

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

FREDERICK MCGREW,
Appellant.

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DIVISION II
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STATE OF WASHINGTON
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REPLY BRIEF

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I. INTRODUCTION

In his opening brief, Mr. McGrew argued that his conviction was obtained as a result of improper opinion testimony concerning the “normal” conduct of drug transactions, especially the unscientific opinion that drug dealers are almost always armed. He argued that this evidence was especially harmful on the “firearm enhancement” found by the jury. In response, the State largely ignores the testimony that McGrew argues was improper, but instead focuses on other testimony by the witnesses which it argues was admissible. Further, the State argues that this Court should not reach this issue because trial counsel did not object. McGrew concedes that some of the officers’ testimony was admissible. However, each of the three officers expressed improper opinions which invaded the province of the jury—a constitutional error which can be raised for the first time on appeal.

Mr. McGrew also argued that his sentence range was incorrectly calculated because he was convicted of a drug crime with *firearm* enhancement, not a *deadly weapon* enhancement. The State misunderstands McGrew’s argument, spending much of its time

arguing that the Legislature had, in fact, created a vehicle for a jury to return a firearm enhancement—a point never argued by McGrew. Then the State argues that because a firearm factually constitutes a deadly weapon, McGrew was also convicted of a deadly weapon enhancement when his jury returned a firearm enhancement. However, the question is not whether a firearm is a deadly weapon, *factually* speaking. Instead, the question is whether it is a *legally* separate enhancement—an argument that the State utterly fails to address.

McGrew also argued, when the sentencing judge doubled the “class of crime” maximum for McGrew’s drug conviction from 10 to 20 years as a result of a prior drug possession conviction, she failed to *recognize* and thereby *exercise* her discretion not to double the maximum. Once again, the State’s *Response* takes the avoidance route, arguing that the sentencing court did not *abuse* its discretion.

Finally, McGrew argued the sentencing court erred by failing to find that VUCSA with a firearm enhancement constitutes the same criminal conduct as unlawful possession of a firearm. Not only does the State’s *Response* fail to take into account the lessons

from the *Apprendi/Blakely* “revolution,” it argues that because the intent to use the weapon requires more than simple possession, they do not encompass the “same criminal conduct.” However, the test is not: is the intent element exactly the same in both crimes. The relevant legal test is how closely related the crimes are, whether the criminal objective changed from one crime to another, and whether one crime furthered the other. Applying this test, it is clear that the crimes constitute “same criminal conduct.”

II. ARGUMENT

A. Opinion Evidence Invading the Province of the Jury Constitutes a Manifest Error Which Can Be Raised for the First Time on Appeal.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3). A narrow exception, however, exists for “manifest error[s] affecting a constitutional right.” RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The admission of opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest

constitutional error.” *Kirkman*, 159 Wn.2d at 936. Instead, a manifest error requires “an explicit or almost explicit witness statement” that the defendant is guilty. *Kirkman*, 159 Wn.2d at 936.

On the issue of whether McGrew possessed a gun and after offering extensive testimony about how drug deals commonly occur in cars, the following opinion evidence was offered:

It’s a business, but it’s also a dangerous business, and incidents occur between drug dealers where they will be get shorted or they have a dispute and they will pull out a gun. Also a drug dealer is not immune from getting robbed, and a lot of them will keep a weapon for their protection, because that’s their business and they want to protect themselves and protect their business.

RP 106-107.

Thus, what the State was attempting to do is to have the jury find that McGrew must be guilty because of the behavior of other, unidentified individuals who plied their trade in the area where McGrew was arrested. In other words, the expert testimony was employed not for the permissible purpose of assisting the jury to understand the facts at issue, but rather for the impermissible purpose of encouraging the inference of Appellants’ guilt from the behavior of unrelated persons.

In other words, the testimony of the three police officers was not the kind of specialized knowledge outside the ordinary knowledge of laypeople, but was instead merely an opinion on guilt dressed up as an expert opinion. *See United States v. Castillo*, 924 F.2d 1227, 1232-34 (2nd Cir. 1990) (“...we take serious issue with the Government's use of an expert witness to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons.”).

The evidence in this case about whether McGrew admitted that he possessed the gun was hotly contested. RP 374. Thus, in order to bolster its case and satisfy the “beyond a reasonable doubt” standard, the State offered inadmissible opinion evidence—a near explicit statement of McGrew’s guilt which constitutes manifest error.

This Court should reach this issue and reverse.

B. The Trial Court Erred When It Sentenced McGrew Using a Standard Range for VUCSA with a Deadly Weapon Enhancement When He was Convicted of VUCSA with a Firearm Enhancement.

Delivery of Cocaine with a *Firearm Enhancement* is legally distinct from Delivery of Cocaine with a *Deadly Weapon*.

The State admittedly did not charge, nor convict Mr. McGrew of VUCSA with a deadly weapon enhancement. However, the State argues that because a firearm is a deadly weapon, McGrew was necessarily convicted of a deadly weapon enhancement. The State would be correct only if firearm and deadly weapon enhancements constituted one enhancement, legally speaking.

As originally enacted, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, did not establish a discrete firearm enhancement. Instead, “firearm” was included in the definition of a “deadly weapon.” Factually speaking, it still is. The Hard Time Act created a separate enhancement for firearms, without amending the deadly weapon section.

Thus, a prosecutor can charge a defendant who possessed a firearm during an eligible crime with either a firearm or a deadly weapon enhancement. However, where a defendant is given notice that he needs to defend against a firearm enhancement alone, he cannot be held accountable for an uncharged enhancement. *See In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 204 P.3d 936

(2009). The two enhancements are legally separate, even if there is factual overlap.

This Court should remand for resentencing on the VUCSA with a seriousness level of II.

C. The Trial Court Erred by Doubling McGrew's Maximum Sentence.

Mr. McGrew largely rests on his opening brief on this claim. His reply is limited to the sentencing court's failure to recognize its discretion whether or not to apply the "doubling" statute. *See e.g., State v. McGill*; 112 Wn.App. 95, 100, 47 P.3d 173 (2002) (court's refusal to exercise discretion out of belief that it lacked authority to do so was reviewable and required remand).

At the first sentencing hearing, as the trial prosecutor conceded on the record, "I don't think the court ever actually stated on the record, I am applying RCW 69.50408, which is the 'drug doubler in this case,'" but did only so inferentially since it imposed a sentence of 136 months. RP (9/26/08) 4. At the resentencing, the State then argued that the sentencing court did not have the discretion to revisit issues already correctly decided—that "this hearing should not be intended to be a complete do over." *Id.* at 6.

The sentencing court's response in imposing sentence certainly does not indicate that the court felt it had discretion to exercise. Likewise, it does not reveal the consideration and or weighing of relevant factors normally associated with the use of discretion. Quite the opposite, the sentencing court stated that it applied the "doubler statute *because* we had the crime of delivery of cocaine and we had a firearm in this situation, so that was RCW 69.50.408." *Id.* at 17 (emphasis supplied). However, those facts simply provide the starting point for the sentencing court's discretion. The doubler statute does not apply "because" of those convictions.

In any event, McGrew is not arguing that the use of discretion to double is inappropriate, only that the trial court recognize its discretion. Given the necessity of a remand for resentencing on the other error(s), this Court should remand with directions that the trial court can, if it so chooses, impose the "doubler" statute or not.

D. The VUCSA With a Firearm Enhancement and McGrew's Unlawful Possession of a Firearm Conviction Constitute "Same Criminal Conduct."

Mr. McGrew was convicted VUCSA with a firearm enhancement. That enhancement added 60 months to his sentence. Mr. McGrew was also convicted of Unlawful Possession of Firearm, adding a point to McGrew's offender score. Both the firearm enhancement and the gun charge were the result of McGrew's constructive possession of one gun; at one time; in one place. The sentencing court should have found that the enhancement and the gun conviction constituted the same criminal conduct.

In response, the State argues that the "same criminal conduct" rule does not apply to crimes committed with firearm enhancements because a weapons enhancement is not a crime, but is merely "a period of confinement added to a sentence because of a particular circumstance of the crime," citing *In re Charles*, 135 Wn.2d 239, 252, 955 P.2d 798 (1998). The State's *Response* fails to account for the post-*Charles* revolution in sentencing law.

When the term "sentence enhancement" describes an increase beyond the maximum authorized statutory sentence, it becomes the

equivalent of an “element” of a greater offense than the one covered by the jury's guilty verdict. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). A weapon enhancement fits squarely within this definition. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).¹

Indeed, Justice Thomas, concurring in *Apprendi*, wrote: “This case turns on the seemingly simple question of what constitutes a ‘crime.’” *Apprendi*, 530 U.S. at 499 (2000) (Thomas, J., concurring). A second sentence in Justice Thomas’s *Apprendi* opinion deserves highlighting.

Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - of whatever sort, including the fact of a prior conviction - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Id.

Thus, McGrew was convicted of VUCSA with a firearm and

¹ The State Supreme Court has accepted review in *Kelly*, the case primarily relied on by the State in its response.

unlawful possession of a firearm. The question is whether, given that both crimes involve the possession of a firearm the crimes constitute the same criminal conduct.

The State's sole argument on the merits is that because the VUCSA requires possession with intent to facilitate it includes an additional *mens rea* requirement not found in the unlawful possession conviction. While this is true, it also makes no difference.

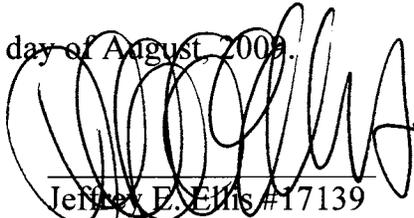
In deciding whether different crimes encompass the same criminal conduct, a focus is on whether the criminal intent, as objectively viewed, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This objective test considers how closely related the crimes are, whether the nature of the criminal objective changed between crimes, and whether one crime furthered the other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

In this case, the State's evidence was that McGrew possessed a firearm on one occasion for one purpose. It would be hard to find a clearer case of same criminal conduct.

III. CONCLUSION

Based on the above, this Court should reverse and remand this case to Pierce County Superior Court for a either a new trial or a new sentencing hearing.

DATED this 10th day of August, 2009.



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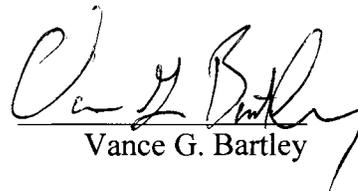
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 11, 2009 I served the parties listed below with a copy of *Petitioner's Reply Brief* as follows:

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