistrial due to the serious illness and unavailability of the deputy prosecutor.

10/22/07RP 3-4. The court granted a mistrial. 10/22/07RP 18. A new trial began with a different judge on November 28, 2007.

a. Witness testimony. Five occupants of the Expedition testified at trial. Dimitris Tinsley testified that as the young men drove to the intersection of Henderson and South Rainier, he was on the phone and not paying attention.

12/06/07RP 46, 49. He heard shots coming from both inside and outside the car and did not know who fired the shots. 12/06/07RP 49-50, 57. The prosecutor attempted to impeach him with his statement to police, in which he stated he knew the shots came from the back seat of the car (although he did not tell police he knew who fired the gun). 12/06/07RP 49, 52. Tinsley testified he told police some things they did not include in his statement. 12/06/07RP 52.

Jaron Cox testified he was asleep in the car and did not wake up until he heard gunshots at Henderson and Rainier.

12/12/07RP 415-16, 429. He did not see who fired the gun.

12/12/07RP 416, 434. The prosecutor attempted to impeach him with his statement to police, in which he stated Melton referred to being a member of a gang while en route to the intersection at Henderson and South Rainier. 12/12/07RP 425. Cox testified he did not actually say everything contained in his police statement.

12/12/07RP 422-25, 428-29, 433-37.

Marcus Holmes testified he heard two shots come from the back seat but did not see who was shooting. 12/17/07RP 676-77, 679. He assumed Melton fired the gun because Melton's window was down half-way and Tinsley's window was open only a crack. 12/17/07RP 677-78, 689, 701. Holmes heard shots come from outside as well. 12/17/07RP 679. The prosecutor attempted to impeach him with his statement to police, in which he did not state that he heard shots coming from outside the car. 12/17/07RP 699-700. Holmes testified police never asked him that question. 12/17/07RP 699-700.

The trial court admitted portions of the above witnesses' hearsay statements to police only to impeach the witnesses' credibility and not as substantive evidence. 12/12/07RP 426-27 (citing ER 607); CP 81. The court instructed the jury that the out-of-

court statements of Cox, Holmes and Tinsley could be considered by the jury "only as it relates to the credibility of these witnesses and for no other purpose." CP 81.

Jeffrey Harris testified he did not know what happened after he got in the car, as he was drunk or high on drugs, had passed out, and did not wake up until after police stopped the Expedition. 12/13/07RP 550. He also admitted he possessed a gun in the car that night. 12/13/07RP 551.

Melton testified that as the Expedition drove past the bus stop, he grabbed a gun belonging to someone else in the car and shot the gun in the air one or two times without pointing it at anyone. 12/17/07RP 733, 747. He heard other shots coming from both inside and outside the car but did not know who fired those shots. 12/17/07RP 747-51. He did not intend to shoot at any of the people at the bus stop. 12/17/07RP 736. He denied being in a gang but admitted he associated with gang members that he had grown up with. 12/17/07RP 726.

Three of the alleged victims also testified at trial. Jeremiah Butler testified he saw a gun pointing out and shooting from the front passenger seat of the Expedition as he walked away from the bus stop. 12/06/07RP 106, 111, 115. He did not see who was

holding the gun and could not identify Melton at trial. 12/06/07RP 107. He heard two to five shots. 12/06/07RP 109, 119.

Joseph Williams testified he heard five to six shots as the Expedition drove near him. 12/06/07RP 130. He was not sure whether he saw a gun and did not know where in the Expedition the shots came from. 12/06/07RP 133. He thought there might have been two guns because the shots were so quick. 12/06/07RP 143. He could not identify Melton. 12/06/07RP 146.

Shawn Webster testified he heard several shots coming from the car. 12/13/07RP 575, 591. He could not see who was shooting or how many people were shooting. 12/13/07RP 575, 589.

No other witnesses present at the scene testified.

b. Gang evidence and testimony regarding missing and reluctant witnesses. Before and during trial, the State moved to admit evidence that the shooting was gang-related. 11/28/07RP 16-17, 21; 12/10/07RP 148-157, 164-65. Over defense objection, the court ruled the evidence was relevant to show motive, intent, the absence of self-defense, and res gestae, and that the evidence was not overly prejudicial. 11/29/07RP 52, 57-59, 63-65; 12/10/07RP 160-63, 167.

Consequently, at trial, Seattle Police Detective Shandy Cobane testified he had known Melton for years, and that Melton affiliated with gang members from the "CD" although he did not admit to being a gang member himself. 12/10/07RP 251-53. Cobane further testified that there was a long-standing rivalry between gangs from the South End and gangs from the CD, that Franklin High School was a CD gang location, and that the intersection of Henderson and South Rainier was a hub of South End gang activity. 12/10/07RP 244-46. Finally, Cobane testified gang members sometimes retaliate after a gang fight by engaging in a drive-by shooting, and that they might do so in order to gain status or simply out of anger. 12/10/07RP 258-61.

Before trial, in arguing the gang evidence was admissible, and in response to defense counsel's objection, the deputy prosecutor expressly assured the court the State would not argue that any missing witnesses were absent due to fear of gang retaliation. 11/29/07RP 53-54. The court agreed the State would not be allowed to "make comments or argument to the jury that witnesses will not be appearing because they are afraid because this is a gang related case." 11/29/07RP 54.

But at trial, the State's witness Seattle Police Detective Thomas Mooney did just that. Mooney testified he spent "countless hours" looking for the young men who had ridden in the Expedition. 12/13/07RP 628. He testified that, for instance, Cox's family was initially very uncooperative and he did not succeed in getting Cox to testify until he talked to his grandmother. 12/13/07RP 628. Jeffries's family was "very rude" and "completely uncooperative." 12/13/07RP 629. They told him "in no uncertain terms" that "their son was not going to be testifying in this case and they would do whatever they had to to prevent that from happening." 12/13/07RP 629. Degtjar had "conveniently disappeared" since the case went to trial and Mooney received "no cooperation from anybody I've talked to regarding his whereabouts." 12/13/07RP 630. Harris was initially uncooperative but finally testified after Mooney spoke to his grandmother. 12/13/07RP 630. Tinsley would not respond to his many attempts to contact him. 12/13/07RP 630. Finally, Shawn Webster's friends Terry Black and Carlos Pace, who were also present at the bus stop, could not be found. 1213/07RP 631.

After eliciting this testimony from Detective Mooney, the prosecutor then asked if, "[i]n your experience in the gang unit in these types of cases, is the lack of cooperation you've encountered

usual or unusual?" 12/13/07RP 631. When the detective responded, "[i]t's fairly usual, unfortunately," the prosecutor asked, "have individuals told you why they don't want to cooperate?"

12/13/07RP 632. Defense counsel objected on grounds of relevance but the court overruled the objection. 12/13/07RP 632.

Mooney then responded that the primary reason why witnesses did not cooperate in gang cases was due to "fear of retaliation and being labeled a snitch." 12/13/07RP 632.

c. Solan's testimony regarding the witnesses' hearsay identifications. During direct examination, Seattle Police Detective Michael Solan testified he was aware that, during a "show up" identification procedure soon after the incident, some witnesses from the scene identified two people from the Expedition as the possible shooters. 12/06/07RP 94. But Solan did not further investigate those identifications because police had already determined, from Melton's statement to police, that he was the shooter. 12/06/07RP 92, 98.

On cross-examination, defense counsel asked Solan "if anyone from the scene of the arrest provided you with information as to who was identified by the witnesses transported to the show up?" 12/10/07RP 179. The detective responded, "Well, the

suspects pointed to Mr. Melton as the shooter within the vehicle.

The witnesses." 12/10/07RP 179.

On redirect, the prosecutor asked, "Can you walk us through how you came to identify the defendant as the shooter in this case?" 12/10/07RP 192. The detective responded, "Based upon suspects within the vehicle Mr. Melton was taken out of, they identified him as being the sole shooter." 12/10/07RP 192.

Defense objected to the hearsay but the court overruled the objection, stating, "The door is opened." 12/10/07RP 192. The detective then elaborated, "The other suspects in the vehicle identified Mr. Melton as the shooter. And Mr. Melton stating that he shot and handled the weapon, to me, made him the sole suspect in this case." 12/10/07RP 193. The detective further elaborated that Tinsley was never specifically identified by anyone as the shooter, whereas Melton was identified as the shooter "By six people and himself." 12/10/07RP 204.

d. Jury inquiry. On the first day of deliberations, the jury submitted a written inquiry to the court, asking, "We would like to see Shawn Webster's testimony on the stand." CP 126; 12/20/07RP 889. After conferring with both attorneys, the court responded, "Please re-read jury instruction number 30 and continue

with your deliberations." CP 127; 12/20/07RP 889. The court explained to the parties that the third paragraph in that instruction "makes it very clear to jurors that you will not rehear or hear testimony twice, in essence, to make a long story short." 12/20/07RP 889. Neither party objected. 12/20/07RP 889.

A review of the court's instructions to the jury demonstrates that the court inadvertently directed the jury to the wrong instruction. Instruction number 30, which the court instructed the jury to re-read, is the accomplice liability instruction.<sup>1</sup> CP 83. Apparently the court intended to instruct the jury to re-read instruction number 31, which states in the third paragraph: "You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations." CP 84. In total, instruction number 31 is four pages long and contains 13 separate paragraphs. CP 84-87.

e. Verdicts and sentencing. The jury found Melton guilty of the lesser included offense of second degree assault with a deadly weapon for count one, as to Webster, but guilty as charged of the other counts—three additional counts of second degree

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<sup>1</sup> Copies of instructions numbers 30 and 31 are attached as an appendix.

assault with a deadly weapon and one count of second degree unlawful possession of a firearm. CP 91-98, 132-42. The court imposed a standard-range sentence and four consecutive 36-month firearm enhancements. 2/22/08RP 17; CP 132-42.

E. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY THAT THE WITNESSES WERE RELUCTANT TO TESTIFY BECAUSE THEY FEARED RETALIATION

Detective Mooney testified that he spent "countless hours" looking for the young men who had ridden in the Expedition and that Cox, Jeffries, Harris, and Tinsley testified only after he exerted considerable pressure on them and their families. 12/13/07RP 628-30. He was completely unsuccessful in persuading Degtjar, or two witnesses at the scene, to testify. 12/13/07RP 630-31. Over defense objection, Mooney was permitted to testify that such lack of cooperation was common in gang cases due to "fear of retaliation and being labeled a snitch." 12/13/07RP 632.

Although the decision to admit evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion, the trial court abused its discretion in this case. That is because the court may not admit evidence that a witness is reluctant to testify due to fear of

retaliation, unless the State shows the defendant *caused* the witness's fear. State v. Bourgeois, 133 Wn.2d 389, 399-400, 945 P.2d 1120 (1997).

a. The court abused its discretion in allowing the State to elicit testimony that the witnesses' absence or reluctance to testify was due to fear of retaliation, in the absence of evidence that Melton caused the witnesses' fear. Generally, a criminal defendant's efforts to prevent witnesses from testifying is relevant to show consciousness of guilt. Bourgeois, 133 Wn.2d at 400 (citing State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)). But such evidence is admissible only if there is an established connection between the defendant and the reluctance of a witness to testify. Bourgeois, 133 Wn.2d at 400. Further, the State may not bolster a witness's testimony by bringing out evidence that the witness was reluctant or fearful to testify in the absence of an attack on the witness's credibility by the defendant. Id. at 400-01.

Here, the State presented *no* evidence of the reason for the witnesses' purported fear of testifying, other than Mooney's testimony that witnesses are generally fearful of testifying in gang cases. The State presented no evidence to show any link between

any actions by Melton and the witnesses' purported fears. The trial court therefore abused its discretion in admitting the evidence.

b. The error in admitting the evidence was not harmless. Error in admitting evidence warrants reversal if it is prejudicial, that is, if within reasonable probabilities the outcome of the trial was materially affected by the error. Bourgeois, 133 Wn.2d at 403. The improper admission of evidence is harmless if the evidence is of minor significance in reference to evidence that is overwhelming as a whole. Id. The reviewing court must measure the admissible evidence of guilt against the prejudice, if any, caused by the inadmissible testimony. Id.

Here, Mooney's testimony that the witnesses were reluctant to testify because they feared retaliation suggested to the jury that Melton somehow threatened the witnesses, thereby demonstrating his dangerous character and consciousness of guilt. The evidence was therefore highly prejudicial.

Moreover, the untainted evidence of guilt was far from overwhelming. Although four of the other men in the car testified, none of them knew who fired the gun. 12/06/07RP 49-50, 57; 12/12/07RP 416, 434; 12/13/07RP 550; 12/17/07RP 676-77. Detective Solan testified, over objection, that all of the men in the

car had identified Melton as the shooter, 12/10/07RP 193, 204, but as discussed below, those hearsay statements were erroneously admitted. Portions of the witnesses' statements to police were admitted for impeachment purposes but not as substantive evidence of guilt. 12/12/07RP 426-27; CP 81. Finally, none of the witnesses at the scene could say who fired the gun and two of the witnesses did not even see a gun. 12/06/07RP 107, 133; 12/13/07RP 575, 589. Although Jeremiah Butler saw a gun, it was pointing out of the front right passenger window and not the rear passenger window where Melton was sitting. 12/06/07RP 106, 111, 115. Shawn Webster testified he was hit by a bullet that ricocheted off of a lamp post, thereby corroborating Melton's testimony that he shot the gun in the air and not at the group. 12/13/07RP 575.

Because the untainted evidence of guilt was not overwhelming and in light of the errors that occurred in admitting other testimony, the court's erroneous decision to admit Mooney's testimony that the witnesses feared retaliation was not harmless.

2. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MELTON'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES BY ADMITTING SOLAN'S TESTIMONY THAT THE OTHER OCCUPANTS OF THE CAR ALL IDENTIFIED MELTON AS THE SHOOTER

Detective Solan was permitted to testify, over defense objection, that all of the other young men in the Expedition had identified Melton as the sole shooter. 12/10/07RP 192, 204. The court allowed the hearsay, ruling counsel had "opened the door" to the testimony when he asked Solan on cross-examination whether the detective had followed up in investigating the results of the show up identification performed at the scene of the arrest. 12/10/07RP 179, 192.

The court abused its discretion and violated Melton's right to confront the witnesses by admitting Solan's testimony.

a. The witnesses' statements of identification were inadmissible hearsay. Generally, a witness's out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay. ER 801(c); ER 802. However, a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person." ER 801(d)(1)(iii).

Although ER 801(d)(1)(iii) does not require that statements of identification be elicited directly from the declarant, the rule does require they be admitted through the testimony of someone who heard or saw the identification. State v. Grover, 55 Wn. App. 923, 932, 780 P.2d 901 (1989); State v. Jenkins, 53 Wn. App. 228, 233 n.3, 766 P.2d 499 (1989).

Here, two of the declarants who purportedly made the statements of identification did not testify at trial: Daniel Degtjar and Michael Jeffries. Further, the hearsay statements of the other witnesses were admitted through the testimony of Detective Solan, who did not personally hear or see the identifications. Other detectives had interviewed and taken statements from those witnesses. See 12/06/07RP 32; 12/10/07RP 214; 12/11/07RP 395; 12/12/07RP 451-52; 12/13/07RP 615.

Therefore, Solan's testimony was inadmissible hearsay.

b. Admission of the testimony violated Melton's constitutional right to confront the witnesses. The Sixth Amendment provides a criminal defendant the right "to be confronted by the witnesses against him." Article 1, section 22 of the Washington Constitution provides an accused the "the right . . . to meet the witnesses against him face to face."

In Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held the Confrontation Clause prohibits admission of "testimonial" out-of-court statements against a criminal defendant unless the declarant (1) appears as a witness at trial; or (2) is unavailable and the defendant had a prior opportunity to cross-examine him or her.

Here, the witnesses' out-of-court statements were "testimonial" for purposes of the Confrontation Clause. At a minimum, "testimonial" refers to statements made in response to police interrogation. Crawford, 541 U.S. at 68. All of the witnesses' statements of identification referred to in Solan's testimony were elicited from the suspects during police interrogation. 12/06/07RP 32; 12/10/07RP 214; 12/11/07RP 395; 12/12/07RP 451-52; 12/13/07RP 615. The statements were therefore "testimonial" and Melton had a right to cross-examine the declarants. Because two of the declarants, Degtjar and Jeffries, did not testify and Melton had no prior opportunity to cross-examine them, admission of their statements violated Melton's constitutional right to confrontation.

c. Counsel did not open the door to the improper testimony. Generally a party may waive the right to complain on appeal about an error in admitting testimony if the party "opened

the door" to the testimony by being the first to raise the issue at trial. See, e.g., State v. Gefeller, 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969) (defendant opened door to erroneous admission of police detective's testimony that defendant had taken a lie detector test and the results were inconclusive, because defendant asked detective on cross-examination whether a lie detector test had been given and what the results were); State v. King, 58 Wn.2d 77, 78, 360 P.2d 757 (1961) (defendant opened door to doctor's testimony regarding hearsay statements of complainant, by earlier asking complainant on cross-examination what she had told doctor); State v. Severns, 19 Wn.2d 18, 19, 141 P.2d 142 (1943) (defendant opened door to erroneous admission of bed sheet, because he "had in cross-examination of the county sheriff, developed the full details in regard to [the bed sheet]").

The purpose of the "opened the door" doctrine is to prevent a party from bringing up a subject, dropping it at a point where it might appear advantageous to him, and then barring the other party from any further inquiry about it. Gefeller, 76 Wn.2d at 455. The doctrine rests on basic principles of fairness, as "[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the

party who opened the door, but might well limit the proof to half-truths." Id. Thus, "when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." Id.

The purposes of the doctrine determine its application and scope. The doctrine does not apply where the subject matter is raised inadvertently at trial and not as the fault of the party examining the witness. Thus, where the witness's answers are "volunteered or unresponsive" to the questions asked, the examining party does not open the door to the testimony. Id.

Here, the court misapplied the opening the door doctrine, because the detective's answers to defense counsel's questions were unresponsive and volunteered. During cross-examination, defense counsel asked the detective "if anyone from the scene of the arrest provided you with information as to who was identified by the witnesses transported to the show up?" 12/10/07RP 179. The detective did not answer that question, however, and instead volunteered that "the suspects pointed to Mr. Melton as the shooter within the vehicle. The witnesses." 12/10/07RP 179. Counsel had

asked a "yes or no" question designed to elicit whether the detective conducted any follow-up investigation of the show up identification. Counsel did not raise the issue of whether the witnesses in the Expedition had identified anyone as the shooter. Thus, because the detective's response was volunteered and unresponsive and beyond the scope of the question asked, counsel did not open the door to the testimony.

Counsel did not open the door to the detective's testimony about the witnesses' hearsay identifications, yet the prosecutor was permitted to raise the issue again and again on redirect examination, over defense objection. 12/10/07RP 192-93, 204. The trial court abused its discretion in applying the opening the door doctrine and the detective's testimony on the subject of the witnesses' identifications was inadmissible.

d. The error in admitting the testimony was not harmless. A Confrontation Clause claim involves a manifest error affecting a constitutional right and may therefore be raised for the first time on appeal. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007); RAP 2.5(a)(3). Further, a Confrontation Clause violation is subject to the constitutional harmless error test. That is, in order to find the error harmless, the reviewing court must

conclude beyond a reasonable doubt that the properly admitted evidence was so overwhelming as to necessarily lead to a finding of guilt. State v. Flores, 164 Wn.2d 1, 18-19, 186 P.3d 1038 (2008).

As discussed above, a trial court's ruling in violation of the evidence rules warrants reversal if the reviewing court concludes that, within reasonable probabilities, the outcome of the trial was materially affected by the error. Bourgeois, 133 Wn.2d at 403.

Here, Solan's testimony that Melton was identified as the shooter "[b]y six people and himself" was highly prejudicial.

12/10/07RP 204. In the same way that an officer's testimony about a defendant's confession "has significant impact on a jury," Wilson, 144 Wn. App. at 185, an officer's testimony that several witnesses identified the defendant as the perpetrator must also carry significant weight with the jury. Solan essentially assured the jury that he was certain Melton was guilty and there was no need for further investigation, because not only did Melton confess, but "[t]he other suspects in the vehicle identified Mr. Melton as the shooter." 12/10/07RP 193. Solan's testimony encouraged the jury to rely on his assessment of the strength of the evidence.

Further, Solan's testimony about the out-of-court identifications was contrary to the witnesses' testimony at trial. Tinsley, Cox, Holmes, and Harris all testified they did not know who shot the gun. 12/06/07RP 49-50; 12/12/07RP 416, 434; 12/17/07RP 676-77; 12/13/07RP 550. Thus, Solan's testimony undermined the credibility of those witnesses.

The erroneous admission of the out-of-court identifications, in combination with the other errors that occurred in the trial, seriously prejudiced Melton and together warrant a new trial.

3. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION, BY INSTRUCTING THE JURY TO RE-READ THE ACCOMPLICE LIABILITY INSTRUCTION IN RESPONSE TO THE JURY'S INQUIRY

During deliberations, the jury requested to review Shawn Webster's trial testimony. CP 126; 12/20/07RP 889. In response, the court inadvertently directed the jury to re-read the accomplice liability instruction. CP 127; 12/20/07RP 889.

By directing the jury to re-read the accomplice liability instruction, the court impermissibly commented on the evidence in violation of article IV, section 16 of the Washington Constitution.

Because the record does not affirmatively show that no prejudice could have resulted, the conviction must be reversed.

a. Article IV, section 16 forbids a court from, directly or indirectly, conveying to the jury the judge's opinion about the credibility, weight or sufficiency of any evidence introduced at trial.

Article IV, section 16 of the Washington Constitution states, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The provision forbids those words or actions of a trial judge "which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some of the evidence introduced at the trial." State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

The purpose of article 4, section 16 "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Even where such a remark of the trial judge is made inadvertently, if the remark implicitly conveys to the jury the judge's personal opinion concerning the worth of the evidence, it is an unconstitutional comment on the evidence. Id.

In determining whether the trial judge's words or actions amount to a comment on the evidence, the reviewing court looks to the facts and circumstances of the case. Jacobsen, 78 Wn.2d at 495. An impermissible comment on the evidence may be conveyed by the judge either directly or by implication. Id.

b. By instructing the jury to re-read the accomplice liability instruction, the judge implicitly conveyed her opinion about the strength of the evidence of accomplice liability. In its inquiry, the jury requested to review the testimony of Shawn Webster, the young man who was shot in the head with the ricocheting bullet. CP 126; 12/20/07RP 889. Webster had testified he heard several shots coming from the Expedition but could not see who was shooting or how many people were shooting. 12/13/07RP 575, 591. In response, the judge directed the jury to re-read the accomplice liability instruction. By doing so, the judge highlighted the evidence of accomplice liability, implicitly conveyed to the jury that Webster's testimony should be evaluated in light of that evidence, and suggested the judge's personal opinion about the weight and credibility of the evidence of accomplice liability.

Any remark that has the potential effect of suggesting that the jury need not consider an element of an offense may qualify as

judicial comment. State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006). Here, by highlighting the evidence of accomplice liability, the judge suggested that the jury need not consider whether Melton acted as a principal. Therefore, the court's supplemental instruction amounted to an impermissible comment on the evidence in violation of article IV, section 16.

c. The comment on the evidence requires reversal.

A court's error in commenting on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006); Levy, 156 Wn.2d at 725. Where the court comments on an element of the crime and that element is disputed, the record does not affirmatively show that no prejudice could have resulted.

Jackman, 156 Wn.2d at 745; Levy, 156 Wn.2d at 722, 726-27.

Here, the parties disputed the element of accomplice liability and therefore the error is not harmless.

The State did not charge Melton as an accomplice and its theory at trial was that Melton was the sole shooter. See, e.g., 12/06/07RP 92, 98; 12/10/07RP 179, 192, 204; 12/18/07RP 804, 815-16; 12/19/07RP 873-76. But the prosecutor also argued in closing argument that even if more than one shooter was involved,

Melton was guilty as an accomplice because he was the "ringleader" of the group, "the instigator and the one who started this." 12/19/07RP 876.

On the other hand, the defense disputed both that Melton acted as a principal and that he was an accomplice. Counsel argued Melton was not guilty as a principal and suggested instead that Tinsley was the shooter, as some witnesses identified him during the show up procedure as a possible shooter, and other witnesses observed a person shooting a gun out of the front passenger window, where Tinsley was sitting. 12/18/07RP 838, 840-41. Counsel also argued Melton was not guilty as an accomplice, as he did not act with knowledge that his actions would promote or facilitate commission of the crime, and he did not solicit, command, encourage or request another person to commit the crime. 12/19/07RP 856-58.

The court's supplemental instruction highlighting the accomplice liability instruction implied that the court found the evidence of accomplice liability to be significant, and suggested the jury could resolve the dispute between the parties regarding Melton's liability by finding him guilty as an accomplice. Thus, the

record does not affirmatively show that no prejudice could have resulted and the conviction must be reversed.

4. THE CUMULATIVE EFFECT OF THE ABOVE ERRORS DENIED MELTON A FAIR TRIAL

The due process clauses of the federal and state constitutions provide a criminal defendant the right to a fair trial. U.S. Const. amend. 14; Const. art. I, § 3, 22. The cumulative effect of trial court errors may result in an unfair trial and require reversal, even if each error on its own is harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The cumulative effect of the above trial court errors requires reversal of Melton's convictions, in the event this Court concludes that each error examined on its own would otherwise be harmless, or that some error was improperly preserved. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court has discretion under RAP 2.5(a)(3) to review any inadequately preserved errors and determine if the cumulative effect of incompetent evidence denied the defendant his constitutional right to a fair trial. Id.

In Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the

defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. 64 Wn. App. at 158. In Coe, the court reversed four rape convictions due to numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89.

In this case, each of the above errors requires reversal, but if this Court disagrees, then certainly the cumulative prejudice of admission of the detective's testimony suggesting the witnesses feared retaliation from Melton, admission of the detective's testimony that all of the witnesses in the car had identified Melton as the shooter, and the court's supplemental jury instruction highlighting the evidence of accomplice liability, together denied Melton a fair trial. This Court must therefore reverse the convictions.

5. MELTON'S SENTENCE IMPOSING FOUR  
FIREARM ENHANCEMENTS BASED ON USE  
OF A SINGLE GUN DURING ONE INCIDENT  
VIOLATES HIS RIGHT TO BE FREE FROM  
DOUBLE JEOPARDY

a. The constitutional bar on double jeopardy prohibits multiple firearm enhancements for the same offense. While the State may allege and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not

enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005); North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

The double jeopardy provisions of the United States and Washington Constitutions provide that a person may not be convicted more than one time under the same criminal statute if he or she has committed only one "unit" of the crime. State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342. If the legislature has not specified the unit of prosecution, or if legislative intent is unclear, this Court resolves any ambiguity in favor of the accused. Tvedt, 153 Wn.2d at 711.

b. Unit of prosecution analysis bars imposing multiple firearm enhancements for the same incident and same weapon. A defendant cannot be punished multiple times for possession of marijuana simply because the drug was stored in two different places. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). The Adel Court ruled that the prosecution's attempt to divide possession based on its location rested "on a slippery slope of prosecutorial discretion to multiply charges." Id. at 636.

Likewise, in State v. Varnell, 162 Wn.2d 165, 107 P.3d 24 (2008), the defendant was charged with four counts of solicitation because he asked one person to kill four individuals. The court ruled that because Varnell asked an undercover detective to commit four murders in one conversation, "at the same time, in the same place, and for the same motive," his acts "constitute a single unit of prosecution." Id. at 171.

In State v. DeSantiago, 149 Wn.2d 402, 419, 68 P.3d 1065 (2003), the court found that the firearm enhancement statute's use of the words "a firearm" means that a defendant may be punished separately for each firearm involved. Here, unlike DeSantiago, the single incident involved a single firearm, and yet this one firearm resulted in four additional prison terms.

c. The unit of prosecution analysis also bars multiple firearm enhancements for a single incident and single weapon. Melton received four consecutive firearm enhancements, totaling 144 months of additional incarceration, for possessing a single firearm on a single occasion during a single incident. This additional incarceration more than doubled the standard range sentences imposed for the offenses themselves, piling 144 months on top of the 57 months he received in concurrent sentences for the substantive offenses – and each those offenses was enhanced in degree because of the firearm. CP 135.

RCW 9.94A.533(3) provides,

if an 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.

The same statute also states:

(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.

RCW 9.94A.533(3)(e).

This statute establishes the procedure for serving any firearm sentencing enhancement but does not speak to whether such enhancement should be imposed for offenses that involve the same conduct and same firearm used with the same general purpose. Because of the intertwined nature of the offenses and the use of a single firearm on a single occasion, Melton should receive a single firearm enhancement for the incident, rather than four enhancements despite the single use of a firearm.

6. BECAUSE THE FIREARM ENHANCEMENTS ARE ELEMENTS OF THE ASSAULTS AND ELEVATED THEM TO MORE SERIOUS CRIMES, THE IMPOSITION OF ADDITIONAL PUNISHMENT IN THE FORM OF FIREARM ENHANCEMENTS VIOLATED DOUBLE JEOPARDY

Melton was convicted and sentenced for four counts of second degree assault. Each offense was elevated in degree, and consequent punishment, because it was committed while Melton used a firearm. CP 15-18. Additionally, the prosecution further charged Melton with committing each offense while in possession of a firearm, and thus requested another 36 months of prison for each offense based on this added allegation. *Id.* Because double jeopardy principles prohibit this stacking of punishments based on the same allegations, Melton's sentence must be reduced.

In the past, this Court has rejected double jeopardy challenges to charging both a substantive crime involving use of a deadly weapon as an element and a deadly weapon enhancement. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), rev. denied, 163 Wn.2d 1053 (2008) (burglary, robbery, assault); State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, rev. denied, 106 Wn.2d 1016 (1986) (rape).

But recently, the Washington Supreme Court granted review of two cases raising this very issue, State v. Aguirre<sup>2</sup> and State v. Kelley.<sup>3</sup> Accordingly, an authoritative decision addressing this

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<sup>2</sup> The Court of Appeals decision in Aguirre was unpublished, but the Supreme Court website lists the issue for which review was granted as, Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a weapon was both an element of the charge and the basis for imposing a deadly weapon sentence enhancement. State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wash.2d 1036 (2009), issue statement available at: [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2009Sep#P669\\_37364](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2009Sep#P669_37364). Oral argument is scheduled for October 29, 2009.

<sup>3</sup> State v. Kelley 146 Wn. App. 370, 189 P.3d 853 (2008), rev. granted, 165 Wash.2d 1027 (2009). The Supreme Court website lists the issue for which review was granted as, Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a firearm was both an element of the charge and the basis for imposing a firearm sentence enhancement.

Available at: [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_suprem](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_suprem)

claim should occur in the near future and any such ruling would apply to Melton. See State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Because Melton's case is still pending on direct review and not yet final, he would be entitled to receive the benefit from a favorable decision substantially reducing his sentence. See State v. Evans, 154 Wn.2d 438, 443, 114 P.3d 627 (2005).

It is now well-established that any fact increasing the maximum penalty that may be imposed upon a criminal defendant is akin to an element of an offense. Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 494 n.194, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).<sup>4</sup> The aggravating factor is the functional equivalent of an element and must be charged in the information and proven beyond a reasonable doubt. Recuenco, 163 Wn.2d at 434.

RCW 9.94A.533 increased Melton's sentence over and above the Blakely statutory maximum, i.e., the standard range under the sentencing guidelines, for the crime. Thus, following

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[e\\_issues.display&fileID=2009Sep#P669\\_37364](#). Oral argument is also scheduled for October 29, 2009.

<sup>4</sup> See also Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002).

Blakely, Apprendi, and Recuenco, the enhancement statute is the functional equivalent of an element of the crime. The prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying crime and the weapon enhancement no longer hold sway, and the reasoning of Nguyen is no longer dispositive because the Supreme Court has accepted review of cases speaking to the same issue. Thus, Melton seeks relief for the double jeopardy violation that occurs from the stacking of punishments for the same factual elements.

There is no question that Melton's second degree assault convictions are the same in fact and in law as the accompanying firearm enhancements. First, each involves the same criminal act. Had Melton not used a handgun in the course of the assaults, he could not have been convicted of second degree assault. The assault charges expressly predicated the elevation to the second degree on the ground they were committed "with a deadly weapon." CP 15-17. Each count involves the use of a gun in the course of an assault, and is the same in fact as in law. RCW 9A.36.021(1)(c) (defining second degree assault as occurring when, "under

circumstances not amounting to assault in the first degree," a person "[a]ssaults another with a deadly weapon.").

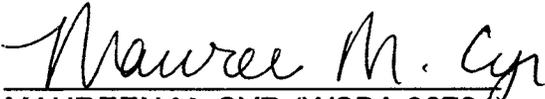
Melton's use of one gun both elevated the degree of the crimes charged, increasing his standard range sentence, and resulted in the imposition of firearm enhancements. Melton was given an additional 144 months, or 12 years in prison for the firearm enhancements. He was essentially sentenced for using a firearm while armed with a firearm, and he was thus convicted and punished twice for the use of a single weapon. The addition of a firearm enhancement to Melton's four convictions placed him twice in jeopardy for the use of a gun and violated the state and federal constitutions. The firearm enhancements must be vacated and his case remanded for resentencing. State v. Gohl, 109 Wn. App. 817, 824, 37 P.3d 293 (2001), rev. denied, 146 Wn.2d 1012 (2002).

#### E. CONCLUSION

The trial court erred in admitting testimony that the witnesses were reluctant to testify because they feared retaliation, in admitting testimony about the out-of-court statements of several witnesses who identified Melton as the shooter, and in commenting on the evidence of accomplice liability. These errors, individually and together, prejudiced Melton and denied him a fair trial, requiring

reversal of his convictions. Also, the four consecutive firearm enhancements violated the state and federal constitutional prohibition against double jeopardy and must be vacated.

Respectfully submitted this 3rd day of August 2009.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

# **APPENDIX**

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and six verdict forms, A, B, C, D, E, and F, for recording your verdict.

Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Assault in the First Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Count I, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on Verdict Form A, do not use Verdict Form B. If you find the defendant not guilty of the crime of Assault in the First Degree, or after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser degree crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "guilty" or "not guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

When completing the verdict forms, you will next consider the crime of Unlawful Possession of a Firearm in the Second Degree, as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form C the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Count II, do not fill in the blank provided in Verdict Form C.

When completing the verdict forms, you will next consider the crime of Assault in the Second Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form D the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Count III, do not fill in the blank provided in Verdict Form D.

When completing the verdict forms, you will next consider the crime of Assault in the Second Degree as charged in Count IV. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form E the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Count IV, do not fill in the blank provided in Verdict Form E.

When completing the verdict forms, you will next consider the crime of Assault in the Second Degree as charged in Count V. If you unanimously agree on a verdict, you must fill in the blank

provided in Verdict Form F the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Count V, do not fill in the blank provided in Verdict Form F.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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

STATE OF WASHINGTON, )

Respondent, )

v. )

DAVID MELTON, )

Appellant. )

NO. 61377-4

2009 AUG -3 PM 1:47  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, ANN JOYCE, STATE THAT ON THE 3RD DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **APPELLANT'S AMENDED OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	<input checked="" type="checkbox"/>	U.S. MAIL
APPELLATE UNIT	<input type="checkbox"/>	HAND DELIVERY
KING COUNTY COURTHOUSE	<input type="checkbox"/>	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

<input checked="" type="checkbox"/> DAVID MELTON	<input checked="" type="checkbox"/>	U.S. MAIL
315656	<input type="checkbox"/>	HAND DELIVERY
CLALLAM BAY CORRECTION CENTER	<input type="checkbox"/>	_____
1830 EAGLE CREST WAY		
CLALLAM BAY, WA 98326-9723		

**SIGNED** IN SEATTLE, WASHINGTON THIS 3RD DAY OF AUGUST, 2009.

x *Ann Joyce*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710