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

STATE OF WASHINGTON

V.

MOSES BELIZ, JR.

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The evidence was insufficient to convict Mr. Beliz of attempted murder in the second degree.

2. The trial court erred when it denied Mr. Beliz the right to confront his accuser by denying his motion to impeach the victim with his prior criminal history.

3. The trial court erred by not granting a new trial for a violation of Brady v. Maryland.

4. Mr. Beliz was erroneously sentenced to a firearm enhancement when he was charged with a deadly weapon enhancement.

Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to convict Mr. Beliz of attempted murder in the second degree when the victim testified that he was shot accidentally by him?

2. Did the trial court err, in deciding Mr. Beliz' motion to impeach the victim with his prior criminal history, by holding that ER 609 is judged the same way for defendants as for prosecution witnesses and that drug convictions are almost never relevant?

3. Did the trial court err by not granting a new trial for a violation of Brady v. Maryland when the State did not disclose that a material witness was working for the State as a confidential informant?

4. Was Mr. Beliz erroneously sentenced to a firearm enhancement when he was charged with a deadly weapon enhancement?

B. Statement of Facts

Moses Beliz was charged by amended information with attempted second degree murder while armed with a firearm, first degree burglary, attempted first degree robbery, and unlawful possession of a firearm in the second degree. CP, 19. The victim of the first three offenses is Bruce Bratton. The case proceeded to trial by jury and the jury convicted him of all four offenses. CP, 137-41.

Bruce Bratton resides in Quilcene, Jefferson County, Washington. RP, 169. Mr. Bratton is a former Marine and, according to his trial testimony, works in construction. RP, 170, 195.

On December 19, 2007 Mr. Bratton returned home in the mid-afternoon and discovered things were out of place in his shop. RP, 173-74. He first noticed that his stove was on. RP, 175. Someone had used that oven to cook some food, including fruit pies. RP, 176, 178. Mr. Bratton owned some surveillance equipment, but he had never set it up. RP, 181.

Believing he had been burglarized, Mr. Bratton decided it was a good time to set up his surveillance equipment. But he was missing some wiring, so he left to go to the hardware store. RP, 182.

Mr. Bratton returned at 6:00 to set up the equipment. RP, 182. He had just started setting up the equipment when he saw a shadow hiding behind a container of the shop. RP, 187-88. Looking closer, he determined the shadow was a man with a ski mask holding a gun. RP, 187. He assumed that the masked man was the same person who had broken into his house earlier and who eaten his food. RP, 188.

Mr. Bratton told the masked man, "You better just get out of here." RP, 190.

The masked man ordered him to get on his knees. RP, 191. Then he held a gun to his head and demands to know where the "stuff" is. RP, 191. He demanded that he hand over his money. RP, 191. So Mr. Bratton handed over the money in his wallet, a little more than \$100. RP, 192. Then the masked man demanded his cell phone. RP, 192.

At that point, Mr. Bratton decided to fight back a little by throwing his cell phone at him. RP, 192. But when he threw the cell phone, it startled the masked man and caused him to pull the trigger of the gun. RP, 192, 246. The shot hit Mr. Bratton in the leg. RP, 193. Mr. Bratton testified he believed the gunshot wound was an accident. RP, 245.

Before the masked man could do anything else, Mr. Bratton, jumped the intruder and started fighting with him. RP, 193. The masked man hit him multiple times on the head with the pistol. RP, 194. The intruder was telling Mr. Bratton to “quit.” RP, 195. But Mr. Bratton was not going to quit as long as the masked man had a gun, so he stabbed the masked man in the eye with his thumb. RP, 195.

During the struggle, the mask got pulled off the intruder and Mr. Bratton was able to see his face. RP, 196. Soon after that, the man ran away and Mr. Bratton chased him down the driveway. RP, 197-98. He then went to a friend’s house and called 911. RP, 199. The mask was later sent to the crime lab for DNA testing and DNA was found from both Joseph Martinez and Moses Beliz. RP, 452.

According to the 911 transcript, Mr. Bratton was asked if he knew the masked man. Mr. Bratton responded that he had no idea. RP, 205. Mr. Bratton told the 911 operator that the masked man was a “little guy” with short dark hair. RP, 205, 209. Later, he told law enforcement that the man was a white male, short dark hair, dark clothing, unknown age, but young, with a possible eye injury. RP, 247.

When the police arrived, they tried to follow the masked assailant using a tracking dog. RP, 329. The dog followed the assailant as far as the Little Quilcene River, but then lost the scent. RP, 330. The water depth of

the Little Quilcene River at that time was approximately two-and-a half feet. RP, 385.

Duane Logue lives directly across the Little Quilcene River from Mr. Bratton's house. RP, 384. The two houses are 0.45 miles apart. RP, 350. On the evening of December 19, Mr. Logue was at his house alone. RP, 303. He heard his Jeep start up and leave, but he did not think much of it because it was common for his roommate to borrow his Jeep. RP, 304. The next morning, he discovered that the Jeep was missing. RP, 304. The Jeep was recovered the next day. RP, 284, 305. Inside the Jeep was found a pair of jeans that did not belong to him. RP, 306. The pants were wet to approximately knee level. RP, 381. Later testing found a blood stain on the jeans. RP, 443-44. Testing of the blood stain as well as the crotch area of the jeans found Mr. Beliz' DNA on the jeans. RP, 449.

In an effort to bolster the testimony of Mr. Bratton, the State called six friends of Mr. Beliz to testify about conversations they had with him. The first was Joseph Martinez, who testified about events before the robbery of Mr. Bratton. Mr. Martinez is a heavy methamphetamine and "acid" user with a long history of petty theft. RP, 133, 149, 159. He had been convicted fourteen times of misdemeanor theft, once for vehicle prowl, once for possession of stolen property, and once for forgery. RP,

133-34. He was testifying under a cooperation agreement with the prosecutor's office. RP, 132.

According to Mr. Martinez, he drove from Omak to Quilcene the day before the Bratton robbery. RP, 142. Mr. Martinez had just been released from jail in Omak four days prior. RP, 137. He had not eaten in those four days because he spent the entire time "high" on drugs. RP, 146-47. Several times in his testimony, Mr. Martinez testified that his memory was faulty because he was so high and drunk during this period. RP, 149, 151.

Mr. Martinez came to Quilcene with three companions. Mr. Martinez did not know the name of the driver. RP, 142. The driver was a short white guy. RP, 158. The second passenger, a guy named Zack, was a short, pot bellied, white guy. RP, 158-59. The third passenger was Moses Beliz. RP 135. They drove over to Quilcene and went to Mr. Bratton's shop. RP, 143-44.

Mr. Martinez said the reason they came over was to collect some money owed on a Jeep and maybe look for some work. RP, 137. When they arrived, they initially knocked on the door, but no one answered, so they just let themselves in and spent the night. RP, 144-45. The group helped themselves to Mr. Bratton's fruit pies. RP, 145. Mr. Martinez snooped around and found a small amount of methamphetamine in

Bratton's house, which he also helped himself to. RP, 160. After he got done eating the fruit pies, Mr. Martinez got thirsty for beer. RP, 154. So he stole Mr. Bratton's bicycle and rode to the local Quilcene store. RP, 155, 237. But instead of paying for the beer, he decided to shoplift it. RP, 155. But he got caught by the owner who stopped him and called the police. RP, 156. He was arrested and a couple days later, while still in jail, detectives interviewed him about what he knew about breaking into Mr. Bratton's shop. RP, 157.

Mr. Beliz' second friend to testify was Joseph Morris. On an unspecified date prior to Christmas, Mr. Morris had a conversation with Mr. Beliz, RP, 467-69. Mr. Beliz showed up driving a Jeep. RP, 469. Mr. Beliz said the cops were chasing him. RP, 475. He had been staying in a shed for a couple of days. RP, 476-77. Mr. Morris recalled telling Detective Nole that Mr. Beliz told him that while in the shed he had encountered a man while wearing a mask and the gun jammed. RP, 477. At trial, Mr. Morris could not recall whether he had heard this information directly from Mr. Beliz or if he had read it in the local newspaper. RP, 488.

About three days later, Mr. Beliz appeared at the home of his friend Susan Bishop. RP, 314. Ms. Bishop is also a friend of Mr. Bratton and had been with Mr. Bratton when he initially discovered that his home

had been broken into. RP, 312. Mr. Beliz looked like he had been running hard and said he had been on the run for three days. RP, 315. He had a black eye. RP, 316.

Just before Christmas, Anna Christiansen, gave Mr. Beliz a ride. RP, 507. After he left her vehicle, she discovered a watch that did not belong to her. RP, 509. She later discovered that the watch belonged to Mr. Bratton and she returned the watch to him in March of 2008. RP, 510. During that same time period, Ms. Christiansen also gave rides to other friends who have a history of criminal behavior. RP, 512.

The State also called John Hall to testify about statements made by Mr. Beliz to him. RP, 526. Mr. Hall also knows Mr. Bratton. RP, 528. The State wanted to ask Mr. Hall about a conversation he had with Mr. Bratton and Mr. Beliz. RP, 529. The State attempted repeatedly to use leading questions with Mr. Hall because he was a "little reluctant" to testify. RP, 529. When given an opportunity, however, Mr. Hall answered directly. RP, 530. According to Mr. Hall. Mr. Bratton asked him to ask Mr. Beliz, "Ask him why he put a cap in me." RP, 530. Mr. Beliz denied shooting Mr. Bratton. RP, 530. When asked if Mr. Beliz said, "Oh shit, was that your brother?" he answered, "You understand that I'm, I'm an alcoholic and a drug addict, and I got some, I got some severe mental shit that is going on in my head." RP, 530. When pressed,

however, he admitted that he “vaguely” recalled that response. RP, 531. When asked further about the recorded conversation with the detective, he said, “[O]bviously I said that on the recording. . . It was my voice and, yeah, yeah, I listened to it.” RP, 532. The prosecutor asked, “Do you recall telling Detective Apeland that Mr. Beliz told you they had gone there to rob the place?” RP, 534. Mr. Hall answered, “No, I don’t never tell nobody anything about him going to rob any place, because I never knew that.” RP, 534. At that point the prosecutor asked to play Mr. Hall’s tape recorded interview. RP, 534. Mr. Beliz objected. RP, 534. The court allowed the playing of the tape because “Mr. Hall indicated he did not recall telling [Detective] Apeland the question about Mr. Beliz telling him something.” RP, 534. The tape was admitted as Exhibit 70. RP, 539.

Rebecca Presler is a former girlfriend of Mr. Beliz. RP, 517. She has another ex-boyfriend named Michael. RP, 519. Ms. Presler has been convicted of four misdemeanor theft charges and one felony theft charge. RP, 515. She also has a conviction for giving false information to a police officer. RP, 515. She related a conversation she had with Mr. Beliz where he allegedly asked her to tell the police that Michael was the one who shot Mr. Bratton. RP, 520. He also said that he needed to get back to Joey Morris’ house. RP, 521. Mr. Morris had some items of his that he needed to pick up. RP, 522.

Moses Beliz was eventually arrested for the attack on Mr. Bratton. At the time of his arrest, there were some cuts and slight bruising under his right eye. RP, 376. His primary defense at trial was alibi and that he had been misidentified as the assailant. He pointed out that although Mr. Bratton told the 911 operator that he did not know the assailant, he in fact knew Mr. Beliz. Mr. Bratton conceded at trial that he had met Mr. Beliz on at least two occasions. RP, 240. The first time was four years prior when Mr. Bratton purchased a Bronco from him. RP, 241. The second time was about two years prior when Mr. Bratton gave Mr. Beliz some gas money. RP, 241. But Mr. Beliz had never been behind the main house to the shop. RP, 242.

Consistent with the defense theory that Mr. Beliz had been misidentified, the defense also emphasized discrepancies between Mr. Bratton's description to law enforcement and Mr. Beliz' physical description. For instance, Mr. Beliz would not normally be described as a "little guy," although he had apparently gained weight while in jail, probably between thirty and fifty pounds. RP, 255, 281. Although Mr. Bratton described the assailant as having short hair, Mr. Beliz' hair was shorter at trial than at the time of his arrest. RP, 281. There was also a discrepancy about his race. Although Mr. Bratton described a young, white man, Mr. Beliz is a 38 year old Spanish-Indian. RP, 585.

Tammy Owen testified that she is a close friend of Mr. Beliz. RP, 572. She testified that she remembered December 18, 2007 very well because it is the birthday of both her uncle and grandmother. RP, 575. On the morning of December 18, Mr. Beliz came to her house in Port Hadlock and she fed him breakfast. RP, 574-75. After breakfast he fell asleep. RP, 575. He left for about an hour in the afternoon, but was at the house all day otherwise. RP, 575. He slept through dinner. RP, 576. On December 19, he left between 8:30 and 10:00 at night with someone driving a red Jeep. RP, 577.

Mr. Beliz testified he did not rob or shoot Mr. Bratton. RP, 606. He came over to Quilcene from Omak to find methamphetamine. RP, 590. He came with two people, Joseph Martinez and "Joe from Idaho." RP, 587. They tried to find methamphetamine in Seattle first, but were unsuccessful. RP, 590. They then went to Mr. Bratton's house hoping to buy methamphetamine from him. RP, 598. When they arrived at Mr. Bratton's house, Mr. Beliz said that he knew Mr. Bratton and said, "[W]e can't go here." RP, 598. He then went to Ms. Owen's house and had breakfast. RP, 599.

The next day, Joe from Idaho stopped by driving a red Jeep and picked him up. RP, 601. They went to Mr. Morris' house. RP, 601. Joe

from Idaho is white, 150 pounds, with short dark hair. RP, 602. Joe from Idaho then left the area and Mr. Beliz has not seen him since.

The defense sought to introduce evidence that Mr. Bratton was a well known drug dealer in Quilcene and the motive for the robbery was to steal drugs. RP, 61-63. Mr. Beliz sought to create an inference that the “stuff” demanded by the masked man was in fact drugs. RP, 191.

The jury heard very little evidence of this, however. Although the jury heard that Mr. Bratton is well known to local law enforcement, they did not hear why he was well known. RP, 326. At the time of Mr. Beliz’ trial, Mr. Bratton was pending trial for drug possession, but the trial court did not allow inquiry into this except insofar as Mr. Beliz was allowed to ask if he was pending trial for an unnamed felony. RP, 102, 251. The defense sought to introduce evidence of Mr. Bratton’s criminal history. He has been convicted three times of drug offenses, in 1976 for manufacture and delivery of drugs, and 1998 and 2000 for possession. RP, 59. The trial court began its analysis by citing two cases, State v. Hardy, infra, and State v. Calegar, infra, and commented that the analyzing ER 609 is the same for defendants as for other witnesses. RP, 56-57. The court held that none of the criminal history was admissible. RP, 63.

After the jury found Mr. Beliz guilty, he filed two post-trial motions. The first motion was to arrest judgment on the attempted murder

charge. RP, 737, CP, 155. The trial court agreed that the evidence of attempted murder was “pretty weak,” but held that giving all reasonable inferences to the State, the motion must be denied. RP, 746-49.

The second motion was regarding witness Rebecca Presler. Defense counsel discovered after the trial that Ms. Presler was working as a confidential informant for the Sheriff’s Office and this was not disclosed to the defense in time for trial. RP, 751. The defense learned this information when Mr. Beliz’ defense counsel, James Gilmore, learned that Ms. Presler was the confidential informant on another, unrelated, pending criminal case to which he had just been appointed. RP, 750-51. Had Mr. Gilmore known this fact prior to Mr. Beliz’ trial, he would have requested a copy of Ms. Presler’s contract and impeached her with that fact. RP, 755. The trial court was concerned that there was a violation of Brady v. Maryland, infra. RP, 759. The State conceded that Ms. Presler had worked as an informant, but her contract ended two to three months prior to the trial. RP, 754.

At the hearing on December 23, 2008, the trial court set the case over for more briefing. The court ordered the State to provide a copy of Ms. Presler’s contract. RP, 760. The State stated it would comply. RP, 760. Mr. Beliz filed a written motion for a new trial. CP, 169. At the next

hearing on December 30, 2009, the State advised the court that it was refusing to turn over Ms. Presler's contract. RP, 774.

Detective Apeland testified that Ms. Presler's contract ended on September 6, 2008. RP, 779. There were no offers for leniency in exchange for her testimony on Mr. Beliz' case. RP, 779. At the time Ms. Presler was working for the sheriff's office, she was providing them with helpful information in exchange for not being charged with a pending traffic offense. RP, 781. The trial court denied the motion. RP, 796.

At sentencing, the trial court added five years to Mr. Beliz' standard range because he was armed with a firearm at the time of the commission of the attempted murder. RP, 814. The court commented that the amended information alleged a violation of RCW 9.94A.602 and 9.94A.125. CP, 20, RP, 814. The court noted that the information "is actually a Deadly Weapon enhancement, not a Firearm enhancement." RP, 814. The court admonished the prosecutor's office to "clean it up in the future." RP, 814.

C. Argument

1. The evidence was insufficient to convict Mr. Beliz of attempted murder in the second degree.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences. State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007).

The crime of attempted murder requires the specific intent to cause the death of another person. State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). To prove specific intent to kill, it is not necessary for the State to show that the defendant verbalized or acted out his intent beforehand, as intent to kill is rarely provable by direct evidence. State v. Gallo, 20 Wn.App. 717 729, 582 P.2d 1360 (1978). Rather, intent to kill may be inferred from all the circumstances surrounding the event.

It has been said in Washington case law that proof that a defendant fired a weapon at a victim is a sufficient basis for finding an intent to kill. State v. Elmi, 138 Wn.App. 306, 156 P.3d 281 (2007); State v. Hoffman, 116 Wn.2d 51, 85, 804 P.2d 577 (1991); State v. Odom, 83 Wn.2d 541, 551, 520 P.2d 152 (1974).

The fact that a firearm was fired cannot be per se proof of an intent to kill, however. It is necessary to review the totality of facts. In State v. Fernandez-Medina, 141 Wash.2d 448, 6 P.3d 1150 (2000), the defendant was charged in the alternative with two counts each of first degree attempted murder and first degree assault for firing a firearm five times, hitting and injuring two people. The jury convicted him of first degree assault. On appeal, the Supreme Court held that he was entitled to the lesser-included offense instruction of second degree assault.

In State v. Byrd, 125 Wash.2d 707, 887 P.2d 396 (1995), the defendant was charged with second degree assault. The victim testified that the defendant raised his revolver, cocked it, and told him he was “history.” When the police officer later seized the firearm, he testified it appeared that the firearm had been recently fired. The Supreme Court reversed on the ground that the jury instructions were inadequate for the jury to understand that the defendant was required to have a specific intent to create apprehension and fear of bodily harm.

Both the Elmi and Hoffman cases cite the Odom case for the proposition that firing a firearm is sufficient to infer an intent to kill. But Odom does not say that. In Odom, the assignment of error was that the jury instructions created an impermissible presumption. The Supreme Court held that any error in the jury instructions was harmless in light of

the overwhelming evidence that the defendant shot his victims. The case does not stand for the proposition that any time a firearm is fired, there is sufficient evidence of an intent to kill.

In Mr. Beliz' case, assuming all facts in the light most favorable to the State, Mr. Beliz approached Mr. Bratton with a firearm and demanded his "stuff." He then demanded his money, which Mr. Bratton handed over. He then demanded his cell phone, which Mr. Bratton threw at him. According to Mr. Bratton's testimony, the act of throwing the cell phone startled Mr. Beliz and caused him to squeeze the trigger. Mr. Bratton testified that the fact he got shot on the leg was accidental. Mr. Bratton then tackled Mr. Beliz and they wrestled for a while. Mr. Beliz hit him several times on the head with the gun saying, "Quit!" The two separated after Mr. Bratton stabbed Mr. Beliz in the eye with his thumb and Mr. Beliz ran away.

Under these circumstances, there is more than ample evidence of an assault. Mr. Beliz pointed the firearm at Mr. Bratton and, at least implicitly, threatened him if he did not hand over his property. But there is no evidence that he intended to kill Mr. Bratton. The only reason the trigger was pulled was because he was startled and accidentally fired the gun. Under these circumstances, there was insufficient evidence of

attempted second degree murder. This charge should be reversed and dismissed.

2. The trial court erred when it denied Mr. Beliz the right to confront his accuser by denying his motion to impeach the victim with his prior criminal history.

A defendant has the Sixth Amendment right to confront his accuser. This includes the right to introduce impeachment evidence. The right to introduce prior criminal history of the victim is an issue of constitutional magnitude. State v. Jones, 117 Wn.App. 221, 70 P.3d 171 (2003).

At Mr. Beliz' trial, the trial court denied his motion to impeach Mr. Bratton with his prior criminal history. The court cited two cases that stand for the proposition that drug convictions should never be admitted against a defendant because they are not probative of the defendant's credibility. State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997); State v. Calegar, 133 Wash.2d 718, 947 P.2d 235 (1997). But the trial court failed to distinguish between the defendant and prosecution witnesses, even going so far as to say the analysis is the same. But there is a substantial difference between the defendant and prosecution witnesses, particularly a material witness such as the victim.

There is a significant difference between a prior felony being admitted to impeach a material prosecution witness and the accused. Washington uses a two-pronged test for determining whether the failure to admit the criminal conviction of a prosecution witness violates the defendant's right to confrontation. Jones at 233, citing State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983). First, the evidence must be relevant. Second, if the evidence is relevant, the court looks to see whether the State has shown a compelling interest that outweighs the interest of the defendant in admitting the evidence. Reviewing the issue for the first time on appeal, the Court in Jones held that a twenty year old forgery conviction was not relevant and failure to introduce the conviction was not manifest constitutional error.

Neither of the cases cited by the trial court stand for the proposition that prior drug convictions are per se inadmissible, as implied by the trial court. In Hardy, the Supreme Court began its analysis with this quotation, "Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes." Hardy at 706, citing 5 Karl B. Tegland, Wash. Prac., Evidence § 114, at 383 (3d ed.1989). The Court then explained at length why admitting prior drug convictions improperly

prejudice the defendant. But there is little, if any, danger that the jury will believe the victim has a propensity to commit crimes because the victim is not charged with a crime.

Likewise, the Calegar Court was concerned with drug convictions of the defendant, not another witness. The Court cited at length from a former case in saying, “The State in Jones argued that Jones's criminal record reflected a propensity for lying because ‘lying is an integral facet of the criminal personality...’ We explicitly rejected the State's argument stating, ‘simply because *a defendant* has committed a crime in the past does not mean *the defendant* will lie when testifying.’” Calegar at 724, citing State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984) (emphasis added).

As Justice Talmadge made clear in his dissent in Hardy, neither Hardy nor Calegar stand for the proposition that drug convictions are per se inadmissible, even against a defendant. See Hardy at 716 (Justice Talmadge, dissenting). The Hardy and Calegar cases were decided on the same day. While Calegar was unanimous, Hardy was decided by a 6 to 3 majority. In his dissent, Justice Talmadge quotes the unanimous decision of Calegar for the proposition that the State must show “that the specific nature of the crime of possession of a controlled substance was probative

of the defendant's ability to tell the truth on the witness stand.” Hardy at 717, quoting Calegar at 727.

As the Hardy and Calegar cases make clear, the State bears a difficult burden when it seeks to admit a drug conviction against a testifying defendant. But the defendant does not bear that same difficult burden when seeking to impeach a prosecution witness. The difference lies in the fact that the defendant has the Sixth Amendment right of confrontation and the State does not.

Before admitting a prior offense under ER 609(a)(1), the trial court is required to balance the following factors on the record: (1) the length of the defendant's criminal record;(2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant;(5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction. Calegar at 722, citing State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1216 (1980).

In Mr. Beliz’ case, he sought to admit Mr. Bratton’s criminal history of drug convictions. Unlike the Jones case, Mr. Beliz argued for the admissibility of the convictions; therefore, this issue is not raised for the first time on appeal and Mr. Beliz need not show manifest constitutional error.

Mr. Bratton has been convicted three times of drug offenses, in 1976 for manufacture and delivery of drugs, and 1998 and 2000 for possession. RP, 59. In addition, at the time of Mr. Beliz' trial, he was pending trial for yet another drug possession. The trial court refused admission of the three convictions and admitted the pending charge as a pending, unnamed felony as evidence of bias. While the 1976 conviction was arguably stale because it was more than ten years old, the other two convictions were within ten years.

Drugs were a major, if understated, theme of Mr. Beliz' trial. Mr. Beliz testified that he came over to western Washington with two other men for the purpose of buying drugs. According to his testimony, the trip was not a success. The group could not find anyone in Seattle to buy drugs from, so they came to Quilcene. The one person they knew in Quilcene from which to buy drugs, Mr. Bratton, was not home, so they went into his house. Joseph Martinez, who had been high constantly for four days, found a tiny bit of methamphetamine, which he promptly consumed. He then left on Mr. Bratton's bicycle, rode to a nearby convenience store, shoplifted a beer, and was arrested. Meanwhile, Mr. Beliz and the driver, Joe from Idaho, were left drugless. Mr. Beliz went to a friend's house, has breakfast, and sleeps for over twenty-four hours. Meanwhile, Joe from Idaho, who matched Mr. Bratton's description closer

than Mr. Beliz, shows up the next day in a red Jeep (presumably Mr. Logue's stolen Jeep). He then leaves and returns to Idaho.

Mr. Beliz was attempting to establish a reasonable doubt that Joe from Idaho was the assailant and, desperate for methamphetamine, decided to rob Mr. Bratton of his "stuff." In order to do that, he needed to establish that Mr. Bratton is someone likely to possess illegal "stuff," such as methamphetamine. The fact that he has thrice been convicted on dealing or possessing methamphetamine is relevant to help establish that fact. In addition, the fact that he has a pending drug possession charge would have been helpful.

The State sought to paint Mr. Bratton in a different light. The State introduced evidence that he is a longtime resident, works in construction, and is a military veteran. Mr. Beliz had the right to impeach that picture of Mr. Bratton.

Turning to the six Alexis factors. Mr. Bratton has a lengthy criminal history with three felony convictions and one pending. Although one of the convictions was remote, the other two were not. In addition, the pattern of arrests, starting in 1976 and ending just prior to Mr. Beliz' trial arguably made them all relevant. All of the convictions involved drugs, which do not directly implicate credibility.

The fourth Alexis factor, the age and circumstances of the witness weigh in favor of admissibility. Whether Mr. Bratton was a long time drug dealer as the defense contended, or a local ex-Marine construction worker as the State contended, was a central issue. The proposed evidence was directly relevant to impeach the State's portrayal of its star witness. Mr. Bratton's credibility was the central issue in this trial because he was the victim of the gun shot and the only eyewitness to the robbery. Although drug convictions normally have minimal impeachment value, given the facts of this case, his criminal history was very impeaching.

Had the trial court engaged in the proper analysis, Mr. Bratton's criminal history, including the fact that he was pending a drug possession charge, would have been admitted. But the trial court was of the erroneous assumption that the defendant's criminal history is analyzed the same as prosecution witnesses. Mr. Beliz had the constitutional right to confront the only eyewitness to the robbery and assault. This included the right to confront him with his prior criminal history. A new trial is required.

3. The trial court erred by not granting a new trial for a violation of Brady v. Maryland.

After Mr. Beliz' trial, defense counsel learned that one of the State's witnesses had been working under contract for the State as a confidential informant. Ms. Presler had been actively working as a confidential informant until September 6, 2008. The State sought to portray her as someone who had previously been working for the State, but was no longer under any obligations to the State. But this portrayal was not accurate. The record reveals that Ms. Presler had at least one (and maybe more than one) case where she had acted as a confidential informant and was expected to testify in the future. That is how defense counsel learned of her: he was assigned an unrelated case that was pending trial where she was the confidential informant.

One of the difficulties with analyzing this case is that, although the trial court ordered Ms. Presler's contact to be turned over to the defense, the State refused to comply with that order. As a result, we do not know the exact terms of her contact. Because it is the State that has refused to turn over this relevant information, despite a court order to do so, it is reasonable to give all reasonable inferences to Mr. Beliz. A reasonable inference from this record is that Ms. Presler was arrested for a traffic offense and agreed to do controlled buys for the Sheriff's Office and testify in court about those buys. At least one of those controlled buys (Mr. Gilmore's unrelated client) was still pending trial at the time of Mr.

Beliz' trial. If she failed to cooperate with law enforcement regarding that case, she would lose the benefit of her contact. She, therefore, had a motive and bias to act favorably with the police and prosecutor's office. Mr. Beliz had a Sixth Amendment right to impeach her with that motive and bias.

The right of cross-examination under the Sixth Amendment allows more than asking general questions concerning bias and motive; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974). Mr. Beliz had the right to confront Ms. Presler with his motive and bias as an active confidential informant.

The reason Mr. Beliz did not impeach Ms. Presler with this fact is that the State never disclosed it to defense counsel. This was a direct violation of Mr. Beliz' Sixth Amendment right to be advised of all exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). When there is a Brady violation as a result of prosecutorial misconduct, a conviction must be set aside if there is any reasonable likelihood that the undisclosed testimony could have affected the jury's decision. State v. Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993), citing United States v. Agurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976). The fact that the prosecutor did not know that Ms.

Presler was a confidential informant is not relevant. Detective Apeland was part of the prosecution team in Mr. Beliz' case and any exculpatory or impeaching evidence known to him is imputed to the prosecutor. See Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). A new trial is required.

4. Mr. Beliz was erroneously sentenced to a firearm enhancement when he was charged with a deadly weapon enhancement.

Count I of the amended information charged Mr. Beliz with attempted murder in the second degree. It also charged a sentencing enhancement. The amended information reads that he is charged with possessing a firearm and lists two statutes: RCW 9.94A.602 and 9.94A.125. Neither of these statutes authorizes a firearm enhancement. The trial court noted this discrepancy at sentencing, but added a five year enhancement. This was error.

Every person has the right to be put on notice of any enhancement that increases the maximum penalty for the offense. Apprendi v. New Jersey, 430 U.S. 466, 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). There is an ambiguity between the words in Mr. Beliz' sentencing

enhancement and the statute. Based upon the statutes listed, Mr. Beliz was charged, not with a firearms enhancement, but with a deadly weapon enhancement.

Under Washington law, there is a significant difference between a deadly weapon enhancement and a firearm enhancement. State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), reversed in part, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), modified, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008).

Under Washington law, the information must allege the elements of the offense, including any sentencing enhancements. Recuenco III at 435, citing State v. Theroff, 95 Wn.2d 385, 622 p.2d 1240 (1980). In Theroff, the original information contained a firearm enhancement, but the amended information omitted the allegation. The Supreme Court reversed the enhancement. The purpose of this rule is to give notice to defendants and permit them an opportunity to prepare a defense.

The amended information for Mr. Beliez listed two statutes, RCW 9.94A.125 and 9.94A.602. These two statutes are redundant because the former has been repealed and recodified as the latter. See Recuenco III, footnote 3. The statute reads:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission

of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

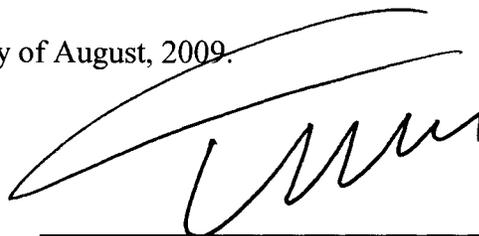
As the Supreme Court noted in Recuenco III, this statute defines deadly weapons as including firearms. This statute is a remnant of the days before the “Hard Time for Armed Crime” Initiative in 1995. Upon passage of the Initiative, RCW 9.94A.310 split the previous deadly weapon enhancement into separate enhancements for firearms and for other deadly weapons. RCW 9.94A.310, which has since been recodified as RCW 9.94A.533, prescribes a five year firearm enhancement for Class A felonies and a two year enhancement for all other deadly weapons. As the Recuenco III Court noted, however, RCW 9.94A.602 (former 9.94A.125) was not amended to reflect the changes of the Initiative. Recuenco III at 438.

The significance of this history for Mr. Beliz is that he was charged with a statute that fails to distinguish between firearms and other deadly weapons. He was not charged with RCW 9.94A.533 at all, but solely RCW 9.94A.602. Although he was put on notice that the State sought a deadly weapon enhancement, he was not put on notice that the State sought a five year firearm enhancement. This error is not harmless. Recuenco III at 441-42. The remedy is to remand for the imposition of a two year deadly enhancement.

D. Conclusion

The attempted second degree murder charge should be reversed and dismissed. The remaining counts should be reversed and remanded for a new trial. The firearm enhancement on Count I should be remanded for entry of a deadly weapon enhancement.

DATED this 3rd day of August, 2009.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,)	Case No.: 08-1-00054-6
)	Court of Appeals No.: 38763-8-II
Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
MOSES BELIZ, JR.,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On August 3, 2009, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

ORIGINAL

1 On August 3, 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
2 the Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend, WA 98368.

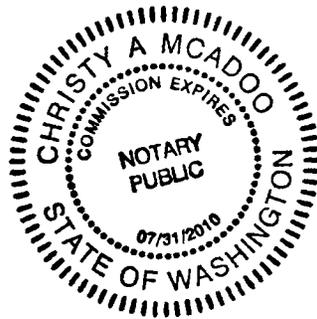
3 On August 3, 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
4 Mr. Moses Beliz, Jr., DOC #952567, Washington State Penitentiary, 1313 North 13th Avenue,
5 Walla Walla, WA 99362.

6 Dated this 3rd day of August, 2009.



7
8 Thomas E. Weaver
9 WSBA #22488
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 3rd day of August, 2009.



12
13 Christy A. McAdoo
14 NOTARY PUBLIC in and for
15 the State of Washington.
16 My commission expires: 07/31/2010