

NO. 66610-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ARCHULETA,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON
THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether this Court should affirm the juvenile court's reasonable exercise of discretion in determining that Archuleta should be tried as an adult for attempted murder in the first degree, assault in the first degree, and unlawful possession of a firearm for shooting two unarmed victims on a crowded street.

2. Whether this Court should hold in accordance with overwhelming authority from Washington and elsewhere that the Sixth Amendment right to a jury trial does not apply to juvenile decline hearings.

3. Whether this Court should hold in accordance with controlling Washington authority that Archuleta's claim of prosecutorial misconduct should be rejected.

4. Whether this Court should hold in accordance with controlling Washington authority that the "to convict" instruction for attempted murder in the first degree contained all the essential elements of that crime.

5. Whether this Court should reject Archuleta's claim that double jeopardy is violated by a conviction for unlawful possession of a firearm and two firearm enhancements on two completely separate substantive charges because the criminal charge and the

enhancements have different elements and are based on different facts.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Andrew Archuleta (dob 8/7/93), was charged originally in juvenile court with attempted murder in the first degree with a firearm enhancement (count I), assault in the first degree with a firearm enhancement (count II), and unlawful possession of a firearm based on a shooting that took place in Auburn on July 6, 2009. CP 123-26. In accordance with the statute in effect at the time, a decline hearing was mandatory due to the nature of the charges and Archuleta's age at the time of commission. Former RCW 13.40.110(1)(a).¹ The State gave notice that it would ask the juvenile court to decline jurisdiction. CP 127-28.

A decline hearing was held in the juvenile court in January 2010 before the Honorable Christopher Washington. As will be discussed in detail in the first argument section below, the juvenile court decided that declining jurisdiction was in the best interest of

¹ Amendments to this statute went into effect 20 days after Archuleta committed these crimes. See Laws of 2009, ch. 454, § 3.

the public and ordered that the case be transferred to adult court.
CP 334-40; RP (1/25/10) 145-48.

A jury trial was held in October 2010 before the Honorable John Erlick. The charges were amended for trial to add a count of intimidating a witness (count IV) and to add a gang aggravator to the attempted murder charge. CP 31-33. At the conclusion of the trial, the jury found Archuleta guilty as charged on counts I, II, and III, and returned special verdicts for both firearm enhancements and the gang aggravator. CP 35-40. The jury acquitted Archuleta of count IV. CP 34.

The trial court imposed a sentence totaling 420.75 months in prison -- the low end of the standard range. CP 114-21; RP (1/14/11) 37-41. Archuleta now appeals. CP 122.

2. SUBSTANTIVE FACTS

In the evening on July 6, 2009, brothers Isaac Garnica and David Garnica, along with their younger stepbrother Paul Berger, were skateboarding in the street outside the Auburn apartment complex where they lived with their mother and sister. RP (10/18/10) 57-58, 137; RP (10/21/10) 27-28. At the same time, Dustin Moore was outside with his two friends, Sergio Ramos and

David Lopez Labra, both of whom lived in the same apartment complex as the Garnica brothers. Moore, Ramos, and Lopez Labra stopped to talk to the Garnicas and took turns riding their skateboard as well. RP (10/11/10) 107-12. Other teenagers from the neighborhood were also outside that evening, including Luis and Rodrigo Garcia-Perez. RP (10/20/10) 28-29; RP (10/21/10) 128-29.

While he was outside skateboarding with his brothers, Isaac Garnica noticed a silver minivan drive by and park in the parking lot of an apartment building two or three buildings down the street from his own. RP (10/18/10) 139-41. Isaac knew that the van belonged to members of a gang -- the Rancho San Pedro 3rd Street Pee-Wee Sureños ("RSP") -- with whom he had had significant problems in the past.² RP (10/18/10) 152-55.

² RSP originated in the Los Angeles area; the RSP set based in Auburn was founded by Archuleta's father, Anthony Archuleta, Sr., also known as "Pee-Wee." RP (10/19/10) 46. Archuleta's father and older brother, Anthony, Jr., were the leaders of RSP in Auburn; Archuleta was one of its lieutenants. RP (10/19/10) 56. The RSPs believed that Isaac Garnica was responsible for shooting Archuleta in September 2008, although Isaac maintained he had nothing to do with it. RP (10/18/10) 155-57. Isaac had also been a member of a rival gang of the RSPs. RP (10/18/10) 157-59. Between September 2008 and the summer of 2009, Isaac had several run-ins with the RSPs, including an incident in February 2009 when RSP members shot at him, but missed. RP (10/18/10) 130-35.

Soon after the silver van parked, an individual with a t-shirt on his head walked up the street toward Isaac Garnica.

RP (10/13/10) 81, 84-85, 131-34; RP (10/21/10) 28-29. Dustin Moore, who was starting to walk toward a nearby park to play soccer at the time, immediately recognized the individual to be Archuleta, with whom he had had a class at school. RP (10/11/10) 114-17. Moore made eye contact with Archuleta as they passed one another; Moore said, "Hey, Andrew," but Archuleta did not respond. RP (10/11/10) 117-18.

Archuleta walked up to Isaac Garnica and, without a word, pointed a 9mm pistol at him and started firing. RP (10/13/10) 85-86; RP (10/18/10) 64-66. David Garnica tried to intervene by punching Archuleta, but Archuleta then pointed the gun at David's head. David put his right hand in front of his face, and as a result, he was shot in the hand. RP (10/18/10) 66; RP (10/21/10) 29-33. Archuleta then ran away towards the park. RP (10/11/10) 120.

Dustin Moore saw that Archuleta was running in his direction with the gun in his hand, so Moore took off running as fast as he could. RP (10/11/10) 121. Sergio Ramos was concerned about Moore, so he went looking for him after Archuleta fled the scene. Ramos found Moore hiding in a nearby apartment complex; Moore

immediately said, "Oh my God, that's Andrew Archuleta."

RP (10/13/10) 136.

Officer Buie Arneson was one of the first officers to arrive at the scene of the shooting. He did what he could to render aid to Isaac Garnica until medic units arrived. RP (10/11/10) 52-53. When the medics arrived, Ofc. Arneson turned his attention to David Garnica, who was bleeding profusely from his shattered fingers and wincing in pain. RP (10/11/10) 54-55. Arneson asked David if he knew who had shot him, and David gave the name "Archuleta." RP (10/11/10) 55. David was not immediately able to provide a first name, but when a bystander said, "It's Andrew," David confirmed, "Yeah, Andrew Archuleta[.]" RP (10/11/10) 56-57. After David was transported to the hospital, he also told Officer Allison Freeman that Archuleta was the shooter. RP (10/12/10) 121. David also selected Archuleta's photograph from a montage and gave a recorded statement to detectives. RP (10/12/10) 58-62, 140-49.

Isaac Garnica was shot five times and suffered extensive, life-threatening injuries. He had bullet wounds in his upper and lower right lung, his diaphragm, his neck and jaw, and his upper right arm. RP (10/14/10) 120-24. His jugular vein was severed, his

liver was lacerated, and one of his kidneys had to be removed. RP (10/14/10) 123, 126. He had bullet fragments in his spine and injuries to his spinal cord. RP (10/14/10) 127. In short, Isaac Garnica certainly would have died without immediate and extensive medical care. RP (10/14/10) 125.

Archuleta could not be immediately located by the authorities; however, Officer Todd Glenn was aware that Archuleta maintained a MySpace page, so he set about locating Archuleta through the IP address of the computer where new postings were coming from. RP (10/14/10) 69-71. Ofc. Glenn traced the IP address to a residence in Tacoma. RP (10/14/10) 88. Auburn detectives set up surveillance on the residence and verified that Archuleta was there. RP (10/14/10) 146-48. On July 10, 2009, after obtaining a search warrant, Auburn Police personnel arrested Archuleta with assistance from a Tacoma Police SWAT team. RP (10/14/10) 148-49.

Archuleta was transported to the Auburn city jail, where he was contacted by Detective Michael Jordan and Detective James Hamil. When the detectives first arrived, Archuleta was asleep in the holding cell. RP (10/12/10) 67, 171. The detectives woke him

up, and he responded by throwing an RSP gang sign.

RP (10/12/10) 67-70, 171-72.

By the time of Archuleta's decline hearing in January 2010, Isaac and David Garnica were claiming that Archuleta was not the shooter, and they testified to this effect at trial. RP (1/19/10) 95, 120-21; RP (10/18/10) 164; RP (10/21/10) 52. However, the Garnica brothers admitted that they learned about the decline hearing from Archuleta's sister, and that they received a ride to the decline hearing from Archuleta's sister and mother. RP (10/18/10) 162-64; RP (10/21/10) 56-57. Isaac Garnica also admitted that being labeled a "snitch" by gang members has negative consequences. RP (10/18/10) 159-60.

Archuleta presented an alibi defense. Archuleta's father's girlfriend and two of her daughters testified that Archuleta was at their residence in Tacoma on the night of the shooting.

RP (10/26/10) 49, 50-55, 96-98, 114-16.

Additional facts will be discussed further below as necessary for argument.

C. ARGUMENT

1. THE JUVENILE COURT EXERCISED SOUND DISCRETION IN DETERMINING THAT ARCHULETA SHOULD BE TRIED AS AN ADULT.

Archuleta first claims that the juvenile court erred in ruling that jurisdiction should be declined and Archuleta should be tried as an adult for attempted murder in the first degree, assault in the first degree, and unlawful possession of a firearm. Brief of Appellant, at 7-17. This claim should be rejected. The record demonstrates that the juvenile court exercised its discretion properly in ruling that trying Archuleta as an adult was in the best interest of the public, given the nature of Archuleta's crimes. Accordingly, this Court should affirm.

The juvenile court may, after holding a decline hearing, "order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public." Former RCW 13.40.110(2). In determining whether to decline jurisdiction, the juvenile court must consider the eight factors originally set forth in Kent v. United States, 383 U.S.

541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).³ All eight Kent factors need not be proven in order to justify declining jurisdiction, but the record must demonstrate that all factors were considered. State v. M.A., 106 Wn. App. 493, 498, 23 P.3d 508 (2001). The State has the burden of proving by a preponderance of the evidence that prosecuting the offender as an adult is in the best interest of the juvenile or the public. State v. Toomey, 38 Wn. App. 831, 834, 690 P.2d 1175 (1985).

The juvenile court's decision whether to decline jurisdiction is discretionary, and will be reversed on appeal only if there has been a manifest abuse of discretion, meaning that the juvenile court's decision is manifestly unreasonable or is based on untenable grounds. M.A., 106 Wn. App. at 498. A court abuses its discretion only if no reasonable person would have ruled as the court did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). In

³ These factors are: 1) the seriousness of the alleged offense and whether the protection of the community requires waiver; 2) whether the offense was committed in an aggressive, violent, premeditated, or willful manner; 3) whether the offense was committed against persons or property; 4) whether the case has prosecutive merit; 5) the desirability of disposition of the offense in one court if the juvenile's accomplices are adults; 6) the offender's sophistication and maturity, considering his or her home, environmental situation, emotional attitude, and pattern of living; 7) the offender's previous record and criminal history; and 8) the prospects for adequate protection of the public and the likelihood of rehabilitation through the use of resources available in juvenile court. Kent, 383 U.S. at 566-67. The fifth factor is irrelevant in this case.

determining whether the juvenile court exercised its discretion appropriately, the appellate court examines the entire record, including the juvenile court's oral ruling, to determine the sufficiency of the court's reasons for declining jurisdiction. M.A., 106 Wn. App. at 498.

As a preliminary matter, the State recognizes that the juvenile court's findings and conclusions in this case are sparse. CP 338-340; RP (1/25/10) 145-48. Moreover, most of the court's written findings are actually conclusions.⁴ CP 339. However, even in cases where the juvenile court's findings are inadequate, the decision to decline jurisdiction should be affirmed if the record as a whole supports the decision. State v. Holland, 98 Wn.2d 507, 518, 656 P.2d 1056 (1983); M.A., 106 Wn. App. at 500. The record as a whole plainly supports the juvenile court's decision in this case.

In this case, the record establishes that the juvenile court gave particular weight to Kent factors 1, 2, 3, and 8 in making its ruling. The seriousness of these offenses and the need to protect community safety, the violent and premeditated nature of these

⁴ Findings of fact that are actually conclusions of law will be treated as such, and vice versa. See Woodruff v. McClellan, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

crimes, the serious injury inflicted on the victims and potential danger to the bystanders, and the inadequacy of the prospects for protecting the public if the case were retained in the juvenile system are the factors the juvenile court identified as key in making its decision to decline jurisdiction. CP 339; RP (1/25/10) 147-48. The record amply supports the juvenile court's findings in these regard.

First, there can be no dispute that the first Kent factor weighed in favor of decline.⁵ These crimes were very serious, and Archuleta's conduct posed a grave risk of death not only to Isaac and David Garnica, but to innocent bystanders as well. This shooting took place on a crowded neighborhood street on a summer evening when numerous young people were outside skateboarding and engaging in other harmless recreational activities. CP 185-86; RP (1/19/10) 115. Accordingly, as the juvenile court found, the serious nature of these crimes and the need to protect the community weighed heavily in favor of declining jurisdiction. CP 339.

As to the second Kent factor, it also cannot be disputed that these crimes were aggressive, violent, premeditated, and willful.⁶

⁵ Archuleta stipulated to this factor. CP 307.

⁶ Archuleta stipulated to this factor as well. CP 307.

The record established that Archuleta had a long-standing motive to kill Isaac Garnica because of the widespread rumor that Isaac was responsible for shooting Archuleta in September 2008. CP 186; RP (1/19/10) 40, 44-45, 119. Moreover, all of the witnesses to the shooting stated that the shooter walked up to Isaac Garnica with a t-shirt covering his head, and, without saying a word, raised the gun and began firing. When David Garnica tried to protect his brother, he was shot in the hand when he put his hands up to protect his face. CP 185; RP (1/19/10) 39. These actions denote a calculated and deliberate mental state. Also, as noted above, the shooting took place on a public street in view of several bystanders: this behavior was brazen. As the juvenile court found, the violent, aggressive, premeditated and willful nature of these crimes also weighed heavily in favor of trying Archuleta as an adult. CP 339; RP (1/25/10) 147-48.

There is also no dispute that these were crimes against persons rather than property under the third Kent factor, and that the victims suffered very serious injuries.⁷ Isaac Garnica was shot five times, and certainly would have died without immediate,

⁷ This factor was also conceded. CP 308.

intensive, and ongoing medical intervention. CP 165-81; RP (1/19/10) 36. David Garnica's hand was severely injured as he was protecting himself from being shot in the face. RP (1/19/10) 37. This factor also weighed greatly in favor of declining jurisdiction, as the juvenile court found. CP 339; RP (1/25/10) 147.

The juvenile court's conclusion that the juvenile system would not provide adequate protection for the public under the eighth Kent factor is also fully supported by the record. If retained in the juvenile system, Archuleta faced a standard range of only 103 to 129 weeks at JRA for the attempted murder and assault charges, with all jurisdiction irrevocably ending on August 7, 2014 (Archuleta's 21st birthday). CP 322; RCW 13.40.300. As stated in the State's brief in support of declination, "[t]he idea that [Archuleta] could spend less than five years at JRA for shooting two individuals (clearly attempting to kill one) in broad daylight with children present on a summer evening is a miscarriage of justice and out of step with the community's expectation of protection." CP 152. Accordingly, the juvenile court was justified in finding that the nature of these offenses was simply too severe "for [the court] to view this as being something that could be effectively dealt with in the juvenile system, just from a public safety point of view."

RP (1/25/10) 148. As the juvenile court found, this factor also weighed heavily in favor of decline.

In sum, Kent factors 1, 2, 3, and 8 -- which the juvenile court identified on the record as being key to its decision -- all weighed heavily in favor of decline, and the juvenile court's findings as to these factors are fully supported by the record. Indeed, the juvenile court's findings in this regard cannot reasonably be disputed. Furthermore, the record shows that the juvenile court considered the other relevant factors as well.

The juvenile court also found that Archuleta "manifests a sophistication and maturity requiring that the Juvenile Court jurisdiction be declined" under the sixth Kent factor. CP 339. This ruling also finds ample support in the record. The evidence showed that Archuleta had been living without parental or adult supervision. In fact, when Auburn detectives went to Archuleta's residence during their investigation of the shooting where Archuleta was the victim, they found that the only "adult" in the house was an 18-year-old member of Archuleta's gang who was eventually arrested for a homicide. RP (1/19/10) 46-47. The forensic psychological report submitted by Archuleta's attorney reflected that Archuleta's "lifestyle suggests a level of 'street smarts'" and that he was not attending

school. CP 317. Archuleta's juvenile probation counselor (JPC), (who recommended retention in the juvenile system) also reported that Archuleta had been living on his own prior to his arrest. CP 325. Additionally, Archuleta was only one month shy of his 16th birthday when he committed these crimes. If Archuleta *had* been 16 when he shot Isaac and David Garnica, adult jurisdiction would have been automatic. RCW 13.04.030(1)(e)(v)(A).

As to the seventh Kent factor, the juvenile court noted that Archuleta's prior contacts with law enforcement were relatively minimal, particularly in light of his heavy involvement in the gang lifestyle. RP (1/25/10) 146. The court also recognized that Archuleta's attorney and the JPC had outlined the possibilities for rehabilitation offered by the juvenile system. RP (1/25/10) 146. Moreover, regarding the fourth Kent factor, the court acknowledged that the Garnica brothers' testimony that Archuleta was not responsible for the shooting would present challenges to the prosecution; however, the court further observed that the right to a jury trial in adult court could actually benefit Archuleta in this regard. RP (1/25/10) 146-47.

In sum, the record reflects that the juvenile court considered all of the relevant Kent factors as required, and evidence in the

record supports the court's findings with respect to each. The juvenile court exercised its discretion properly in deciding that the State had proved that declining jurisdiction was in the best interest of the public, and thus, this Court should affirm.

Nonetheless, Archuleta argues that the juvenile court's decision was erroneous, citing the forensic psychological report, the JPC's report, and the juvenile court's alleged disregard of Archuleta's best interests. Brief of Appellant, at 7-17. These arguments should be rejected.

First, as noted above, although both were submitted in support of retention, the psychological report and the JPC report contained information that weighed in favor of declination. In fact, the JPC admitted the Kent factors "either weigh in favor of decline or it could be a 50/50 split." CP 332. The JPC further acknowledged that the crimes at issue merited a lengthy period of incarceration, and that the rehabilitative services at JRA would be made available to Archuleta in the event of declination. CP 332-33. This is hardly an enthusiastic endorsement for retention in the juvenile system. Finally, the juvenile court did acknowledge that the juvenile system afforded opportunities for rehabilitation; however, the court placed greater weight on the need to protect

public safety in light of the nature of the crimes committed.

RP (1/25/10) 146-48. This was entirely proper, given that declination may be based on the best interest of either the offender or the public. Former RCW 13.40.110(2). This Court should affirm.

2. THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL DOES NOT APPLY TO A COURT'S DECISION WHETHER TO DECLINE JUVENILE COURT JURISDICTION.

Archuleta next claims that he was entitled to a jury trial on the issue of whether he should be tried as an adult. Brief of Appellant, at 17-25. This claim is without merit. The purpose of a decline hearing is to determine jurisdiction, not to determine punishment, and this Court and other courts have rejected this claim on that basis.

In several cases, including Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court has held that the Sixth Amendment requires that any facts (other than criminal history) that increase the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury and found beyond a reasonable doubt.

On the other hand, a court's decision whether to decline juvenile court jurisdiction is a pretrial determination, wholly independent from the determination of guilt on the underlying charge. In fact, a decline hearing is not an adversarial hearing. As the Washington Supreme Court has explained,

Such a hearing does not result in a determination of delinquency . . . ; does not result in a determination of guilt as may a criminal trial; and does not directly result in confinement or other punishment as may both a delinquency hearing and a criminal proceeding. In short, the transfer hearing, as we have recently said, is to determine "whether best interests of the child and of society would be served by the retention of the juvenile court authority over him or whether the juvenile, under all the circumstances, should be transferred to be tried as an adult."

In re Harbert, 85 Wn.2d 719, 725-26, 538 P.2d 1212 (1975)

(quoting In re Sheppard v. Rhay, 73 Wn.2d 734, 738, 440 P.2d 422 (1968)). There is no constitutional right to be tried in juvenile court.

In re Boot, 130 Wn.2d 553, 571, 925 P.2d 964 (1996).

This Court has previously considered and rejected the argument that the decline decision should be made beyond a reasonable doubt rather than by a preponderance of the evidence.

In State v. H.O., 119 Wn. App. 549, 81 P.3d 883 (2003), rev.

denied, 152 Wn.2d 1019 (2004), the defendant argued that the "beyond a reasonable doubt" standard should have been used to determine whether to decline juvenile court jurisdiction in his case based on Appendi and its progeny. This Court held:

We do not read Appendi and Ring⁸ as broadly as does H.O. In those cases, either the guilt or the sentence of an accused was at issue. Neither guilt nor sentencing is at issue at the decline hearing. Rather, the hearing is designed to determine whether the case should be heard in juvenile or adult court. Neither of these cases requires that this jurisdictional determination, intended only to determine the appropriate forum for trial, must be supported by the "beyond a reasonable doubt" standard.

H.O., 119 Wn. App. at 554-55.

More recently, Division Two of this Court followed H.O. in rejecting precisely the argument that Archuleta makes in this case. In In re Personal Restraint of Hegney, 138 Wn. App. 511, 525-28, 158 P.3d 1193 (2007), the Court expressly held that Appendi and its progeny do not apply to juvenile decline proceedings, and that there is no right to a jury trial for such proceedings.

Furthermore, as noted in In re Hegney, other state and federal courts have addressed this issue and have also held that the Sixth Amendment right to a jury trial and proof beyond a

⁸ Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

reasonable doubt, as articulated in Apprendi and Blakely, do not apply to juvenile decline or transfer hearings. See, e.g., United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003); State v. Kalmakoff, 122 P.3d 224, 226-27 (Alaska Ct. App. 2005); State v. Rodriguez, 205 Ariz. 392, 400-01, 71 P.3d 919, 927-29 (2004); In re J.W., 346 Ill. App. 3d 1, 10-12, 804 N.E.2d 1094, 1101-03 (2004); State v. Jones, 273 Kan. 756, 770-78, 47 P.3d 783, 793-98 (2002); Caldwell v. Commonwealth, 133 S.W.3d 445, 452-53 (Ky. 2004); In re Welfare of J.C.P., Jr., 716 N.W.2d 664, 666-68 (Minn. Ct. App. 2006); State v. Lopez, 196 S.W.3d 872, 875 (Tex. Ct. App. 2006). In sum, authorities from Washington and elsewhere overwhelmingly hold that the right to a jury trial does not apply to juvenile decline proceedings.

Nonetheless, Archuleta asks this Court to hold otherwise, citing Blakely, United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). But all of these cases, along with Apprendi, concern procedures for the imposition of a sentence after a defendant has been found guilty of a crime. As noted in H.O., In re Hegney, and the other cases cited above,

juvenile decline proceedings determine jurisdiction, not guilt or punishment. Thus, Apprendi and its progeny are inapposite.

Archuleta's claim, taken to its logical conclusion, is that the Sixth Amendment right to a jury trial should apply to any pretrial factual determination that could conceivably and eventually have the effect of exposing a defendant to potentially greater punishment if the defendant is later found guilty of a crime. A trial court's pretrial rulings denying a motion to dismiss, allowing the State to amend a charge to a higher degree or to allege additional crimes and/or enhancements, or admitting incriminating evidence could certainly have the effect of exposing the defendant to greater punishment following an eventual verdict of guilty. Such rulings, as is true of decline proceedings, also require the trial court to make factual determinations in resolving the legal issue at hand. Accordingly, if Archuleta's argument were accepted, the right to a jury trial would be implicated by these types of pretrial determinations as well.

Nothing in Apprendi, Blakely, or any other case suggests such a broad extension of the rule. This Court should decline Archuleta's invitation to expand the Apprendi line of cases in this

manner. Archuleta's claim should be rejected in accordance with existing authority.

3. THE PROSECUTOR'S STATEMENTS IN REBUTTAL WERE NOT FLAGRANT, ILL-INTENTIONED MISCONDUCT, NOR WERE THEY INCURABLY PREJUDICIAL.

Archuleta next claims that the trial prosecutor committed misconduct during closing arguments. More specifically, Archuleta claims that the prosecutor disparaged the role of defense counsel, and that reversal is required notwithstanding his failure to object when the remarks in question were made. Brief of Appellant, at 25-29 and 43-48.⁹ This argument should be rejected. Although the remarks in question were not proper, they were not so flagrant and ill-intentioned that an instruction to the jury could not have cured any possible prejudice if Archuleta had requested one. Rather, the remarks were isolated and unlikely to have had any material impact on the case. This Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire

⁹ It appears that Archuleta's brief mistakenly includes the same argument twice.

record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A defendant who did not make a timely objection at trial has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The failure to object "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)) (emphasis in original).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are

a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Jurors are presumed to follow their instructions, including the instruction that counsel's arguments are not evidence. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

A prosecutor should not make arguments that disparage or impugn the role of defense counsel. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). However, in the absence of flagrant, ill-intentioned, and incurably prejudicial misconduct, such remarks should not result in reversal of a criminal conviction.

For instance, in Thorgerson, the court found misconduct based on the prosecutor's characterization the defense as "bogus," "desperat[e]," and utilizing "sleight of hand," tactics. Thorgerson, 172 Wn.2d at 450-52. Nonetheless, the court did not reverse the defendant's convictions for multiple counts of child molestation. Rather, the court concluded that the improper remarks were not

likely to have affected the outcome of the case, and that a curative instruction would have been sufficient to ameliorate any resulting prejudice. Id. at 452.

Similarly, in Warren, the court found that it was improper for the prosecutor to have stated that defense counsel's argument was "an example of what people go through in a criminal justice system when they deal with defense attorneys," and that defense counsel's argument consisted of "taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." Warren, 165 Wn.2d at 29. As in Thorgerson, however, the court found that these remarks were not so flagrant and ill-intentioned that they could not have been cured by an instruction from the trial court if a timely objection had been made, and the defendant's conviction for child molestation was affirmed. Id. at 30.

In this case, following a trial that lasted almost a month and involved the testimony of more than two dozen witnesses, the prosecutor made a lengthy closing argument, during which Archuleta made no objections. RP (10/27/10) 25-70. Archuleta's counsel also made a lengthy closing argument, at the end of which he described the State's case as a "manipulation of the evidence,"

and argued that the prosecution had "an agenda." RP (10/27/10) 100-01.

The prosecutor began her rebuttal with a discussion of the jury instruction on reasonable doubt. RP (10/27/10) 101-02. The prosecutor then correctly noted that the defense had made contradictory arguments, including that Archuleta's older brother Anthony was both an alibi witness and an alternative suspect in the shooting. RP (10/27/10) 103. The prosecutor described this tactic as "smoke and mirrors," and stated that "[t]hat is the job of a defense attorney." RP (10/27/10) 103. The prosecutor further stated that her "job is different," and that her job was to present all of the relevant evidence, whether that evidence was helpful to the State or not. RP (10/27/10) 103. The prosecutor then proceeded to discuss additional evidence in detail. RP (10/27/10) 103-11. Archuleta did not object during the prosecutor's rebuttal.

In this case, the remarks at issue in the prosecutor's rebuttal are similar to some of those made in Thorgerson (*i.e.*, "sleight of hand" versus "smoke and mirrors"), although the prosecutor here did not describe the defense as "desperate" or "bogus." Moreover, the remarks in this case are plainly not as egregious as those made in Warren, wherein the prosecutor suggested that defense

attorneys negatively impact the entire criminal justice system. In fact, the prosecutor's remark that her job was to present all of the evidence, whether favorable or not, was arguably a fair reply to defense counsel's argument that the prosecution had an "agenda" in this case. In sum, the remarks in this case were less inflammatory than in Thorgerson and Warren, and thus, reversal is not warranted.

Furthermore, the challenged remarks in this case comprise less than two pages in 55 pages' worth of closing argument and rebuttal in a trial that lasted almost a month; the remainder of the prosecutor's arguments was entirely proper and focused exclusively on the evidence and the jury instructions. As such, the remarks at issue were isolated and insignificant in light of the record as a whole. Therefore, as in Thorgerson and Warren, the remarks in this case were unlikely to have had a material impact on the trial, and they were not so flagrant and ill-intentioned that a curative instruction would not have sufficed to ameliorate any possible prejudice. This Court should reject Archuleta's arguments to the contrary, and affirm in accordance with relevant, controlling authority.

Nonetheless, Archuleta claims that reversal is required because the error is not harmless beyond a reasonable doubt. Brief of Appellant, at 28-29 and 47-48. But this is not the correct standard on appeal unless the misconduct alleged involves a prosecutor who "flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence[.]" State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). The correct standard for any other form of alleged misconduct where there has been no objection at trial is whether the prosecutor's conduct is so flagrantly improper and incurably prejudicial that a remedial instruction to the jury would not have been effective in alleviating the resulting prejudice. Thorgerson, 172 Wn.2d at 443. This case does not involve an allegation of racial bias, and Archuleta's reliance on Monday is misplaced.

4. THE "TO CONVICT" INSTRUCTION FOR ATTEMPTED MURDER IN THE FIRST DEGREE CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THAT CRIME.

Archuleta also claims that the "to convict" instruction for attempted murder in the first degree omitted an essential element

of that crime. More specifically, Archuleta argues that the "to convict" instruction was deficient because it did not include an element of premeditation. Brief of Appellant, at 29-34. This claim should be rejected, because the "to convict" instruction contained all of the essential elements of the crime of attempt, and the elements of murder in the first degree were properly set forth in a separate instruction in accordance with relevant, controlling authority.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Generally, the "to convict" instruction must contain all elements essential to the conviction. Mills, 154 Wn.2d at 7. This Court reviews the adequacy of a challenged "to convict" instruction *de novo*. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2008).

The Washington Supreme Court has made it clear that "[a]n attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime." DeRyke, 149 Wn.2d at 911. The "to convict" instruction need contain only these two elements, with the name of the crime attempted being specific as to the degree of the crime intended (e.g., "first-degree rape" as opposed to simply "rape"). Id. To complete the instructions, the trial court must also give the jury a *separate* instruction on the elements of the crime attempted. Id.

In this case, the "to convict" instruction and the other instructions met these requirements. The "to convict" instruction stated that to find Archuleta guilty, the jury had to find beyond a reasonable doubt:

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

CP 63; WPIC 100.02. This "to convict" instruction was accompanied by the standard WPIC definitions for first-degree murder,¹⁰ premeditation,¹¹ attempted first-degree murder,¹² and substantial step.¹³ In fact, the trial court gave the jury a *second*

¹⁰ The jury was instructed that:

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he causes the death of such person.

CP 60; WPIC 26.01.

¹¹ The jury was instructed that:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 62; WPIC 26.01.01.

¹² The jury was instructed that:

A person commits the crime of Attempted Murder in the First Degree when, with intent to commit Murder in the First Degree, he does any act that is a substantial step toward the commission of that crime.

CP 58; WPIC 100.01.

¹³ The jury was instructed that:

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

CP 59; WPIC 100.05.

definitional instruction on the elements of first-degree murder, which also included the element of premeditation.¹⁴

The trial court's instructions follow exactly the recommended course as directed by the note on use per WPIC 100.02. See 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02 (note on use) 386-87 (3rd ed. 2008). The trial court's instructions also follow exactly the requirements set forth in DeRyke and in State v. Reed, 150 Wn. App. 761, 208 P.3d 1274, rev. denied, 167 Wn.2d 1006 (2009).

In DeRyke, the defendant was charged with attempted rape in the first degree. The "to convict" instruction stated that the jury had to find beyond a reasonable doubt that the defendant took a substantial step towards the commission of the crime of "rape." The instruction did not state what degree of rape the jury had to find the defendant intended to commit.

¹⁴ The jury was further instructed that:

A defendant commits murder in the first degree when:

- (1) the defendant does an act;
- (2) the act was done with the intent to cause the death of another person;
- (3) the intent to cause the death of the other person was premeditated;
- (4) the other person died as a result of the act; and
- (5) the acts occurred in the State of Washington.

CP 61.

Defendant DeRyke claimed that the "to convict" instruction was deficient because it did not contain the elements of the completed crime of first-degree rape. The court rejected this argument, finding that the "to convict" instruction for an attempt crime need only contain the elements of attempt, *i.e.*, the substantial step language and the intent to commit a specific crime. DeRyke, at 911. Although the court found error in the fact that the "to convict" instruction did not specify the degree of rape attempted, the Court found this error harmless because there was only one degree of rape alleged. Id.

In Reed, Division Two of this Court applied DeRyke to the same claim that Archuleta raises here. Defendant Reed was charged with attempted murder in the first degree. Reed, like Archuleta, argued that the "to convict" instruction needed to contain the element of premeditated intent. Reed, 150 Wn. App. at 769. In accordance with DeRyke, the court rejected Reed's argument that anything other than the elements of attempt (*i.e.*, the substantial step language and the intent to commit a specific crime) need be included in the "to convict" instruction. Reed, at 771-75.

In sum, the trial court's instructions in this case were proper, and Archuleta's claim to the contrary is without merit in light of DeRyke and Reed.

Nonetheless, Archuleta argues that premeditation must be included in the "to convict" instruction for attempted first-degree murder, citing State v. Vangerpen, 71 Wn. App. 94, 856 P.2d 1106 (1993), affirmed, 125 Wn.2d 782, 888 P.2d 1177 (1995).

Vangerpen is not on point. The claim in Vangerpen arose from a *charging document* that had failed to charge the crime of attempted first-degree murder,¹⁵ and the issue was whether that charging document could be amended to correct this deficiency after the State had rested its case. Vangerpen, 71 Wn. App. at 101-05, and 125 Wn.2d at 787-91. This is a fundamentally different issue from the instructional issue presented here; charging documents and jury instructions serve very different purposes. DeRyke and Reed -- both of which are also more recent than Vangerpen -- directly address the instructional issue in this case, and hold that the trial

¹⁵ The information stated that "the defendant Shane Michael Vangerpen in King County, Washington, on or about July 20, 1991, *with intent to cause the death of another person* did attempt to cause the death of Officer D.C. Nielsen, a human being." Vangerpen, 71 Wn. App. at 97 n.1. As such, the information failed to specify premeditated intent. No such infirmity exists in the charging documents in this case. CP 1, 8, 31.

court's instructions were proper. Accordingly, this Court should affirm.

5. A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM COUPLED WITH FIREARM ENHANCEMENTS FOR THE CRIMES OF ATTEMPTED MURDER AND ASSAULT DO NOT IMPLICATE DOUBLE JEOPARDY.

Lastly, Archuleta argues that his right not to be placed in jeopardy more than once for the same offense was violated because: 1) he was convicted of unlawful possession of a firearm in the second degree; and 2) the jury also returned special verdicts that he was armed with a firearm when he committed the crimes of first-degree attempted murder and first-degree assault. Brief of Appellant, at 34-42. This claim is frivolous, as the substantive crime of unlawful possession of a firearm and firearm enhancements for the substantive crimes of attempted murder and assault are plainly not the "same offense" in law or in fact for double jeopardy purposes.

When a single act or transaction violates multiple criminal statutes, double jeopardy prevents multiple punishments only if the legislature did not intend the crimes to be treated separately.

Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221,

67 L. Ed. 2d 275 (1977). Double jeopardy in this context is purely a question of legislative intent. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When the legislature authorizes separate punishments, convictions for multiple crimes based on the same act do not violate double jeopardy. Albernaz, 450 U.S. at 343. If the statutes in question do not expressly state that multiple punishments are authorized, courts turn to statutory construction principles to determine whether the crimes may be punished cumulatively. Calle, 125 Wn.2d at 777.

The applicable test was announced by the United States Supreme Court as follows:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). The Washington Supreme Court has expressed this principle as follows:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one

offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Calle, 125 Wn.2d at 777 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). If two crimes are not the same in law and in fact under this test, the crimes are different for double jeopardy purposes unless there is clear evidence of legislative intent to the contrary. Calle, 125 Wn.2d at 780.

As a preliminary matter, it is far from clear that a double jeopardy analysis should apply when the "crimes" at issue are the substantive crime of unlawful possession of a firearm and firearm enhancements attendant to two *completely separate* substantive offenses. Archuleta cites no authority that supports his position in this regard. But in any event, the firearm possession charge and the firearm enhancements in this case are not the same in law or in fact, and there is absolutely no evidence that the legislature does not intend to punish them separately. Therefore, Archuleta's claim is without merit in any event.

Second-degree unlawful possession of a firearm, as charged in this case, is committed when a person under the age of 18 knowingly possesses a firearm under circumstances that do not fit within any of the exceptions enumerated in RCW 9.41.042.¹⁶ RCW 9.41.040(2)(a)(iii). Accordingly, the elements of this offense are: 1) knowing possession of a gun (whether actual or constructive); and 2) the possessor's status as a minor.

By contrast, the firearm enhancements as charged were committed when Archuleta committed the substantive offenses (*i.e.*, first-degree attempted murder and first-degree assault) while armed with a firearm as defined in RCW 9A.41.010. RCW 9.94A.533(3). "Armed" means that the defendant "is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime." State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007).

The firearm possession charge and the firearm enhancements are not the same in law and in fact. Unlawful possession of a firearm requires only knowing possession of a gun

¹⁶ None of these exceptions (which include organized shooting competitions, hunting with a valid license, and service in the armed forces) applies in this case.

while under 18, whereas the enhancements require a readily-available gun and a nexus between the offender, the gun, and the substantive crime. There is no age element for a firearm enhancement, and there is no requirement of proximity, a "nexus," or commission of another substantive crime for unlawful possession of a firearm. Thus, each "crime" contains elements that the other does not. Moreover, the firearm possession charge and the firearm enhancements in this case are based on completely different facts. The firearm charge required proof that Archuleta was under 18 and knowingly possessed a gun; the enhancements were proved by the evidence that Archuleta used a gun to shoot Isaac and David Garnica. Put another way, the unlawful possession charge and the firearm enhancements punish separate conduct: the former punishes Archuleta's ineligibility to possess a gun in the first place, and the latter punish Archuleta's use of a gun to shoot and severely injure two people.

In sum, unlawful possession of a firearm and the two firearm enhancements in this case are not the "same offense" for double jeopardy purposes under Blockburger and Calle. Moreover, Archuleta has provided no evidence of legislative intent that

unlawful firearm possession and firearm enhancements on other charges should not be punished separately; indeed, the evidence is to the contrary.

In State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010), the Washington Supreme Court considered a claim that double jeopardy is violated by the imposition of a firearm enhancement when use of a weapon is an element of the underlying substantive crime. In soundly rejecting this claim, the court noted strong evidence of legislative intent that firearm enhancements are mandatory, any other provisions of law notwithstanding. Kelley, 168 Wn.2d at 79 (citing RCW 9.94A.533(3)(e)). Accordingly, given that firearm enhancements must be punished separately even when based on the *same* act as the underlying offense, it is nonsensical to suggest that firearm enhancements and unlawful possession of a firearm cannot be punished separately when based on *separate* acts. Archuleta's arguments to the contrary are unavailing.

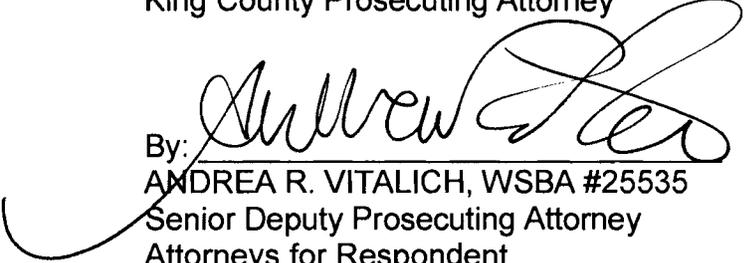
D. CONCLUSION

For all of the reasons set forth above, the State asks this Court to affirm.

DATED this 21st day of February, 2012.

Respectfully submitted,

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By: 

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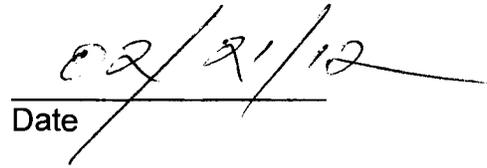
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANDREW ARCHULETA, Cause No. 66610-0-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date