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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by misstating the law in closing argument.

2. There was insufficient evidence to support Mario Sanchez's conviction for first degree manslaughter.

3. The court erred in imposing a firearm enhancement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor commit misconduct by misstating the law in closing argument in telling the jury that failure to take the steps necessary to avoid an injury with a rifle, given the inherent risk of injury in handling a weapon, established the element of recklessness for a manslaughter conviction?

2. Did the prosecutor misstate the law by arguing what was essentially a mandatory presumption that if one shot a person with a rifle he was acting recklessly?

3. Was there insufficient evidence to support a manslaughter conviction where there was no evidence that Mario Sanchez had any intention of harming his cousin and friend; there was no evidence that Mario intended to scare, tease or intimidate

his cousin with a rifle; and there was no evidence even that Mario intended to pull the trigger or knew that there was a round in the chamber or that the safety was not on?

4. Did the trial court err in imposing a firearm enhancement where the Legislature never authorized a procedure for submitting the firearm enhancement to a jury?

C. STATEMENT OF THE CASE

1. Procedural Facts

On June 10, 2005, the Pierce County Prosecutor's Office charged Mario Sanchez with manslaughter in the first degree, committed while he was armed with a firearm. CP 1-4.

Mario Sanchez was convicted as charged by jury verdict after trial before the Honorable Kathryn Nelson. CP 141, 142, 143. On April 14, 2006, Judge Nelson imposed judgment and sentence, sentencing Mr. Sanchez to a term within the standard range. CP 148-158. On the same day, Mr. Sanchez filed a timely notice of appeal. CP 159.

2. Trial evidence

Shortly before midnight on May 6, 2005, the Tacoma police responded to a 911 call of a gunshot injury. RP 137-139, 140-142. The officers found Adino Sanchez in the bedroom of his uncle's home in Tacoma, Washington. RP 138. Adino had been fatally wounded with a rifle by his cousin Mario Sanchez.¹ RP 99-100; 126-128, 137-142, 158-160. Mario was distraught with disbelief and crying when the police arrived.² RP 133, 142-143; 198. Mario and Adino were friends as well as cousins. RP 99-100, 177-178.

The police questioned Mario at the scene that evening. RP 142-148. The police also took Mario to the police station, questioned him further and released him. RP 148-149. Three days later he was questioned again at the police station. The interviews at the station were taped and the tapes

¹ Since the victim and the defendant have the same last name they will be referred to by their first names.

² His father and stepmother, who ran to the room when she heard the gunshot, described Mario as having turned purple like he was in shock or not breathing. RP 133, 135, 173.

were played for the jury.³

Mario told the police that Adino wished to look at the rifle, which Mario had purchased two weeks earlier. RP 144-145. Initially Mario said that when Adino handed the rifle back to him, he took the magazine from it and, as he turned to put the rifle back in the case, it fired. RP 144-145. He did not believe that he had loaded a round into the chamber. RP 146. Mario agreed that Jesus Torres, who was dating his sister, had left the house after the shooting, but denied that Torres had been in the room. RP 146-148.

Mario's first taped statement was generally consistent with his statement at the house right after the shooting. RP 190-191; Pretrial Ex 1; Trial Ex 9. He denied that either he or Adino had chambered a round in the rifle, although Mario said that he was playing with his phone while Adino was

³ After a pretrial CrR 3.5 hearing, the trial court found that all of the statements were made after proper Miranda warnings and were made voluntarily. RP 47; CP 144-147. The only potentially contested issue was whether Mario was in custody during the second taped interview since he was not read his warning on the tape. RP 42-45. The court found that he was not in custody and free to leave at that time. RP 47. Further, defense counsel indicated that, if the statements were deemed voluntary, it was his "strategy and goal" to have the tapes played for the jury. RP 45.

looking at the rifle. Pretrial Ex 1 (p. 6, 10-11); Trial Ex 9. In his second taped statement, Mario agreed that the magazine had been in the rifle at the time, that he may have pulled the trigger, and that Torres had actually been in the room when the rifle was fired.⁴ RP 192-193; Pretrial Ex 2 (p. 2-3, 6); Trial Ex 10. Mario was unclear about what had actually happened; he and Adino had spent most of the day together, Adino asked to look at the rifle and Mario was fiddling with his cell phone while Adino looked at it. Pretrial Ex 2 (p. 7, 17-20); Trial Ex 10. Mario was clear, however, that he believed that the rifle was on safety and would not fire. Pretrial Ex 2 (p. 5, 8-10); Trial Ex 10. He also explained that at the time of the first interview he was afraid that if he said that the clip was in the gun, the police would think he meant to shoot it. Pretrial Ex 2 (p. 4-5); Trial Ex 10. Mario had not read the instruction manual for the rifle. Pretrial Ex 2 (p. 16, 23); Trial Ex 10.

Mario's father Ruben Sanchez had been at the door of the bedroom when the shot was fired. RP 170-172. As he was leaving, he saw Adino passing

⁴ The lead detective testified that he was unable to locate Jesus Torres. RP 197.

the gun to Mario. RP 172-173, 181. Mr. Sanchez, however, according to the testimony of the investigating detectives at trial, had told the police the evening of the incident that he did not see the gun fire and saw only Mario handle the rifle. RP 189; 230-231.

The medical examiner confirmed that Adino died as a result of a gunshot wound to his face and neck. RP RP 156-160. There was no stippling or searing; this established that the shot was fired from a distance of more than three feet. RP 162-166.

The forensic specialist who photographed the scene of the shooting and collected evidence discovered that there was a live round in the rifle. RP 102-103, 109-110, 123. Mathew Noedel, who examined the rifle at the Washington State Patrol Crime Lab, testified that there could not have been a live round in the chamber unless the magazine were in the rifle when it was fired or the rifle had been loaded by hand after it was fired. RP 221. According to Noedel, the rifle could not be made to fire accidentally by dropping it. RP 207, 219. Noedel also testified that the rifle would not fire if its safety mechanism was on, even if there was a round in the chamber. RP 216, 225-227.

3. Closing argument

The defense argument was that the shooting of Adino Sanchez was a tragic accident. RP 282-283.

The prosecutor's argument in closing was that the shooting was reckless essentially just because it had taken place: (a) because there was a magazine in the gun; (b) because there was a live round in the chamber after it was fired; (c) because the trigger was pulled; and (d) because the weapon was pointed at the victim when the trigger was pulled -- whether it was intentionally pointed at him or not. RP 271-272. The prosecutor argued that the shooting was reckless because Mario did not read the manual for the weapon. RP 272.

How is Adino's death avoided? Don't play with an assault rifle. Don't play with a loaded assault rifle. Don't point an assault rifle at a human. Don't pull the trigger unless you want to shoot. Don't ever assume a weapon is unloaded. On the contrary, as we talked about, you have to always assume a weapon is loaded. Don't assume the safety is on. Read the weapon manual. Any one of those things, and we could have avoided Adino's death. He would not be dead if not for the defendant's reckless conduct, and it was sort of a deadly combination of reckless acts when led up to this.

The defendant never made the gun safe before handling it. He's playing with a loaded assault rifle, points the gun at the victim's face for reasons we don't know, and pulls the trigger, again, for

reasons we don't know. Any one of those things by themselves is reckless.

RP 272-272.

The prosecutor further argued that the shooting was not an accident if Mario disregarded a substantial risk and that when you handle a gun, there is a substantial risk. RP 275-276.

C. ARGUMENT

1. THE PROSECUTOR MISSTATED THE LAW IN CLOSING ARGUMENT.

The incident in which Adino Sanchez was shot and killed had all of the earmarks of a tragic accident. There was absolutely no evidence that Mario intended or in any way wished to injure his cousin Adino. There was no evidence that Mario wished to tease, scare or intimidate Adino. There was no evidence that Mario wanted to fire the rifle. Mario was crying and distraught when the police arrived; he and Adino were friends as well as cousins. RP 99-100, 133, 142-143, 177-178, 198.

The prosecutor's misstatement of the law was in arguing that the failure to do what was necessary to avoid an accident with the rifle constituted reckless behavior and, in effect, that any injury with a gun is per se reckless because any mishandling of a gun creates a substantial risk of

harm. RP 273, 275-276. The prosecutor also asked the jury to presume that Mario must have pointed the rifle at Adino from the fact that Adino was shot, where the only inference arising from the shooting is that the gun was pointed at Adino whether or not Mario was aware that it was.⁵ RP 273.

In fact, the jury was required to acquit Mario unless the state established beyond a reasonable doubt that Mario *knew of* and disregarded a substantial risk that a wrongful act might occur and his disregarding of such substantial risk was a gross deviation from the conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010; RCW 9A.32.060; CP 124 (Court's Instruction 8).

The prosecutor misstated the law by arguing that the definition of recklessness created what was in effect a mandatory presumption that failure to avoid an accident with a rifle, given the inherent dangerousness of such a weapon, in itself established recklessness. Mandatory presumptions, presumptions that require the jury to find a

⁵ Under the state's theory Vice President Cheney pointed a gun at his hunting partner and if the wound to his fellow hunter had been fatal, he would have been guilty of manslaughter.

presumed fact from a proven fact, are, however, constitutionally prohibited because they may allow the state to obtain a conviction without proving all of the necessary elements beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 523-524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

For a relevant example, the Ninth Circuit Court of Appeals, in Schwendeman v. Wallenstein, 971 F.2d 313 (9th Cir. 1992), held to be unconstitutional an instruction which permitted the jury to infer recklessness from evidence of speeding. The Ninth Circuit concluded that the instruction in effect told the jurors that they could ignore all of the other evidence and find that the evidence of speeding alone was enough to convict Schwendeman of reckless driving. Schwendeman, 971 F.2d at 316. In State v. Delmarter, 68 Wn. App. 770, 784, 845 P.2d 1340 (1993), the Washington Court of Appeals similarly concluded that the reckless driving instruction was unconstitutional because it created at least an alternative basis for finding an element of the crime charged.

Here, the issue is not an erroneous instruction, but a misstatement of the law by the prosecutor during closing argument. Had the jury

been instructed as the prosecutor argued -- that recklessness could be inferred from not practicing proper gun safety -- it would have been an unconstitutional mandatory presumption. Therefore it was a misstatement of the law and an improper argument.

Given the absence of proof of any kind of intent to injure or fire the weapon, the prosecutor's misstatement of the law likely convinced jurors that the fact that Adino was shot alone was sufficient to convict Mario and to prove that the incident was not an accident. In effect, the jurors were presented with a tautology -- if one follows the proper rules one will not accidentally shoot someone and, therefore, if someone is shot it must be, given the potential for harm from a gun, because the person was reckless. Cars like guns have a tremendous potential for causing serious injury, but even driving above the speed limit deemed by the Legislature to be safe does not conclusively establish recklessness. Given the prosecutor's misstatement of the law relevant to the element of recklessness, Mario Sanchez's conviction should be reversed and remanded.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT

MARIO SANCHEZ'S MANSLAUGHTER CONVICTION.

There was insufficient evidence introduced at trial to establish Mario Sanchez's guilt beyond a reasonable doubt of manslaughter. The evidence was insufficient to establish that he knew of and disregarded a substantial risk that he might shoot Adino. While clearly Mario admitted fatally shooting his cousin Adino with a rifle, the evidence did not establish that Mario acted with awareness that he might shoot Adino and disregarded that risk. As the prosecutor implicitly admitted during closing argument, there was simply no evidence to explain why the shot was fired or why the gun was in a position to hit Adino at the time it was fired. RP 275-276. It was undisputed at trial that there was no animosity between Adino and Mario. There was no evidence that they were acting irresponsibly with the rifle. Moreover, the evidence established that Mario was not aware that there was a round in the chamber or that the safety was off. The prosecutor introduced his statements at trial as part of the state's case and his statements on these points were unchallenged.

Due process, under the state and federal constitution, requires that the state prove beyond

a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here, there was clearly a tragedy and concern that it should never have happened. But these facts are insufficient to establish the mental element of the crime of first degree manslaughter. For that reason, Mario's conviction should be set aside and vacated for insufficiency of the evidence to support it.

3. THE TRIAL COURT ERRED IN IMPOSING A FIREARM SENTENCING ENHANCEMENT.

Mario Sanchez's firearm enhancement should be vacated even though the jury found that he was armed with a firearm. This is because the Legislature failed to enact a procedure authorizing the jury to

make such a finding. In RCW 9.94A.602, the Legislature set out a procedure for alleging and submitting to a jury the issue of whether the defendant was armed with a deadly weapon. In contrast, no procedure has ever been enacted for alleging and submitting to the jury the question of whether the defendant was armed with a firearm. Absent such an enacted procedure, neither the trial court nor the appellate court has the power to create a procedure. State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980); State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

In State v. Recuenco, 154 Wn.2d 156, 164, 110 P.3d 188 (2005), the Washington Supreme Court reversed the trial court's imposition of a firearm enhancement where the jury found only that Mr. Recuenco was armed with a deadly weapon. The Recuenco court also held, however, that since there was no procedure for imposing a firearm enhancement, the firearm enhancement had to be vacated. As in Recuenco, since there is no procedure for imposing a firearm enhancement, it is an illegal sentence which must be vacated. Submitting the issue to the jury was an unauthorized procedure.

Although the United States Supreme Court held

on review that the error in State v. Recuenco could be harmless, the Court did not decide the issue of the absence of a procedure by which to submit the question to the jury. Washington v. Recuenco, No. 05-83 (June 26, 2006), slip op. at 3-4, n. 1 ("Respondent's argument that, as a matter of state law, the Blakely v. Washington, 542 U.S. 296 (2004), error was not harmless remains open to him on remand"). Therefore the decision by the Washington Supreme Court is still controlling on the issue. Accordingly Mario Sanchez's firearm enhancement should be vacated.

D. CONCLUSION

Appellant respectfully submits that his judgment and sentence should be reversed and dismissed because of the insufficiency of the evidence to support conviction. At the least, his conviction should be reversed and the case remanded for retrial because of the prosecutor's misstatement of the law in closing argument.

DATED this 1st day of ~~July~~^{August}, 2006.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that on the 15th day of August, 2006, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via prepaid first class mail:

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