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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence of the weapon seized as a result of an unreasonable intrusion into Hartzell's private affairs that amounted to a constitutionally impermissible search under article I, section 7 of the Washington Constitution.
02. In denying Hartzell's motion to suppress evidence, the trial court erred in entering Findings of Fact 5-10, 12-13, as fully set forth herein at pages 4-6.
03. In denying Hartzell's motion to suppress evidence, the trial court erred in entering Conclusions of Law 1-2, as fully set forth herein at page 6.
04. The trial court erred in admitting evidence of Hartzell's alleged involvement in a shooting incident occurring in another county 28 days after the shooting in Thurston County, which included testimonial statements admitted after the court had improperly ruled that Hartzell had opened the door and that violated Hartzell's constitutional right of confrontation.
05. The trial court erred in giving instruction 27, a purported limiting instruction, that failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes.
06. The trial court erred in giving instruction 27, a purported limiting instruction, that improperly commented on the evidence in violation of Washington Constitution article IV, section 16.
07. The trial court erred in allowing the prosecutor

to shift the burden to Hartzell to present evidence and to imply facts not in evidence.

08. The trial court erred in failing to dismiss Hartzell's convictions where the cumulative effect of the claimed errors materially affected the outcome of the trial.
09. The trial court erred in imposing a charged fire-arm sentence enhancement where the jury was instructed on and found only a deadly weapon sentence enhancement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in failing to suppress evidence of the weapon seized as a result of a unreasonable intrusion into Hartzell's private affairs that amounted to a constitutionally impermissible search under article I, section 7 of the Washington Constitution? [Assignments Error Nos. 1-3].
02. Whether the trial court erred in admitting evidence of Hartzell's alleged involvement in a shooting incident occurring in another county 28 days after the shooting in Thurston County, which included testimonial statements admitted after the court had improperly ruled that Hartzell had opened the door and that violated Hartzell's constitutional right of confrontation? [Assignment of Error No. 4].
03. Whether a purported limiting instruction that informs the jury that it may consider evidence from other jurisdictions as establishing an association of the defendants to the crimes charged but fails to eliminate the possibility that the jury will consider the

evidence for improper propensity purposes is inadequate and constitutes a comment on the evidence? [Assignments of Error Nos. 5-6].

04. Whether the prosecutor's flagrant and ill-intentioned closing argument, which shifted the burden to Hartzell to present evidence and impermissibly implied facts not in evidence, affected the jury's verdict and destroyed the possibility that even a precise objection or a carefully worded curative instruction would have obviated the resultant prejudice? [Assignment of Error No. 7].
05. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Hartzell's convictions? [Assignment of Error No. 8].
06. Whether the trial court's imposition of a charged firearm enhancement after the jury was instructed on and found only a deadly weapon enhancement is harmless error under Washington's right to jury fact-finding, embodied in article I, sections 21 and 22, which is broader than the corresponding Sixth Amendment right? [Assignment of Error No. 9].

C. STATEMENT OF THE CASE

01. Procedural Facts

Charles C. Hartzell IV (Hartzell) was charged by information filed in Thurston County Superior Court on October 15, 2007, with assault in the second degree while armed with a firearm, Count I, drive-by shooting, Count II, and unlawful possession of a firearm in the

first degree, Count III, contrary to RCWs 9A.36.021(1)(c), 9.94A.535/602, 9A.36.045(1) and 9.41.040(1)(a). [CP 3-4].

The court denied Hartzell's pretrial motion to suppress evidence pursuant to CrR 3.6.

At the conclusion of the hearing the Court made this Finding of Fact:

1. On May 5, 2007, at 10:06 p.m. Kitsap County Deputy Sheriff Daniel Twomey was dispatched to a domestic violence call emanating from 14020 Sidney Road SW. The call concerned threats to kill and a suspect who was armed with a handgun.
2. Coincidentally, Twomey happened to be a short distance away from the Sidney Road address and he pulled into the driveway. As he pulled in, a Toyota Rav 4 stopped at the driveway and Twomey was approached (on foot) by a blue jean jacketed male ultimately identified as the defendant.
3. The defendant initiated the conversation with Twomey by announcing that his girlfriend was "acting crazy", that she had been given a pill by "Randy", she was acting weird, they argued, she jumped out of the car, and he was looking for her.
4. The defendant also related that he had been at a Comfort Inn hotel with his girlfriend "Sarah" and "Randy", and that "Randy" also got out of the car.
5. Deputy Twomey made contact with Sarah inside the residence at 14020 Sidney Road SW. She was described as "crying and gasping almost uncontrollably". She described events that she said occurred earlier: She had been at the Comfort Inn

with the defendant and “Randy”. Sarah and the defendant argued and he threatened to slap her. Randy had a gun, she said, and she was threatened – she would be shot if she treated Hartzell “like a punk”. After she was in the car she jumped out. She also said that before she jumped out she heard a gunshot. She did not know who fired it.

6. Based on the totality of the circumstances, Deputy Twomey arrested Hartzell for Harassment. Miranda warnings were given to the defendant and he agreed to talk with the Deputy as long as he could stand outside the patrol car. This request was granted and the defendant made statements to the police.

7. During their contacts with the defendant, deputies noticed an exit type bullet hole protruding from the passenger side door of the Toyota Rav 4. On the passenger floorboard officers saw a cartridge case (spent bullet casing). These items were not immediately seized.

8. The officers requested a K-9 search dog in order to assist in their search of the vicinity for a gun. Hartzell denied any knowledge of a gun when officers asked him about it (“in order to “narrow” their search).

9. Deputy Aaron Baker, allowed his K-9, “Ryker” to jump on the passenger door and stick his nose into the open window of the vehicle. (The window was already in a “down” position). The dog put his nose in the vicinity of the window and Deputy Baker commanded: “find it”.

10. Having gained a scent, Ryker tracked down the roadway approximately 50 yards and located a .357 semi-automatic pistol in the brush.

11. Later, a search warrant was procured and executed on the vehicle (Ex. 1 at this hearing).

12. The only issue raised by the defendant's motion to suppress is the propriety of the "dog sniff" in the vicinity of the vehicle's open window.

13. It appears to the court that the application of the dog's nose to the vicinity of the window in order that whatever scent emanated from within to without the vehicle is akin to an officer's use of a flashlight to see in the dark.

Based upon the foregoing, the Court made these Conclusions of Law:

1. The activities of the dog – putting his nose in or within the vicinity of an open window, did not intrude upon any privacy right of the defendant. A person has no privacy interest in the open air about an open window of a parked vehicle.

2. The officers and K-9 were in a place they had a right to be – in a lawful vantage point from which to make observations. They made "open view" observations.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the motion to suppress is denied.

[CP 138-40].

Trial to a jury commenced on February 25, 2008, the Honorable Chris Wickham presiding.¹ The jury returned verdicts of guilty as charged for Counts I (assault), including enhancement, and III (unlawful

¹ Hartzell was tried with his co-defendant Jeremy Tieskotter.

possession of a firearm) but was unable to reach agreement on the other charge (drive-by shooting). [CP 204-207].

Hartzell was sentenced within his standard range and timely notice of this appeal followed. [CP 208, 220-234].

02. Substantive Facts: CrR 3.6 Hearing

On May 5, 2007, at approximately 10 p.m., Deputy Sheriff Daniel Twomey responded to a reported domestic violence incident. [RP 02/04/08 18]. “There was a female calling from an address she was unfamiliar with(,)” claiming she “had been in a domestic dispute with her boyfriend who apparently had threatened to kill her and was armed with a handgun.” [RP 02/04/08 19]. By chance, Twomey was driving by the address of the call and pulled into the driveway. [RP 02/04/08 18, 43-44].

A Toyota drove onto the shoulder of the roadway behind Twomey and Hartzell got out and “walked down and met (Twomey) at (his) patrol car.” [RP 02/04/08 20, 47]. Hartzell volunteered that he was “looking for his girlfriend” who was “was acting crazy and had jumped out of the car.” [RP 02/04/08 22]. He thought her behavior was the result of “someone” giving “her a blue pill that he thought was Xanax(,)” which “made her act crazy.” [RP 02/04/08 23].

He had his hand, specifically his left hand, in his pocket, and had taken it out and put it back in and then taken it out and put it back in his pocket after I'd asked him to keep his hand out of his pocket.

[RP 02/04/08 24].

Concerned that Hartzell might be armed with a handgun, Twomey told him he was going to frisk him for weapons.

(B)eing by myself, you know, in a rural area. I know my backup is still several minutes out, you know, dealing with, you know, what's dispatched as a violent situation, most definitely concerned for my safety, and I told him I was gonna pat him down because of it.

[RP 02/04/08 25].

During the pat-down, after Hartzell tried to jerk his left hand out of Twomey's grip, he was put in handcuffs and told he was being detained for Twomey's safety before being seated in the patrol car. [RP 02/04/08 25]. He was not "free to leave." [RP 02/04/08 47]. No weapon was found on Hartzell.

When asked his name, Hartzell told Twomey it "was Anthony Avery and provided ... a date of birth of July 15th, 1983." [RP 02/04/0826]. Hartzell went on to explain that he had been "with his girlfriend Sarah" at a local hotel [RP 02/04/08 26], where they had been sent "by a guy named Juan to pick up a rental car(,)" and that "somewhere around the general area where we were she had gotten out of the car." [RP

02/04/08 27]. He also said that he wanted to speak with his attorney, who “was a Washington State Supreme Court Justice.” [RP 02/04/08 27].

At about this time, Twomey’s backup arrived, which freed him to contact Sarah Dodge in the nearby residence. [RP 02/04/08 28]. She was “crying almost uncontrollably [RP 02/04/08 29]” and told Twomey that she had been dating Hartzell, whom she referred to by several names, for about five months, and that they had gotten into an argument at a local hotel, where she had been with Hartzell and his friend Randy, who had a gun, and that she thought Hartzell was going to shoot her with the gun or kill her with his hands. [RP 02/04/08 29-30, 42]. She left the hotel with Hartzell and Randy and got into the back seat of the Toyota now parked on the roadway behind Twomey’s patrol vehicle. [RP 02/04/08 31]. Based on this information, Hartzell was placed “under arrest for domestic violence, harassment.” [RP 02/04/08 32].

Hartzell was advised of his Miranda² warnings and agreed to talk to Twomey on the condition he could stand outside the patrol car, which was okay with the deputy. [RP 02/04/08 32-33]. Hartzell said “he wanted to set the record straight [RP 02/04/08 33]” and explained that he had gone to the hotel to rescue Sarah, who was fighting with her boyfriend Pow. [RP 02/04/08 34]. A search of Hartzell incident to his arrest produced his

² Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

proper identification, and Twomey discovered that he had outstanding warrants for his arrest. [RP 02/04/08 35, 59].

The passenger door on the Toyota indicated that a “bullet had existed the vehicle from inside out.” [RP 02/04/08 36]. It was a “fresh exit hole.” [RP 02/04/08 57]. The windows were rolled down. [RP 02/04/08 58, 71]. Twomey could see inside the car from outside. “There was a spent bullet casing lying on the passenger floorboard.” [RP 02/04/08 37].

Twomey then recontacted Dodge, who gave him some unspecified information about a handgun being fired in the car. [RP 02/04/08 38].

At approximately 11:30 p.m., Deputy Aaron Baker arrived at the scene with his certified K-9 search dog, Ryker, to search the area for a gun, which the dog did by tracking human scent. [RP 02/04/08 64-68, 75-76]. He had the dog “jump up on the passenger side of the (Toyota)” and then “sniff around for a second, gave him the find command, and then followed along behind him and let him work the ditch area and the brush.” [RP 02/04/08 70]. Baker could not recall if Ryker’s nose broke the plain of the open window of the vehicle, though he admitted his police report said he had let the dog ‘stick his nose into the open window.’ [RP 02/04/08 72, 77-78, 80]. Within 50 to 100 yards of the Toyota, a few feet

from the road, the dog located a pistol, a .357 caliber Springfield Armory XD. [RP 02/04/08 71, 81].

A more thorough search of Hartzell before he was booked into jail produced “a .357 SIG cartridge with a black marker marked on the base of the cartridge” located in “the corner seam of his right jacket pocket(.)” [RP 02/04/08 39].

A search warrant for the Toyota was executed the following morning. [RP 02/04/08 39-40, 52].

03. Substantive Facts: Trial

On April 7, 2007, at approximately 5:00 in the morning, Michael Vernam woke up to the sound of multiple gunshots. [RP TRIAL VOL. I 129-130]. From his second-story window, he saw

a car about 70 yards away. It was dark. All I could see was a gun firing pretty much and one person I can't identify, and then they were gone.

[RP TRIAL VOL. I 130].

He said there was a sunroof on the compact-sized car. [RP TRIAL VOL. I 139]. “(T)he window on the top of the vehicle leaves a dark remnant close to the rest of the car that's colored. So I think that's what I saw.” [RP TRIAL VOL. I 138]. On the morning of the shooting, he had told the police that he had seen two male heads sticking out of a sunroof firing. [RP TRIAL VOL. I 147-48]. “I remember seeing a sunroof.” [RP

TRIAL VOL. I 149]. “I could have been mistaken.” [RP TRIAL VOL. I 149]. When asked if he was sure of it (there being a sunroof) right now, he responded: “I’m sure.” [RP TRIAL VOL. I 150].

11 spent cartridge cases of two different calibers were found on the street in the vicinity of the shooting: nine .357 SIG and two 9mm Luger. [RP TRIAL VOL. I 72-85; RP TRIAL VOL. III 353]. The nine .357 SIG cartridge cases were fired by the firearm located in the area of the vehicle Hartzell was driving at the time of his arrest the following May 5th. [RP TRIAL VOL. III 457]. The cartridge case found inside the vehicle was also determined to have been fired by the same weapon. [RP TRIAL VOL. II 264; RP TRIAL VOL. III 461]. The two 9mm cartridge cases were fired by a firearm that Tieskotter admitted to having fired on another occasion the following April 11th before either destroying or giving the weapon away. [RP TRIAL VOL. II 329-30, 334, 360-64; RP TRIAL VOL. III 454, 489-95].

Nine bullet holes were found in the exterior of a nearby two-story dwelling occupied by Kimberly Hoage and her daughter. [RP TRIAL VOL. I 90-93]. The bullets had entered various living areas, including the kitchen and master bedroom, striking the headboard on the waterbed where Hoage and her daughter had been sleeping. [RP TRIAL VOL. I 103-118, 122; RP TRIAL VOL. II 380-83].

Hoage first met Hartzell and Tieskotter about two weeks before the shooting, and Hartzell had stayed at her place with his girlfriend for about a week until Hoage had asked them to leave a couple of days before the shooting because “they were doing illegal things” involving forgery. [RP TRIAL VOL. II 386-89, 392]. They parted on good terms. [RP TRIAL VOL. II 394].

Though, according to Hoage, Hartzell had left with his laptop, he called her sometime before the shooting and said he had left it at her house. [RP TRIAL VOL. II 394-96]. After the shooting, Hoage received a text message from Hartzell: “(I)t said something about being cold when there was holes in my house, and he wanted a thousand dollars, his laptop back, and he seals leaks.” [RP TRIAL VOL. II 396]. Hoage testified under a use immunity agreement because of alleged forgery taking place in her house. [RP TRIAL VOL. II 397-98].

Twomey testified on direct as he did at the earlier hearings [RP TRIAL VOL. II 236-278], this time asserting that only Hartzell’s left hand was going in and out of his pocket. [RP TRIAL VOL. II 243-44].

Items seized from the Toyota Hartzell had been driving on May 5th included a box of .357 SIG ammunition, a shoulder holster capable of holding the gun found outside the vehicle, and a tool chest containing paperwork relating to Hartzell and a collection notice to Hoage. [RP

TRIAL VOL. II 262, 265, 275-77, 289; RP TRIAL VOL. III 498, 503, 506].

During cross-examination, in an attempt to overcome any inference of his association with the pistol discovered outside the Toyota, Hartzell had Twomey acknowledge that Dodge had said that only Randy had the gun [RP TRIAL VOL. II 283, 288], that after it was fired inside the vehicle, Randy — who was sitting in the area where the spent cartridge was later recovered — had asked her if “she had heard that” before telling her to ‘(s)hut the fuck up [RP TRIAL VOL. II 291-92](,)’ and that the retrieved gun matched her description of the weapon. [RP TRIAL VOL. II 284].

In re-direct, Twomey was permitted to testify to what else Dodge had told him about her allegations preceding Hartzell’s arrest, starting with her claim that she had been threatened that Hartzell was going to kill her with his hands or shoot her. [RP TRIAL VOL. III 473-74].

Randy delivered the threat, although she said that Hartzell was corroborating with Randy and was right behind him agreeing with everything Randy was saying while the threats were being made.

[RP TRIAL VOL. III 474].

Dodge also explained that before she jumped out of the car, Hartzell had told her: 'I hope you die, so I don't have to kill you.' [RP TRIAL VOL. III 476].

Deputy Baker testified similar to his CrR 3.6 testimony, this time saying that his search dog found the firearm about 100 to 130 yards from the Toyota. [RP TRIAL VOL. III 521, 527]. Hartzell's mother claimed that her son was with her cleaning a restaurant at the time of the shooting. [RP TRIAL VOL. IV 607].

Hartzell stipulated that prior to April 7, 2007, he had been convicted of a serious offense. [RP TRIAL VOL. III 570; CP 161].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OF THE WEAPON SEIZED AS A RESULT OF AN UNREASONABLE INTRUSION INTO HARTZELL'S PRIVATE AFFAIRS THAT AMOUNTED TO A CONSTITUTIONALLY IMPERMISSIBLE SEARCH UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and article I, section 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917

P.2d 563 (1996). In determining whether the exigencies of a particular case permit the police to conduct a warrantless search, “[t]he totality of circumstances said to justify a warrantless securing or search ... will be closely scrutinized.” State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978). Under Const. article I, section 7 and the Fourth Amendment, once challenged, the burden shifts to the State to justify a warrantless search. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 447, 451, 909 P.2d 293 (1996).

Article I, section 7 provides greater protection to the privacy of individuals in automobiles than the Fourth amendment. State v. Mendez, 137 Wn.2d 208, 219-20, 970 P.2d 722 (1999). Under this article of our state constitution, this court must determine “whether the State unreasonably intruded into the defendant’s ‘private affairs.’” Mendez, 137 Wn.2d at 219 (quoting State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)).

An unreasonable intrusion into a person’s private affairs does not occur when an item is observable from an unprotected area without the use of sense enhancement devices. State v. Dearman, 92 Wn. App. 630, 633-34, 962 P.2d 850, review denied, 137 Wn.2d 980 (1999) (citing State v. Young, 123 Wn.2d 173, 182-83, 867 P.2d 593 (1994)) (infrared device exceeds limits on surveillance under Washington law because it allows

police to detect heat distribution patterns undetectable to the naked eye or other senses). In Dearman, Division I of this court found, under article I, section 7, canine sniffs of a defendant's home unduly intrusive. Dearman, 92 Wn. App. at 635.

Here, Deputy Baker's use of his certified K-9 search dog's superior olfactory abilities to detect the tracking scent after the dog had been allowed to 'jump up on the passenger door and stick his nose into the open window [RP 02/04/08 77],' constituted a search requiring a search warrant. This is not a close issue; it is what Baker stated in his police report: the dog stuck 'his nose into the open window.' It was nothing less than an unconstitutional endeavor to discover evidence of a crime. The dog was then given the "find command" and the K-9 search shortly found the weapon that was subsequently linked to the shooting in Thurston County, which would not have been seized sans the dog's superior olfactory senses and access into the vehicle's open window. As in Dearman, supra, this exceeded the limits under Washington law and amounted to a constitutionally impermissible warrantless search in violation of article I, section 7 of the Washington Constitution because it allowed the police to detect the tracking scent, which was otherwise undetectable to human senses.

Under these facts, the K-9 sniff was unduly intrusive and constituted a constitutionally impermissible search under article I, section 7 of the Washington Constitution. The court erred in denying Hartzell's motion to suppress evidence of the weapon, with the result that his convictions should be reversed and dismissed with prejudice.

02. IT WAS REVERSIBLE ERROR FOR THE THE TRIAL COURT TO ADMIT EVIDENCE OF HARTZELL'S ALLEGED INVOLVEMENT IN A SHOOTING INCIDENT OCCURRING IN ANOTHER COUNTY 28 DAYS AFTER THE SHOOTING IN THURSTON COUNTY, WHICH INCLUDED TESTIMONIAL STATEMENTS ADMITTED AFTER THE COURT HAD IMPROPERLY RULED THAT HARTZELL HAD OPENED THE DOOR AND THAT VIOLATED HARTZELL'S CONSTITUTIONAL RIGHT OF CONFRONTATION.

02.1 Review: Procedural History

On the first day of trial, the prosecutor informed the court that he would be offering evidence from Kitsap County against Hartzell that would bring ER 404(b) into play. [RP TRIAL VOL. I 10]. This was to be limited to physical evidence of the pistol found outside the vehicle Hartzell had been driving, the ammunition taken from Hartzell and the vehicle, and information relating to Kimberly Hoage found inside the tool chest located within the vehicle. [RP TRIAL VOL. I 18]. Over objection, the court ruled that it "would allow the State to offer

that evidence.” [RP TRIAL VOL. I 26]. “(T)he jury could consider that as relevant on identification, identifying (Hartzell) on the incident alleged in Thurston County....” [RP TRIAL VOL. I 26]. There was to be no mention of the domestic violence complaint. [RP TRIAL VOL. I 18].

Following the cross-examination of Deputy Twomey, the prosecutor argued that “the door has been opened by Mr. Hartzell concerning the remarks made by Sarah Dodge to Dep. Twomey....” [RP TRIAL VOL. II 308]. The court denied Hartzell’s objection to this evidence [RP TRIAL VOL. II 310-16], and Twomey was permitted to relate Dodge’s domestic violence complaints that she had been threatened that Hartzell was going to kill her with his hands or shoot her and that he had told her he hoped she would die in order to save him the trouble. [RP TRIAL VOL. III 473-76].

02.2 Argument

02.2.1 Weapon

There is no issue that the weapon found in Kitsap County was not related to the shooting in Thurston County by the forensic evidence presented at trial. What is at issue is Hartzell’s connection, if any, to this weapon in view of the admissibility of other evidence admitted from Kitsap County.

The admission of other crimes, wrongs or acts is governed by ER 404(b). Under the rule, the court is prohibited from admitting “(e)vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” This prohibition is designed to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person who would be likely to commit the crime charged. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) evidence may be admissible for a limited purpose, “such as proof of ... identity.” Such evidence, however, is relevant to the current charge “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.” State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (quoting State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994)). To be admissible, the prior act must be of such a high degree of similarity “as to mark the handiwork of the accused.” State v. Laureano, 101 Wn.2d 745, 765, 682 P.2d 889 (1984). The modus operandi “‘must be so unusual and distinctive as to be like a signature.’” State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting Edward W. Cleary, McCormick’s Handbook of the Law of Evidence § 190, at 449 (2d ed. 1972)).

Before admitting ER 404(b) evidence, a trial court must

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d at 642 (citing State v. Lough, 125 Wn.2d at 853). To avoid error, the trial court must conduct this analysis on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). “In doubtful cases, the evidence should be excluded.” State v. Baker, 89 Wn. App. 726, 732, 950 P.2d 486 (1997). A limiting instruction must also be given if the evidence is admitted. State v. Lough, 125 Wn.2d at 864.

The trial court’s decision to admit evidence under ER 404(b) will be overturned for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Lack of adherence to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial court admitted the weapon as relevant on the issue of “identifying” Hartzell as one of the participants in the prior shooting in Thurston County. [RP TRIAL VOL. I 26]. But this was done without sufficient proof of Hartzell’s connection to the weapon in Kitsap County or adherence to the requirement of weighing the probative value against

the prejudicial effect of admitting the evidence on the record. Thang and Neal. Hartzell never contested that the weapon was located some 100 to 130 yards from the vehicle he had been driving. [RP TRIAL VOL. III 521, 527]. His concern was that the prosecutor was hopeful that the jury would “infer that I was the possessor of that firearm; therefore 28 days before possessing the firearm in Kitsap County, I could have committed the shooting in Thurston County.” [RP TRIAL VOL. I 23]. No evidence was presented that Hartzell ever possessed the weapon in Kitsap County, and it was uncontested that he was never convicted of charges of possessing it there. “They dropped the charges.” [RP TRIAL VOL. I 24].

Also, no evidence was proffered demonstrating that the weapon or the circumstances attendant to its alleged use in Kitsap County by statements attributed to Sarah Dodge were so unique (Thang) or so unusual and distinctive so as to evince a signature-like quality (Coe) or the mark or handiwork (Laureano) of any one person.

02.2.2 Testimonial Evidence

Hartzell did not open the door to the admissibility of statements made by Dodge to Twomey. The “opening the door” doctrine, which pertains to the admissibility of evidence, is used in two contexts:

(1) party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

State v. Jones, 144 Wn. App. 284, 298 183 P.3d 307 (2008) (quoting Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007)).

During the cross examination of Twomey, in an attempt to overcome the inferences generated by his direct examination that Hartzell was somehow connected to the weapon found outside the vehicle, Hartzell asked and Twomey acknowledged that Dodge had never said that anyone other than Randy Perry had ever possessed or fired the weapon. [RP TRIAL VOL. II 283-84, 288, 291-92]. This questioning was in response to the State's evidence and was not a subject that Hartzell introduced or raised for the first time.

In any event, this "opening the door doctrine," which pertains to the admissibility of evidence, must give way to constitutional concerns, such as the right to a fair trial. See State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (constitutional concerns trump strict application of court rules).

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly, article I, section 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face.” Const. art. I, § 22 (amend. 10).

The right to confront adverse witnesses is an issue of constitutional magnitude, which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999). And even if an out-of-court statement satisfies the requirements of the Rules of Evidence, it is only admissible against a defendant if it also satisfies the confrontation clause. State v. Whisler, 61 Wn. App. 126, 132, 810 P.2d 540 (1991) (citing State v. Palomo, 113 Wn.2d 789, 794, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990)).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment’s Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59; State v. Price, 158 Wn.2d 630, 639, 146 P.3d 2283 (2006).

There can be no serious contention that Dodge was unavailable or that Hartzell had a prior opportunity to cross-examine her. And her statements to Twomey fall squarely within the “core” class of testimonial statements. See Crawford v. Washington, 541 U.S. at 51. They were “pretrial statements that declarants would reasonably expect to be used prosecutorially.” Id. at 51. And the “statements were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available at a later trial.” Id. at 52.

A violation of a defendant’s constitutional right of confrontation is harmless error only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Under this test, “a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing State v. Guloy, 104 Wn.2d at 426). On the other hand, the erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984).

Hartzell was charged with assaulting Hoage with a firearm, and after the jury heard Dodge's statements to Twomey regarding her fear that Hartzell would kill her with a gun, he was stripped of any chance to a fair trial, for in this context the only logical relevancy of the evidence was to show Hartzell's propensity to commit similar acts, which is itself reversible error under State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). There was a reasonable possibility that the jury used Dodge's statements to connect Hartzell to the gun recovered in Kitsap County and then to someone who is no stranger to using a gun to assault woman and finally to the person who participated in assaulting Hoage with the same weapon.

02.3 Conclusion

Evidence of the events in Kitsap County should have been excluded. As demonstrated above, the two incidents (Kitsap and Thurston) did not reflect an over-arching design or plan nor specifically a signature type crime. In this case, potential prejudice outweighed probative value. And the error was exacerbated by the purported limiting instruction, court's instruction 27, which instead of restricting the jury's consideration of the evidence, was tantamount to a comment on the evidence (see following argument). Whether viewed as an evidentiary error (outcome materially affected) or as a constitutional

error (untainted evidence is so overwhelming that it necessarily leads to a finding of guilt), the admission of the evidence here was not harmless. There is a reasonable doubt that the jury would have reached the same verdicts in the absence of the evidence at issue, and the evidence also materially affected the outcome of the trial. Hartzell is entitled to a new trial.

03. A PURPORTED LIMITING INSTRUCTION THAT INFORMS THE JURY THAT IT MAY CONSIDER EVIDENCE FROM OTHER JURISDICTIONS AS ESTABLISHING AN ASSOCIATION OF THE DEFENDANTS TO THE CRIMES CHARGED BUT FAILS TO ELIMINATE THE POSSIBILITY THAT THE JURY WILL CONSIDER THE EVIDENCE FOR IMPROPER PROPENSITY PURPOSES IS INADEQUATE AND CONSTITUTES A COMMENT ON THE EVIDENCE.

03.1 Review: Kitsap County Evidence

In addition to evidence of the retrieval of the gun and shell casings, there was testimony that approximately a month after the Thurston County shooting, Deputy Twomey had been dispatched to a “man-with-a-gun” incident involving a skin head, that Hartzell had been handcuffed before his arrest for officer safety, that Hartzell provided a false name and date of birth, that Dodge had jumped from the vehicle Hartzell had been driving after the weapon had been fired through the

passenger door, that Hartzell had told her he hoped she would die so he wouldn't have to kill her, and that she thought Hartzell was going to either shoot her or kill her with his hands. [RP TRIAL VOL. II 237-39, 244-45, 249; RP TRIAL VOL. III 473-76].

03.2 Instruction

Over objection [RP TRIAL VOL. IV 656-57], the trial court gave the following instruction:

Evidence from other jurisdictions has been admitted that you may consider as establishing an association of the defendants to the crimes charged. You must not consider this evidence for any other purpose.

[Court's Instruction 27; CP 201].

This instruction is based loosely on WPIC 5.30, which reads:

Evidence has been introduced in this case on the subject of _____ for the limited purpose of _____. You must not consider the evidence [for any other purpose] [for the purpose of _____].

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.30, at 132 (1994) (WPIC).

00.3 Overview: Comment on the Evidence

The Washington Constitution explicitly prohibits judicial comments on the evidence. Const. article IV, section 16.³ The

³ Article IV, section 16 reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Washington Supreme Court has interpreted this section as forbidding a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge’s opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726.

In Becker and Jackman, the court found improper comments warranted reversal where the comments concerned questions that were highly contested or the principal issues in the case. Jackman, 156 Wn.2d at 744 (judicial comment removed material fact from the jury’s consideration); Becker, 132 Wn.2d at 65 (finding comment “tantamount to a directed verdict”).

03.4 Argument

There are many things wrong with court's instruction 27. Despite the trial court ruling that it was "fair to the defense" because it limits "in the way 404(b) attempts to limit," the opposite is true. [RP TRIAL VOL. IV. 656].

The instruction has nothing to do with limitation. The phrase "(e)vidence from other jurisdictions," means just that: everything. The jury was allowed, indeed encouraged, to consider all of the evidence, including assertions that Hartzell was a gun-carrying skin head who thought nothing about lying to the police about his name and date of birth, who had threatened to kill his ex-girlfriend with either his hands or a gun and who had heartlessly told her he hoped she would die in order to save him the trouble as she leapt from the vehicle he was driving. The jury could then use this "evidence" to associate (read connect) Hartzell to the crimes charged. Unlike WPIC 5.30, which limits a jury's consideration of certain evidence to a specific subject, the jury here was unfettered in this regard.

Court's instruction 27 permitted the jury to structure its analysis as follows:

Does all of the evidence from Kitsap County connect Hartzell to the crimes charged? The person who did all of those things is likely to have

committed the crimes charged. Thus it is likely that Hartzell is guilty because of what happened in Kitsap County.

Rather than limit the jury's use of the evidence of the prior misconduct, court's instruction 27 focused instead on the conduct, all of it, and assumed that because he had acted similarly before, he committed the current charges. "Once a thief always a thief." See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, reviewed denied, 106 Wn.2d 1003 (1986).

Court's instruction 27 was insufficient to ensure that the evidence from Kitsap County was not improperly used to prove Hartzell's propensity to commit the crimes charged, as argued in the preceding section. See State v. Pogue, 104 Wn. App. at 985. Without an adequate limiting instruction, it was error to admit all of the evidence from Kitsap County, which requires reversal if within reasonable probability the evidence materially affected the outcome of the trial. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Given that it cannot be asserted with sufficient confidence that the jury would have found Hartzell guilty even if it did not know of all of the evidence from Kitsap County, this court must reverse Hartzell's convictions and remand for a new trial.

Also, this court should hold that court's instruction 27 was equivalent to a directed verdict, and violated the Washington Constitution's prohibition on judicial comments on the evidence.

The instruction not only permitted the jury to use all of the evidence from Kitsap County without discernible limitation, but also to consider the evidence "as establishing an association of the defendants to the crimes charged(,)" which assumes the condition precedent, that is, Hartzell's association or connection to this evidence from Kitsap County, which is a factual determination the jury needed to make, not the court. Hartzell passionately contested his association with this evidence and treated it throughout the trial as the principal issue in the case.

My fear is that the jury is going to infer, because I was around somebody associated to that gun a month later, that I am somehow associated to that gun and somehow I'm associated or participated to a crime here....

[RP TRIAL VOL. 1V 657].

Since the instruction removed the material fact of whether Hartzell was associated with this evidence, it constituted an unconstitutional comment on the evidence by the trial judge. This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, "[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the

record that no prejudice could have resulted from the comment”. Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff’d in part, rev’d in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibility asserted that the court’s improper comment in instruction 27 did not influence the jury. The State cannot sustain its burden of rebutting the presumption that the court’s comment was prejudicial, with the result that this court should reverse Hartzell’s convictions because of the unconstitutional comment on the evidence made by the trial court in instruction 27.

04. THE PROSECUTOR’S FLAGRANT AND ILL-INTENTIONED CLOSING ARGUMENT, WHICH SHIFTED THE BURDEN TO HARTZELL TO PRESENT EVIDENCE AND IMPERMISSIBLY IMPLIED FACTS NOT IN EVIDENCE, SUBSTANTIALLY AFFECTED THE JURY’S VERDICT AND DESTROYED THE POSSIBILITY THAT EVEN A PRECISE OBJECTION OR A CAREFULLY WORDED CURATIVE INSTRUCTION WOULD HAVE

OBVIATED THE RESULTANT PREJUDICE.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where there is no objection to the prosecutor's comment below, the right to assert prosecutorial misconduct on this basis is waived unless the remark was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

In this state, prosecutors are held to the highest professional standards.

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial (citation omitted).

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent

the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

During the State's case-in-chief, evidence was elicited that according Sarah Dodge, Randy Perry was the only person who ever had possession of the gun he fired inside the vehicle shortly before Dodge called the police. [RP TRIAL VOL. II 283-84, 288]. Kimberly Hoage confirmed that she initially thought Juan Copin was responsible for the shooting at her house because he "has the affiliations with the gangs." [RP TRIAL VOL. III 409]. Copin was angry with her because a rental vehicle of his that he allowed her to use had been stolen from her place about two days before the shooting. [RP TRIAL VOL. III 410]. When inquiry was made as to whether the police had ever questioned Copin, Detective Haller claimed that the investigation was ongoing, that there were several additional suspects and that he was not at liberty to share the information. [RP TRIAL VOL. IV 615-16, 622-23].

Drawing appropriate inferences from this testimony, Hartzell argued to the jury that the State certainly did not want to present Dodge as a witness to corroborate the above and that Randy Perry and Juan Copin and others were not on trial because the investigation was ongoing. [RP TRIAL VOL. IV 716, 723].

Ignoring that Deputy Twomey had testified that Dodge told him she feared Hartzell was going to kill her [RP TRIAL VOL. III 473-74], the prosecutor, without objection, fervently argued that:

Ms. Dodge is available to the defense, Mr. Hartzell. Sarah Dodge was his girlfriend. Sarah Dodge could have been called by Mr. Hartzell. I have been attacked for not calling Sarah Dodge, but I can assure you, ladies and gentlemen, that the defense could have called her.

[RP TRIAL VOL. IV 733-34].

Mr. Hartzell could have called these people he has named like Sarah Dodge and this Juan Copin. He did not, and you may consider the evidence and the lack of evidence, and you might consider why Mr. Hartzell did not offer Ms. Dodge or for that matter Juan Copin.

You might also consider, ladies and gentlemen, that when a defendant doesn't have to do anything and yet resorts ... in the case of Mr. Hartzell (to) offering up the evidence from his mother, does not that strike you as acts of desperation? And if it is an act of desperation, isn't that further evidence of guilt?

[RP TRIAL VOL. IV 734].

Over objection, and without a shred of evidence, the prosecutor neared the end his argument with this:

I mean what do we expect that poor lady, Mr. Hartzell's mother, to do but to try to help her son. She is given that date and time April 7th between 3:00 and 6:00 or 3:00 and 7:00 is important, mom, I need your help.

[RP TRIAL VOL. IV 735].

While a prosecutor may argue reasonable inferences from the evidence presented, a prosecutor cannot imply, let alone state, that a defendant has a duty to present exculpatory evidence. See State v. Barrow, 60 Wn. App. 869, 872-73 809 P.2d 209, reviewed denied, 118 Wn.2d 1007 (1991). A defendant is under no obligation or duty to present evidence, and it is error for a prosecutor to comment on a defendant's lack of evidence. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

A prosecutor may, however, under the "missing witness" doctrine, comment on a defendant's failure call a witness whose production is peculiarly within the control of the defense; whose testimony would corroborate the defendant's testimony; and whose testimony is not necessarily self-incriminating. State v. Blair, 117 Wn. 2d 479, 488-90, 816 P.2d 718 (1991). This doctrine rests on a pretty simple premise: The party who would gain from a witness's testimony would not fail to call the witness unless the testimony would be unfavorable. Of course, this inference is severely weakened if there are other legitimate reasons the party may have failed to call the witness, including the fact that the witness could invoke his or her right against self-incrimination if asked to

testify in support of that party's defense or if the witness was equally available to the parties or if the witness's testimony would merely be cumulative. State v. Blair, 117 Wn. 2d at 489-90.

Here, there was no showing that either Copin or Perry, the "additional suspects," were "peculiarly available" to defense, while there was indication that their testimony, if favorable to Hartzell, would necessarily be self-incriminatory. And Dodge, whose assertion that only Perry possessed the gun had already been admitted into evidence, and who thought Hartzell was trying to kill her, was not exactly available to defense as a witness. If anything, these three uncalled witnesses were equally available to the parties, and as such were outside the scope of the missing witness doctrine. See State v. Davis, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968).

The prosecutor unconstitutionally shifted the burden to Hartzell to present evidence by arguing that in deciding Hartzell's fate the jury should consider why Hartzell did not offer Dodge or Copin as witnesses, for the faulty assumption behind these words is that Hartzell had a duty to do so, and there can be no dissent that this argument implied that he had an obligation to present exculpatory evidence and that the lack thereof was further evidence of guilt. This argument directly and independently infringed on one of the fundamentals of the criminal justice system: the

presumption of innocence. State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). This was improper and constituted misconduct, for “a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.” State v. Perez-Mejia 134 Wn. App. 907, 916, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing United States v. Garza, , 608 F.2d 659, 663 (5th Cir. 1979)).

Further, the prosecutor’s argument relating to Hartzell’s mother cloaks a more fundamental problem: it impermissibly implied facts not in evidence. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (“prejudicial allusions to matters outside the evidence, are inappropriate”) (quoting State v. Belgarde, 46 Wn. App. 441, 448, 730 P.2d 746 (1986), review granted, 108 Wn.2d 1002 (1987). Since the State presented no evidence that Hartzell ever provided his mother with facts necessary for his defense, the prosecutor’s inescapable implication that he had done so was without question a “prejudicial allusion” to matters outside the record. And to argue, as the prosecutor did, that by calling his mother as a witness Hartzell somehow committed an act of desperation, which the jury should consider as further evidence of guilt, not only demeans the system and the parties involved, but unmask any semblance of impartiality while simultaneously falling woefully short of representing

the public interest. This argument was inexcusable. That should be beyond debate.

The State's case against Hartzell was built from a number of pieces of circumstantial evidence, the core of which was the forensic testimony matching the nine spent .357 SIG cartridges with the pistol found almost a month later some 100-plus yards from a vehicle Hartzell had been driving. But the police were never able to place Hartzell at the scene of the shooting on April 7th, and since the case against him relied at its heart on providing this unsettled connection, the prosecutor opted to fill this void during closing argument by resorting to a blizzard of impermissible and inflammatory rhetoric designed to bury this point.

In this context, where Hartzell's conviction was far from a certainty, the prejudicial impact of the misconduct is magnified. State v. Perez-Mejia, 134 Wn. App. at 919. The prosecutor's comments, both individually and collectively, not only substantially affected the jury's verdict but also destroyed the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the prosecutor's argument, with the result that Hartzell was denied a fair trial.

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05. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF HARTZELL'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Hartzell's convictions, the cumulative effect of these errors materially affected the outcome of his trial and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

06. WHERE THE SPECIAL VERDICT FORM FOR IMPOSING A CHARGED "FIREARM ENHANCEMENT" ASKS JURORS TO FIND WHETHER THE DEFENDANT WAS ARMED WITH A "DEADLY WEAPON," AN AFFIRMATIVE JURY RESPONSE AUTHORIZES THE TRIAL COURT TO IMPOSE ONLY A "DEADLY WEAPON" ENHANCEMENT.

06.1 Facts

Hartzell was charged in Count I with assault in the second degree while armed with a deadly weapon: “It is further alleged that this crime was committed while the defendant or an accomplice was armed with a deadly weapon, a firearm.” [CP 3].

The “to-convict” instruction, however, required the jury to find only that Hartzell committed the assault “with a deadly weapon.” [Court’s Instruction 12; CP 186].

Jurors were also instructed that:

For purposes of a special verdict the State must prove beyond a reasonable doubt that defendants were armed with a deadly weapon at the time of the commission of the crime in Count I.

[Court’s Instruction 15; CP 189].

In addition, jurors were instructed that a deadly weapon includes a “pistol, revolver or any other firearm(.)” [Court’s Instruction 15; CP 189]. “A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” [Court’s Instruction 26; CP 200].

On the special verdict form, jurors were not asked to find whether Hartzell was armed with a firearm when he committed the assault offense: “Was the defendant CHARLES CARROLL HARTZELL, IV, armed with a deadly weapon at the time of the commission of the crime in Count I?”

[Special Verdict Form A (Count I); CP 207]. Hartzell, acting pro se, neither proposed nor objected to the special verdict form. [RP TRIAL VOL. IV 657].

Despite the jury's "deadly weapon" finding, the trial court made an additional factual finding in the Judgment and Sentence that "(a) special verdict/finding for use of firearm was returned on Count(s) I, RCW 9.94A.602, 9.94A.533." [CP 220]. The court then applied the 36-month firearm enhancement to Count I rather than the 12-month deadly weapon enhancement. [CP 222, 225].

06.2 Summary of Argument

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). Moreover, A claimed manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988).

A sentencing judge violates a defendant's Sixth Amendment right to a jury trial by imposing an enhanced sentence based on facts not reflected in the jury's verdict. Blakely v. Washington, 542 U.S. 296, 302-03, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). More recently, in Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553, 165

L. Ed. 2d 466 (2006), the same court found subject to harmless error analysis a trial court's imposition of a firearm sentencing enhancement, despite a special verdict on only a deadly weapon finding. Washington v. Recuenco, 548 U.S. at 222.

Although the Washington Supreme Court did not directly reach the issue on remand, it held that in certain circumstances, Washington's constitutional rights to jury trial offer greater protection than the Sixth Amendment. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) ("Recuenco III"). Hartzell's case presents one of those circumstances. The more rigorous state constitutional rights to jury trial would be weakened if a harmless error analysis could excuse imposition of a "firearm" enhancement when the jury finds only the offender was armed with a deadly weapon. Consistent with Washington's broader constitutional jury trial rights, this Court should reject application of the harmless error rule.

06.3 Constitutional Provisions

The framers of Washington's Constitution saw fit to guarantee the right to a jury trial in two provisions. Article I, section 21 declares in relevant part, "The right of trial by jury shall remain inviolate[.]" And a criminal defendant "shall have the right . . . to have a

speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]” Article I, section 22.

The right to trial by jury under the federal constitution resides in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]”

06.4 Washington’s constitutional provisions provide broader protection of the right to a jury trial than the Sixth Amendment.

The Washington Supreme Court has in several contexts held the state constitutional rights to jury trial are broader than their federal counterpart. See, State v. Hicks, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) (increased protection of jury trials under state constitution allows the trial judge to find prima facie case of discrimination when state removes only remaining venire member from a constitutionally cognizable group); State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (finding although “Gunwall analysis” shows jury trial rights under article I, sections 21 and 22 are generally broader than under the Sixth Amendment, right to jury trial does not extend to determination of prior convictions at sentencing), cert. denied, 541 U.S. 909 (2004); State v. Hobble, 126 Wn.2d 283, 298, 892 P.2d 85 (1995) (“The right to trial by jury under the Washington State Constitution is not coextensive

with the federal right.”); Pasco v. Mace, 98 Wn.2d 87, 100, 653 P.2d 618 (1982) (unlike federal constitution, article I, sections 21 and 22 guarantee jury trial for anyone accused of a crime); cf. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (“resort to the Gunwall analysis is unnecessary because this court has already held that the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment.”).

In order to enable courts to determine whether greater protection under the state constitution is warranted in a particular case, our Supreme Court has set forth six nonexclusive criteria in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).⁴

i. Textual language

The accused’s state constitutional right to a jury trial for offenses is “inviolable.” State v. Smith, 150 Wn.2d at 150. “The term ‘inviolable’ connotes deserving of the highest protection.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989) (state’s limit on recoverable damages for tort violates right to trial by jury).

ii. Textual differences

⁴ The Gunwall factors are: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

While article I, section 22 and the Sixth Amendment have comparable language, article I, section 21 has no federal counterpart. State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). This Court noted the “[s]ignificant differences” in the language of the state and federal constitutional jury trial provisions. Pasco, 98 Wn.2d at 97. That two different constitutional provisions guarantee Washington criminal defendants the right to a jury trial demonstrates the general importance of the right. Smith, 150 Wn.2d at 151.

iii-iv. Constitutional history and preexisting state law

Article I, section 21 maintains the right to jury trial as it existed at common law in the territory at the time of its adoption. Pasco, 98 Wn.2d at 96; see State ex. rel. Mullen v. Doherty, 16 Wash. 382, 384-85, 47 P. 958 (1897) (“The effect of the declaration of the constitution . . . is to provide that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate.”). Having established article I, section 21 preserves inviolate the right to jury trial as it existed in 1889, it is necessary to examine the scope of the right under statute and at common law at the time of statehood. In re Ellern, 23 Wn.2d 219, 224, 160 P.2d 639 (1945). This assists courts in determining what the framers intended

when they wrote article I, section 21, as well as section 22. Smith, 150 Wn.2d at 154.

“From the earliest history of this state, the right of trial by jury has been treasured, and this right has been protected even in courts of limited jurisdiction.” Pasco, 98 Wn.2d at 99 (1982) (citing Code of 1881, ch. 131, § 1890, p. 320). The 1881 Code is the statutory foundation for the right to jury at the time Washington became a state. Chapter LXVI of the Code described the “Rights of Parties Accused.” Among the portions addressing the right to jury was section 3-766: “On the trial of any indictment the party accused shall have the right . . . to a speedy public trial by an impartial jury[.]”

Section 4-767, in turn, limited the power of the judge by providing, “No person indicted for an offense shall be convicted thereof unless . . . by the verdict of a jury accepted and recorded in open court.” Similarly, section 7-770 does not mention the jury, but defines the limits of the court’s ability to impose punishment, “No person charged with any offense against the law shall be punished for such offense, unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person.” Even before statehood, it was contemplated the sentence could not exceed that authorized by the verdict.

As to the division of labor and the jury's responsibility at trial, Ch. LXXXVII, section 316-1078 provided: "Issues of fact joined on an indictment shall be tried by a jury of twelve persons[.]" On the other hand, section 326-1088, provided: "The court shall decide all questions of law which shall arise in the course of the trial." Criminal procedure in Washington at the time of statehood, therefore, contemplated the jury as the fact-finding body.

Our Supreme Court's decisions have also consistently recognized the jury's role as finders of fact. Mullen, 16 Wash. at 385 (quoting Code of 1881 section 248, which guaranteed to parties the right "in an action at law, upon an issue of fact, to demand a trial by jury."); Sofie, 112 Wn.2d at 645 ("being close in time to 1889, [Mullen] provides some contemporary insight on the scope issue"); State v. Strasburg, 60 Wash. 106, 116, 110 P. 1020 (1910) (in striking down statute prohibiting criminal defendant from presenting insanity defense to jury, the court emphasized, "The question of the insanity of the accused at the time of committing the act charged being one of fact when sought to be shown in his behalf, it needs no citation of authorities . . . to demonstrate that it is, and always has been, a question of fact for the jury to determine.").

Consistent with this demonstrated intent by Washington's founders, lawmakers and our Supreme Court, the Legislature in 1961

charged juries with determining whether an offender is armed for purposes of sentencing enhancement. RCW 9.95.015; Laws 1961, ch. 138, § 1. Before that provision took effect, the parole board determined whether an offender possessed a deadly weapon at the time of the offense. State v. Coma, 69 Wn.2d 177, 184, 417 P.2d 853 (1966). The Supreme Court found the jury deliberation room was “where the determination belongs.” Coma, 69 Wn.2d at 185 (citing a recommendation of the Legislative Council).

Under the 1961 laws, a mandatory minimum term for being armed with a deadly weapon was available to the parole board only upon a specific finding by the trial judge or a special verdict by the jury. Coma, 69 Wn.2d at 186. In Coma the court emphasized that, consistent with chapter 138, “the Board should refrain from [a]ny consideration of the use or non-use of a deadly weapon in its administrative determination fixing the time to be served[.]” Coma, 69 Wn.2d at 186.

The Sentencing Reform Act continued the practice of jury fact-finding of weapons enhancements, which is now codified in RCW 9.94A.602. Recuenco III, 163 Wn.2d at 438 (citing former RCW 9.94A.125 and .310); State v. Nguyen, 134 Wn. App. 863, 870, 142 P.3d 1117 (2006) (observing courts historically were authorized to empanel juries “as demonstrated by the long line of cases involving habitual

criminal proceedings, for which no statute authorizes jury trials.”), review denied, 163 Wn.2d 1053 (2008).

Washington’s constitutional, statutory and common law history mandate jury fact-finding, including for sentencing enhancement purposes. This well-established right would, however, be a hollow one if, through harmless error analysis, a reviewing court could excuse a trial court’s sentencing enhancement even where it directly conflicts with the jury’s explicit finding.

v. Structural differences

The federal constitution grants limited powers while the state constitution limits the otherwise unqualified power of the state. Schaaf, 109 Wn.2d at 16. This fundamental difference “will always point toward pursuing an independent state constitutional analysis[.]” State v. Young, 123 Wn.2d at 180. To the extent the provisions of article I sections 21 and 22 directly limit the state’s otherwise plenary power, they warrant the rigorous enforcement of the jury trial guarantee. Gunwall, 106 Wn.2d at 66.

vi. Matters of particular state interest or local concern

The conduct of criminal trials in state courts is a matter of particular state or local concern and does not require

adherence to a national standard. Smith, 150 Wn.2d at 152. This court is thus free to give full effect to the intent of the framers of the Washington Constitution.

06.5 Summary

This discussion and application of the Gunwall factors warrants independent state constitutional analysis. Under this analysis, it is apparent from the rich history of jurors' preeminent role as fact-finders that applying a harmless error test to an erroneous weapons enhancement special verdict would undermine the intent of the framers of article I, sections 21 and 22. As demonstrated, the right to trial by jury under the federal constitution, embodied in the Sixth Amendment, is not as broad as Washington's right. Therefore, while the Sixth Amendment may permit a harmless error analysis here, article I, sections 21 and 22 do not. Hartzell requests this Court to reject the use of harmless error in these circumstances. By ignoring the jury's "deadly weapon" finding reflected in the special verdict form, the trial court violated Hartzell's state constitutional right to jury fact-finding.

E. CONCLUSION

Based on the above, Hartzell respectfully requests this court to reverse and dismiss his convictions for assault in the second degree and unlawful possession of a firearm in the first degree and to remand for resentencing consistent with the arguments presented herein.

Dated this 25th day of November 2008.

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
CHARLES HARTZELL,)
)
Appellant.)
_____)

Court of Appeals No. 37425-1-II
CERTIFICATE OF SERVICE

CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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