



TABLE OF CONTENTS

	Page
A. ARGUMENT IN REPLY . . . . .	1
1. THE STATE'S STATEMENT OF THE CASE IGNORES THE EVIDENCE THAT THE SHOOTING WAS A TRAGIC ACCIDENT, NOT A CRIME . . . . .	1
2. THE PROSECUTOR MISSTATED THE LAW IN CLOSING ARGUMENT . . . . .	2
3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MARIO SANCHEZ'S MANSLAUGHTER CONVICTION . . . . .	4
4. THE TRIAL COURT ERRED IN IMPOSING A FIREARM SENTENCING ENHANCEMENT . . . . .	5
B. CONCLUSION . . . . .	7

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Louis,</u> 155 Wn.2d 563, 102 P.3d 936 (2005) . . . . .	5
<u>State v. Monday,</u> 85 Wn.2d 906, 540 P.2d 416 (1975) . . . . .	6
<u>State v. Theroff,</u> 33 Wn. App. 741, 657 P.2d 800 (1983) . . . . .	6
<u>State v. Willis,</u> 153 Wn.2d 366, 103 P.2d 1213 (2005) . . . . .	5
<u>State v. Wingate,</u> 155 Wn.2d 817, 122 P.3d 908 (2005) . . . . .	5
 <u>RULES, STATUTES AND OTHERS</u>	
RCW 2.23.150 . . . . .	5
RCW 9.94A.602 . . . . .	5, 6

**A. ARGUMENT IN REPLY**

**1. THE STATE'S STATEMENT OF THE CASE IGNORES THE EVIDENCE THAT THE SHOOTING WAS A TRAGIC ACCIDENT, NOT A CRIME.**

The state omits from its Statement of the Case the facts which show that the shooting of Adino Sanchez by Mario Sanchez was a tragic accident, not a crime.

First, it was undisputed at trial that Adino and Mario were friends as well as cousins. RP 99-100, 177-178. Mario was distraught and crying when the police arrived. RP 133, 142-143, 198. The state was unable to introduce any evidence of animosity between the two in general or at the time of the shooting. There was not even a hint of a motive.

Second, although Mario was initially untruthful about Jesus Torres being in the room, Torres had no involvement in the shooting. Mario never tried to flee and admitted to the police at the outset that he was holding the rifle at the time of the shooting. RP 142. Mario explained in his second interview that he believed the rifle was on safety, and explained that he had been afraid at the time of the first interview to say the clip was in the gun because he feared the police would think he meant to

shoot it. Trial Ex. 10 (4-5, 8-10).

The trial deputy implicitly admitted the absence of evidence in closing argument by telling the jurors that the shooting was reckless just because it happened--whether Mario intentionally pointed the rifle or not. RP 271-272.

**2. THE PROSECUTOR MISSTATED THE LAW IN CLOSING ARGUMENT.**

Mario Sanchez is challenging the prosecutor's misstatement of the law in arguing that any injury caused with a gun is per se reckless because any mishandling of a gun creates a substantial risk of harm. RP 273, 275-276. In response, the state sets forth an extended quote from the prosecutor's closing argument. Brief of Respondent (BOR) at 14-15. But the prosecutor omits the direct language of the prosecutor which establishes Mario's issue.

The prosecutor argues first that the way to avoid a fatal shooting was to not play with the assault rifle, not to point it at a human, not to pull the trigger, not to assume it is unloaded, not to assume the safety is on, and to read the manual. RP 272. The prosecutor then equates not doing these things with reckless behavior: "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. . . ." RP 272 The prosecutor then continued:

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 (emphasis added). The prosecutor argued that when you handle a gun there is substantial risk:

So let's address that issue of whether or not the defendant knew of and then disregarded a substantial risk. *That [the rifle], in itself, is a substantial risk. That's an AR-15.* We all know what they're designed for. We know that they kill. And the defendant, like anybody else, knew that when you're handling the gun, there's a substantial risk.

RP 275-266 (emphasis added).

This is not the law. The law is that 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. RCW 9A.08.010; RCW 9A.32.060; CP 124. The prosecutor misstated the law by arguing that the definition of recklessness created a mandatory presumption that failure to avoid an accident with a rifle, given the inherent dangerousness of such a weapon, in itself,

established recklessness. The prosecutor misstated the law by arguing that if one handles a gun properly no one will be hurt; and, therefore, it can be assumed that if someone is shot, it is because the person handling the rifle was reckless.

Given the complete absence of proof of intent to injure or fire the rifle, the prosecutor's misstatement of the law likely convinced jurors that the fact that Adino was shot was sufficient alone to convict Mario and to prove that the incident was not an accident. Given this misstatement of the law, Mario Sanchez's conviction should be reversed.

**3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MARIO SANCHEZ'S MANSLAUGHTER CONVICTION.**

The state agrees that "the evidence indicates that the defendant had no desire or intention to kill his cousin." BOR 21. What was also missing from the evidence presented at trial was how the shot came to be fired or why the gun was in a position to hit Adino when it was fired.

As at trial, the state argues that (1) having the gun in a small area created a dangerous situation and (2) there were many things that Mario Sanchez could have done to prevent the accident. BOR 19-20. But these things alone do not establish that

Mario was aware of and disregarded a substantial risk. It is not enough that Mario did not prevent the shooting. His conviction for manslaughter should be reversed and dismissed.

**4. THE TRIAL COURT ERRED IN IMPOSING A FIREARM SENTENCING ENHANCEMENT.**

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. For this reason, Mario Sanchez's firearm enhancement should be vacated.

The state cites three cases, State v. Wingate, 155 Wn.2d 817, 122 P.3d 908 (2005); State v. Louis, 155 Wn.2d 563, 102 P.3d 936 (2005); and State v. Willis, 153 Wn.2d 366, 103 P.2d 1213 (2005), for the proposition that the Washington Supreme Court has affirmed alleging and submitting the issue of whether the defendant was armed with a firearm while committing the crime. BOR 23. None of those cases so hold. Wingate and Louis never address the firearm issue at all. In Willis, interestingly, the court looked only at a *deadly weapon* enhancement,

although the particular deadly weapon happened to be a firearm.

Second, nothing in RCW 2.23.150 authorizes a trial court to fashion procedures in the absence of either a statute or the Constitution conferring jurisdiction on the court. This is what is missing here--a statute, such as RCW 9.94A.602, authorizing the state to allege a firearm enhancement or the court to submit the issue to a jury or setting the burden of proof. That a penalty was set for a firearm enhancement is not sufficient any more than setting a penalty, without more, can establish a substantive crime. It is the function of the Legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). "If statutory sentencing procedures are not followed, the action of the court is void." State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983) (holding that the court had no authority to require the defendant to pay \$1,000 fine to a private charity).

Moreover, a procedure for imposing an enhanced punishment for a firearm conflicts with RCW 9.94A.602, the deadly weapon enhancement statute, since RCW 9.94A.602 includes a firearm as a deadly

weapon and sets a lesser penalty for the deadly weapon enhancement.

The Legislature has not created a procedure for obtaining a firearm enhancement, rather than a deadly weapon enhancement. Therefore, Mario Sanchez's firearm enhancement should be vacated.

**B. 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 9<sup>th</sup> day of November, 2006.

Respectfully submitted,

  
RITA J. GRIFFITH, WSBA 14360  
Attorney for Appellant

Certification of Service

I, Rita Griffith, attorney for Mario Sanchez, certify that on November 9, 2006, I mailed to each of the following persons a copy of the document on which this certification appears:

Kathleen Proctor  
Pierce County Prosecutor's Office  
930 Tacoma Ave. S., Rm. 946  
Tacoma, WA 98402

Mario Sanchez  
893732  
Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

Dated this 9<sup>th</sup> day of November, 2006.

  
\_\_\_\_\_  
Rita J. Griffith Seattle, WA  
WSBA no. 14360

FILED  
COURT RECORDS  
NOV 13 PM 1:30  
STATE OF WASHINGTON  
CLERK