

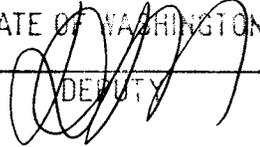
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

RIGOBERTO J. CONTRERAS,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard D. Hicks, Judge

Cause No. 08-1-02091-0

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P.M. 8-28-09

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Contreras his constitutional right to confrontation under both Crawford and Bruton by allowing the State to present the statement of Woods, a non-testifying co-defendant, implicating Contreras.
2. The trial court erred in giving Instruction No. 9, the accomplice liability instruction, where it relieves the State from its burden of proving Contreras committed and overt act.
3. The trial court erred in failing to take the case against Contreras for robbery in the first degree and vehicle prowling as an accomplice from the jury for lack of sufficient evidence.
4. The trial court erred in imposing the firearm enhancement on Count I where there was insufficient evidence to establish the Contreras or an accomplice was armed with a firearm.
5. The trial court erred in imposing a firearm enhancement on the robbery where a weapon was also a necessary element for that crime in violation of the principles of doubt jeopardy.
6. The trial court erred in failing to instruct the jury regarding the firearm enhancement that it could enter a verdict of “not unanimous.”
7. The trial court erred in allowing Contreras to be represented by counsel who provided ineffective assistance in failing to object to the court not instructing the jury regarding the firearm enhancement that it could enter a verdict of “not unanimous.”
8. The trial court erred in violating Contreras’s constitutional right to remain silent at sentencing.

9. The trial court erred in unconstitutionally shifting the burden to Contreras to disprove his criminal history once the State present a Statement of Prosecuting Attorney of Criminal History.
10. The trial court erred in failing to dismiss Contreras's case where the cumulative effect of the claimed errors materially affected the outcome of the trial.
11. The trial court erred in the manner set forth by Contreras's co-defendants in their respective briefs, which assignments of error applicable to Contreras are adopted and incorporated herein pursuant to RAP 10.1(g).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Contreras his constitutional right to confrontation under both Crawford and Bruton by allowing the State to present the statement of Woods, a non-testifying co-defendant, implicating Contreras? [Assignment of Error No. 1].
2. Whether the trial court erred in giving Instruction No. 9, the accomplice liability instruction, where it relieves the State from its burden of proving Contreras committed and overt act? [Assignment of Error No. 2].
3. Whether there was sufficient evidence elicited at trial to find Contreras guilty beyond a reasonable doubt of robbery in the first degree and vehicle prowling as an accomplice? [Assignment of Error No. 3].
4. Whether the trial court erred in imposing the firearm enhancement on Count I where there was insufficient evidence to establish the Contreras or an accomplice was armed with a firearm? [Assignment of Error No. 4].
5. Whether the trial court erred in imposing a firearm enhancement on the robbery where a weapon was also a necessary element for that crime in violation of the principles of doubt jeopardy? [Assignment of Error No. 5].

6. Whether the trial court erred in failing to instruct the jury regarding the firearm enhancement that it could enter a verdict of “not unanimous?” [Assignment of Error No. 6].
7. Whether the trial court erred in allowing Contreras to be represented by counsel who provided ineffective assistance in failing to object to the court not instructing the jury regarding the firearm enhancement that it could enter a verdict of “not unanimous?” [Assignment of Error No. 7].
8. Whether the trial court erred in denying Contreras’s Fifth Amendment right to remain silent and his Fourteenth Amendment right to due process at sentencing? [Assignments of Error Nos. 8 and 9].
9. Whether the trial court erred in failing to dismiss Contreras’s case where the cumulative effect of the claimed errors materially affected the outcome of the trial? [Assignment of Error No. 10].
10. Whether the trial court erred in the manner set forth by Contreras’s co-defendants in their respective briefs, which assignments of error applicable to Contreras are adopted and incorporated herein pursuant to RAP 10.1(g)? [Assignment of Error No. 11].

C. STATEMENT OF THE CASE

1. Procedure

Rigoberto J. Contreras (Contreras) was charged by fourth amended information filed in Thurston County Superior Court with one count of robbery in the first degree as a principal or accomplice (Count I), one count of attempted burglary in the first degree as a principal or accomplice (Count II), one count of unlawful possession of a firearm in the first

degree (Count III), and one count of vehicle prowling in the second degree as a principal or accomplice—a gross misdemeanor (Count IV). [CP 20-21]. The information also included firearm sentence enhancement allegations on Counts I and II. [CP 20-21].

Prior to trial, Contreras made no motions pursuant to CrR 3.5 or 3.6. Contreras and his co-defendants (Timothy Baxter (Baxter), Jason Woods (Woods), Brian Winter (Winter), and Toby Anderson (Anderson)) were tried by a jury, the Honorable Richard D. Hicks presiding. Contreras stipulated to having a prior serious offense that precluded his possession of a firearm for purposes of Count III (unlawful possession of a firearm in the first degree). [CP 22; Vol. III RP 396-397]. Contreras had no objections and took no exceptions to the court's instructions to the jury. [CP 24-97; Vol. IV RP 443-448]. The jury found Contreras guilty of robbery in the first degree (Count I) entering a special verdict finding Contreras committed this crime while armed with a firearm; not guilty of attempted burglary in the first degree or the lesser included offense of attempted trespass in the first degree (Count II); not guilty of unlawful possession of a firearm in the first degree (Count III); and guilty of vehicle prowl in the second degree (Count IV). [CP 101, 102, 103, 104, 105, 106, 107, 108; Vol. V RP 599-611].

On February 19, 2009, the matter came before the court for sentencing. [2-19-09 RP 3-36]. Prior to hearing the State's or Contreras's defense counsel's sentencing recommendation, the court violated Contreras's right to remain silent at sentencing by questioning him regarding whether Contreras had reviewed his criminal history. [2-19-09 RP 3]. The court then heard sentencing recommendations from the State and Contreras's defense counsel and sentenced Contreras to a standard range sentence of 210-months on Count I (150-months for the underlying crime of robbery in the first degree plus 60-months for the firearm sentence enhancement) based on an offender score of ten (10), and to a sentence of 12-months on Count IV (vehicle prowling in the second degree—a gross misdemeanor) with the sentences running concurrently for a total sentence of 210-months. [CP 113-123, 124-127; 2-19-09 RP 3-11].

Timely notice of appeal was filed on February 19, 2009. [CP 109]. This appeal follows.

2. Facts

At approximately 8 AM on the morning of November 18, 2008, a man came to the door of Cary Swofford's (Swofford) trailer wanting to speak with her about his mother. [Vol. III RP 346]. Swofford did not know the man (he looked like a "gangbanger") only speaking to him

through the door. [Vol. III RP 348]. Swofford noticed a number of other men getting out of car parked in the driveway. [Vol. III RP 345].

Swofford woke up her friend, Russel Molnar (Molnar), who was sleeping on the sofa. [Vol. II RP 219]. Molnar went to the door and spoke with a man, who wanted to talk about his mother. [Vol. II RP 222-223]. Molnar didn't know the man or what he was talking about, but did notice two other men standing behind the first man. [Vol. II RP 223-224]. Molnar saw a total of five (5) to ten (10) men at Sworfford's trailer door and in and around the trailer's yard. [Vol. II RP 219, 221]. Molnar refused to allow them into Swofford's trailer and testified that the men got a "little aggressive." [Vol. II RP 225].

Swofford and Molnar turned on a surveillance camera inside Swofford's trailer. [Vol. II RP 222]. Some of the men were seen trying to get into a Geo and an unidentified person did get into a Ford Explorer taking the car stereo/CD player; both vehicles were parked in Swofford's driveway. [Vol. II RP 225, 234; Vol. III RP 340-341]. Molnar went back to the door to confront the men in the yard when someone outside tried to open the door. [Vol. II RP 226, 249-251]. Molnar believed the man who tried to open the door was the same man who had initially come to the door asking about his mother. [Vol. II RP 226]. That same man went to a car in the driveway and returned to the door where Molnar observed over

the monitor of the surveillance camera that he was carrying a rifle about two and a half (2 ½) feet long which the man cocked by slamming it down. [Vol. II RP 225, 228, 235, 241, 275-278]. Swofford did not actually see a gun. [Vol. III RP 351-352, 374, 379, 385].

Molnar called 911 and reported the incident describing to the 911 operator that the men had looked Mexican all wearing beanie caps and left in a 1966 or 1967 light blue Impala; he told the 911 operator there were ten (10) men involved. [Vol. II RP 231, 246, 248, 252-253].

TCSO Deputy Cameron Simper (Simper) was dispatched to Molnar's 911 call and while enroute he saw a light blue compact heading in the opposite direction. [Vol. II RP 90-93]. Simper did a U-turn and stopped the car, which was driven by Contreras. [Vol. II RP 94, 98]. Woods was in the front passenger seat, and Baxter, Anderson, and Winter were in the back seat. [Vol. II RP 99-100]. A CD player was on the floorboard where Woods had been seated, but no weapon was found in the car. [Vol II RP 101, 105]. Simper later searched along the road along the path traveled by the car driven by Contreras finding an unloaded black 12-gauge sawed-off shotgun lacking a firing pin and a trigger housing that had been tampered with—no firing pin or ammunition was found either in the car driven by Contreras or along the road. [Vol. II RP 108; Vol. III RP 313-316]. This shotgun was admitted at trial as Exhibit No. 25, but

Molnar testified that Exhibit No. 25 was not the firearm he had seen and Swofford never actually saw a firearm. [Vol. II RP 115, 283, 287, 294; Vol. III RP 353].

Simper interviewed all save one of the defendants/appellants. [Vol. II RP 128-131, 135-140]. Simper testified that Woods admitted to going to Swofford's home regarding an incident there involving Woods's mother denying ever entering any vehicle while there. [Vol. II RP 136-137]. Simper then testified that Woods told him that the shotgun had been passed to Woods from the backseat of the car driven by Contreras and that he had tossed the gun out the window as he had been told to do. [Vol. II RP 130, 135-136]. Simper testified that both Contreras and Anderson denied any knowledge of the shotgun. [Vol. II RP 137, 139]. Contreras also denied any knowledge about the CD player and denied entering any vehicle. [Vol. II RP 137]. Simper testified that Baxter told him nothing as he had been sleeping—"just along for the ride." [Vol. II RP 138-139].

Swofford and Molnar were taken to the scene where the car driven by Contreras was stopped by TCSO Deputy Kyle Kempke (Kempke) for a show up identification. [Vol. II RP 110, 162, 189-192]. Both Molnar and Swofford identified Woods as being the man who came to the trailer door with Molnar also identifying Woods as the person he saw with the firearm. [Vol. II RP 192-193, 235; Vol. III RP 355]. Kempke testified that both

Swofford and Molnar also identified Contreras and Winter as individuals that had been at the trailer. [Vol. II RP 193-194]. However, both Molnar and Swofford testified that the only identified one person—Woods. [Vol. II RP 235-236; Vol. III RP 355, 363].

TCSO Detective Tim Arnold (Arnold), the State's firearm expert, testified that Exhibit No. 25—the only firearm recovered—could not be test fired due to its lack of a firing pin and the damage to the trigger housing (the firearm was inoperable) resulting in a bullet simple falling out if chambered. [Vol. III RP 313-314, 326-330]. Moreover, it would take an hour to repair the firearm to make it operable provided a firing pin could be ordered and obtained used or from the manufacturer as the firearm was at least 40 if not 75 years old—the ordering process for the part taking weeks or months. [Vol. III RP 314, 324-325, 335].

Contreras did not testify at trial nor did any of his co-defendants.

D. ARGUMENT

- (1) THE TRIAL COURT DENIED CONTRERAS HIS RIGHT TO CONFRONTATION UNDER CRAWFORD AND BRUTON BY ALLOWING THE STATE TO PRESENT THE STATEMENT OF WOODS, A NON-TESTIFYING CO-DEFENDANT, IMPLACATING CONTRERAS THROUGH THE TESTIMONY OF DEPUTY SIMPER.

Under the Sixth Amendment to the Federal Constitution and Art. 1, sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant

has the right to confront and cross-examine the witnesses against him. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 5114 (1983). The right to confront adverse witnesses is an issue of constitutional magnitude that may be considered for the first time on appeal under RAP 2.5(a). State v. Connie J.C., 86 Wn. App. 453, 456, 937 P.2d 1116 (1997) (*citing State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). In State v. Foster, 135 Wn.2d 441, 473-474, 481-498, 957 P.2d 712 (1998) (*See* opinion of Alexander, J., dissenting in part and dissenting opinion of Johnson, J.), a majority of our Supreme Court held that the Washington Constitutional provision provides greater protections to defendants than the federal provision.

The right to confront and cross-examine cannot be restricted absent a demonstration by the State that there is a compelling state interest more important to the truth-finding process than the curtailment of the defendant's confrontation rights. State v. Hudlow, 99 Wn.2d at 16; State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976); State v. Ahlfinger, 50 Wn. App. 466, 474, 749 P.2d 190, *rev. denied*, 110 Wn.2d (1988); State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842 (1984).

First, in Crawford, the United States Supreme Court held absent a defendant's right to confront the declarant, the admission of an out of court testimonial statement violates the Sixth Amendment confrontation

clause. Crawford v. Washington, 124 S. Ct. 1354, 1369-70 (2004). A statement made during police interrogation is considered testimonial. Id at 1364.

Here, Woods was interrogated by Deputy Simper and made a statement. Woods did not testify at trial, but his statement was admitted. Contreras was denied his right to confront Woods and on this basis his convictions should be reversed.

It is anticipated that the State will argue that Crawford has not been violated as Woods's statement was sufficiently reliable under the ER 801(d)(2)(v) co-conspirator exemption from the hearsay rule. However, there is nothing in the record to indicate that a conspiracy existed nor that Woods's statement was made, as required by the exemption, in the furtherance of any conspiracy—he was responding to questions by a police officer. Moreover, it is submitted, as argued below, that the State cannot even establish accomplice liability let alone a conspiracy. And it is well settled that, “accomplices’ confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule.” Lilly v. Virginia, 527 U.S. 116 134, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). Under the facts of this case, Contreras’s right to confrontation was violated and his convictions should be reversed.

Even if this court finds that Contreras's right to confrontation was not violated under Crawford, the admission of Woods's statement would still violate Contreras's right to confrontation under Bruton.

A criminal defendant is denied the right of confrontation when a nontestifying co-defendant's statement that names the defendant as a participant in the crime is admitted at a joint trial, even where the court instructs the jury to consider the confession only against the co-defendant. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1969).

In Bruton, two defendants, A and B, were tried jointly for robbery. The trial court admitted A's confession, which also implicated B, and instructed the jury that it could use the confession only against A. A did not testify at trial, and both defendants were convicted. In finding that B's constitutional right to confront A had been violated, the United States Supreme Court held that no reasonable juror would have adhered to the limiting instruction, and that A's statement had been used against B even though B had not been able to confront A.

Bruton was refined in Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), where the court, under the same pattern of evidence admitted in Bruton, held that A's confession is not effectively redacted where the jury receives a written copy on which B's name is

whited out, leaving a blank space between two commas. In effect the court ruled that even where B is merely implicated by A's statement the right to confrontation is still denied.

In the instant case, the State called Deputy Simper as a witness and he testified to a statement Woods had made to him. Essentially, Simper testified that Woods told him that the shotgun, eventually admitted as Exhibit No. 25, had been passed to Woods from the backseat of the car and that he had tossed the gun out the window as he had been told to do. [Vol. II RP 130, 135-136]. Woods did not testify. Woods statement, while not naming Contreras implicates him in criminal activity.

According to Woods's statement, someone in that car told him to dispose of the shotgun leaving the implication that it could have been Contreras. More importantly, Contreras was driving the car, a small compact with five people crammed inside all of whom were tried together, so if Woods was handed the gun from the backseat and threw it out the front passenger window the implication is that Contreras had to know about the gun and had to be involved as Woods's accomplice.

In light of this testimony, the court gave Instruction No. 4 as a preventive measure, which states:

You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.

[CP 30].

However, in disregard to this instruction and in violation of Contreras's confrontation rights as set forth in Bruton and Gray, the State repeatedly argued in closing that Woods's statement established the connection between all the defendants on trial:

And the defendants, five of them, were located packed into this Datsun.... [Vol. IV RP 484]

In that vehicle, ladies and gentlemen, you had Contreras driving, Woods the front-seat passenger, Baxter to the left rear, Winter in the middle, and Toby Anderson in the right rear. In that vehicle was found the CD player that was stolen from the Explorer on the front floorboard where Mr. Woods was sitting. And the shotgun, according to Mr. Woods, was in the backseat and was pitched out by him. Of course, it had to go out a window, a front window, driver or passenger front window....[Vol. IV RP 485]

...

Ladies and gentlemen, we have this small Datsun vehicle, I believe one of the deputies referred to the defendants as packed in or jammed in. They arrived at the scene together. The weapon was used at the scene, and the weapon was in the car and was tossed from the car. Now, I'm suggesting to you, ladies and gentlemen, that Mr. Woods should be believed. He told the deputies that, yeah, I threw the shotgun out. I threw it out. It came from the back. It came from the back seat. I'm not going to tell you who did it. It came from the back seat....[Vol. IV RP 498]

...

And talk about credibility. Defendants—the ones who were interviewed by the deputies, who acknowledged, we were there. We were there at the scene, but don't know anything about anything getting stolen. I don't know anything about a vehicle

prowl. I don't know anything about a shot gun. Or Mr. Woods, he's supposed to be credible. Yeah, it came from the back seat...
[Vol. IV RP 592]

The State's repeated arguments did not confine Woods's statement as evidence to be used solely against Woods. The State used Woods's statement to tar all of the defendants including Contreras. The Supreme Court has held that it is improper for a prosecutor "to undo the effect of the [Bruton] instruction by urging the jury to use the [co-defendant's] confession in evaluating the [defendant's] case." Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d (1987).

Contreras was denied the right to confront Woods about his statement. The introduction of Woods's statement implicating Contreras in the crimes for which Contreras was charged violated his constitutional right to confrontation under Bruton and its progeny. The State exacerbated the violation of Contreras's confrontation rights by failing to abide by Instruction No. 4. This court should reverse Contreras's convictions.

(2) INSTRUCTION NO. 9, THE ACCOMPLICE LIABILITY INSTRUCTION, RELIEVED THAT STATE OF ITS BURDEN TO PROVE CONTRERAS COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a

defendant to approve or assent to a crime; instead, he must say or do something that carries the crime forward. State v. Peasley, 80 Wn. 99, 100, 141 P.2d 316 (1914). In Peasley, the Supreme Court distinguished between silent assent and an overt act as follows:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

State v. Peasley, 80 Wn. At 100; *see also* State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (physical presence and assent alone are insufficient for conviction as an accomplice).

Similarly, in Renneberg, the State Supreme Court approved the following language: “to aid and abet may consist of words spoken or acts done....” [Emphasis added]. State v. Renneberg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). The court noted that an instruction is proper if it requires “some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.” State v. Renneberg, 83 Wn.2d at 739-40, *quoting* State v. Redden, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

Here, the court instructed the jury in Instruction No. 9 on accomplice liability as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or abets another person in the planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

[CP 35].

This instruction, Instruction No. 9, was fatally flawed because it allowed conviction without proof of an overt act. Under this instruction, the jury was permitted to convict if Contreras was present and assented to his co-defendants’ crimes, even if he committed no overt act contrary to the mandates of State v. Peasley, *supra*, and State v. Renneberg, *supra*.

The final two sentences of Instruction No. 9 do not cure this problem. The penultimate sentence—“A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime”—does not exclude other situations such as a

person who is present and unwilling to assist, but approves of the crime may still be convicted as an accomplice if he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence—“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice”—excludes presence coupled with silent assent or silent approval. Thus, according to this sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt, Contreras’s convictions must be reversed. State v. Peasley, supra, and State v. Renneberg, supra.

(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT CONTRERAS WAS GUILTY AS AN ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE (COUNT I) AND VEHICLE PROWLING (COUNT IV).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Contreras was charged and convicted of robbery in the first degree (Count I) and vehicle prowling (Count II) as an accomplice. The court’s to-convict instruction on Count I, Instruction No. 18, [CP 447-48], set forth the elements the State bore the burden of proving beyond a reasonable doubt as follows:

- 1) That on or about 18th day of November, 2008, the defendant, or an accomplice, unlawfully took personal property from the person or in the presence of another;
- 2) That the defendant or an accomplice intended to commit theft of the property;
- 3) That the taking was against the person’s will by the defendant’s or accomplice’s use or threatened use of immediate force, violence, or fear of injury to that person or that person’s property or the person or property of another;

- 4) That the force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- 5) (a) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and
- 6) That any of these acts occurred in the State of Washington.

The court's to-convict instruction on Count IV, Instruction No. 59, [CP 47-48], set forth the elements the State bore the burden of proving beyond a reasonable doubt as follows:

- 1) That on or about 18th day of November, 2008, the defendant or an accomplice unlawfully entered or remained in a vehicle;
- 2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- 3) That the acts occurred in the State of Washington.

The court also instructed the jury on accomplice liability in Instruction No.9 [CP 35] set forth in its entirety above in section (2), consistent with the State's theory of the case—that Contreras, who admitted to being at Swofford's trailer and as the driver of the car stopped by Simper, must be an accomplice to any crimes committed at the trailer.

“A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed.” State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (citations omitted); *see also* State v. Robinson, 73 Wn. App. 851, 897 P.2d 43 (1994). The evidence must demonstrate more than that the accused was present and knew what was going to happen. In order to convict under an accomplice liability theory, the State must demonstrate some nexus between the party committing the act and the party deemed the accomplice. State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981). A defendant’s presence at the scene of criminal activity combined with knowledge of the criminal activity, does not establish accomplice liability. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979); State v. Amezola, 49 Wn. App. 74, 89, 741 P.2d 1024 (1987).

In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt that Contreras, simply by being present at Swofford’s trailer and driving the car stopped by Simper, was in fact an accomplice to the crimes that occurred at Swofford’s trailer. The State cannot sustain its burden in this regard as to either conviction.

In Robinson, a case similar to the instant case, the defendant was the driver of a car which was stopped at street light. While the car was

stopped, a passenger jumped out of the car, approached a woman walking down the street, grabbed her purse, and jumped back into the car ordering Robinson to drive away, which Robinson did. Robinson was convicted of robbery based on accomplice liability. The appellate court reversed holding that the State had failed to meet its burden in establishing that Robinson was more than merely present with knowledge of his passenger's criminal act even though he had driven away from the crime; Robinson was not an accomplice to the crime.

Like Robinson, the record here does not establish anything more than Contreras mere presence at Swofford's trailer, which Contreras admitted to Simper, that he was the driver of the car, and that he may or may not have been aware of what was truly taking place at Swofford's trailer. There was no evidence presented that Contreras had a gun or displayed what appeared to be a gun, or was even aware that anyone had a gun at Swofford's trailer; there was no evidence presented that it was Contreras who took the CD player from the Ford Explorer parked in Swofford's driveway, and there was no evidence presented that it was Contreras who entered any vehicle parked in Swofford's driveway or that he knew anyone had done so. Absent any evidence that Contreras acted in any way to aid or assist the individuals committing the crimes of robbery in the first degree and vehicle prowling, it cannot be said that

Contreras was an accomplice and therefore guilty. He was merely present at the scene and like the defendant in Robinson drove away after someone else had committed the crimes. This court should reverse and dismiss Contreras's convictions.

- (4) THE TRIAL COURT'S IMPOSITION OF A FIREARM ENHANCEMENT VIOLATED CONTRERAS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE OR AN ACCOMPLICE WAS ARMED WITH A FIREARM.

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The same is true for sentence enhancements. State v. Recuenco, 163 Wn.3d 428, 180 P.3d 1276 (2008).

Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty.

State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995), *quoting* State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn.2d 1025, *review denied*, 117 Wn.2d 1026, 820 P.2d 510 (1991).

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533. Before a firearm enhancement may be imposed, the State must prove "beyond a reasonable

doubt [that] the weapon in question falls under the definition of a ‘firearm:’ ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” State v. Recuenco, 163 Wn.2d at 437, quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Supp. 2005) (WPIC).¹

The State Supreme Court has held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

[Emphasis added]. State v. Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).

Here on Count I, the court imposed a 60-month firearm sentence enhancement on Contreras based on the jury returning a special verdict finding that he was armed with a firearm during the commission of the crime.² [CP 108, 113-123]

¹ This is in contrast to the substantive crime (robbery in the first degree), which requires only that the “defendant or an accomplice displayed what appeared to be a firearm....” See Instruction No. 18 [CP 47-48].

² This court should note that while Contreras was convicted of robbery in the first degree (Count I) and the jury entered a special verdict that he was armed with a firearm during the commission of Count I, [CP 101, 108], triggering the imposition of the firearm enhancement; the jury acquitted Contreras of Count III, unlawful possession of a firearm in the first degree. [CP 105]. There was no evidence elicited at trial the placed Exhibit No. 25 or any firearm for that matter in Contreras’s possession—he was never armed during the commission of the robbery.

The gun introduced at trial, Exhibit No. 25, was not operable, and thus did not qualify as a firearm for purposes of the enhancement. First, it lacked a firing pin. No firing pin was found near the shotgun or in the car Contreras was driving. The gun was at least 40 to 75 years old, and the State's firearms expert believed that the firing pin for this gun was no longer being manufactured and finding a used firing pin could take weeks or months. [Vol. III RP 314, 324-325, 334-335]. Even if a firing pin were available, it would take a firearm expert at least an hour to install. [Vol. III RP 325].

Moreover, the special verdict states:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant RIGOBERTO J. CONTRERAS, armed with a firearm at the time of the commission of the crime of ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM as charged in Count I?

ANSWER: Yes

[Emphasis added]. [CP 108].

According to the language of this special verdict, the jury found that Contreras was the person actually armed with a firearm. This is simply untrue based on the evidence presented at trial. The special verdict should have asked the jury whether Contreras or an accomplice in the commission of Count I was armed with a firearm. While this may seem like a minor distinction given that "If on participant in the crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved," [CP 93], our State Supreme Court has held that the specific language of the special verdict is controlling. *See State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (a special verdict finding a "deadly weapon" enhancement precludes the court from imposing a "firearm enhancement" even where the only deadly weapon involved is a firearm and where the instructions define "deadly weapon" to include a firearm).

Second, the trigger housing had been tampered with, in such a way as to make the gun inoperable—a chambered bullet would simply fall out. [Vol. III RP 314]. No evidence was presented on how long it would take to repair the damage, or if repairs were even possible. [Vol. III TP 334-335].

Third, the State’s expert opined that the gun might have additional problems. [Vol. III RP 335].

Under these circumstances, the State has failed to prove beyond a reasonable doubt that the gun, Exhibit No. 25, qualified as a firearm. *See* Instructions Nos. 13 and 62—defining a firearm as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” [CP 39, 93]. Exhibit No. 25 was not operable and therefore not a firearm by definition. State v. Recuenco, 163 Wn.2d at 437. The firearm enhancement must be stricken and the case remanded for resentencing without the enhancement.

Moreover, the firearm arm enhancement must be stricken because the State failed to prove beyond a reasonable doubt that Contreras or an accomplice “armed” with a firearm. A firearm enhancement applies whenever a person is “armed” with a deadly weapon during the commission of a crime. RCW 9.94A.533(3).

A person is “armed” if the firearm is “easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Proximity and/or possession are insufficient to establish that a person is “armed” under the statute. For example, evidence that an unloaded gun was found under the defendant’s bed is insufficient to prove that he was “armed” for purposes of an enhancement. State v. Valdobinos, 122 Wn.2d at 282. Whether a gun is loaded or unloaded is not determinative, but it is one factor to be considered in determining whether or not a person is “armed” within the meaning of the statute. State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998). Under the same reasoning, a gun’s operability must be considered in determining whether or not a person is armed.

As set forth above, Exhibit No. 25, the only firearm admitted at trial was not only unloaded (no ammunition was ever found) it was not operable (it could not fire—any bullet chambered would simply fall out). Exhibit No. 25 could not be used for offensive or defensive purposes. Accordingly, the defendants were not “armed” with a firearm for the purposes of the enhancement. The enhancement must be stricken and the case remanded for resentencing without the enhancement. State v. Valdobinos, 122 Wn.2d at 270.

- (5) DOUBLE JEOPARDY PRINCIPLES WERE VIOLATED WHERE CONTRERAS'S USE OF A DEADLY WEAPON WAS BOTH AN ELEMENT OF ROBBERY IN THE FIRST DEGREE AND BASIS FOR IMPOSING A SENTENCE ENHANCEMENT.

In the instant case, Contreras was convicted in Count I of robbery in the first degree (requiring the use of a deadly weapon) [CP 47-48, 101], the jury returned a special verdict finding that the crime was committed while was armed with a firearm [CP 108], and the sentence imposed on Count I included a 60-month sentence enhancement. [CP 113-123].

It has long been the law that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of the weapon is an element of the crime. State v. Pentland, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986). This principle has consistently been upheld. *See* State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied* 163 Wn.2d 1053, 187 P.2d 752 (2008), *cert. denied* (Dec. 1, 2008); State v. Kelly, 146 Wn. App. 370, 189 P.3d 853 (2008).

However, the State Supreme Court has recently accepted review of Kelly on the issue of whether double jeopardy principles are violated when a defendant's use of a weapon is both an element of the crime and the basis for imposing a weapon sentence enhancement. [S.C. No. 82111-9]. The matter is set for oral argument on October 29, 2009.

In light of this and out of abundance of caution, Contreras asserts that under Art. 1 sec. 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution, the double jeopardy prohibition against multiple punishments prevents him from being sentenced for the crime of robbery in the first degree, which crime includes a deadly weapon as an element, and also being sentenced to a firearm sentence enhancement.

The double jeopardy clauses of both the State and Federal Constitutions protect against 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969), *overruled on other grounds*, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. Id at 107. Moreover, double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

The first step in deciding whether punishment violates double jeopardy is to determine what punishment is authorized by the legislature.

State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Subject to constitutional restraints the legislature has the power to define crimes and assign punishment. State v. Calle, 125 Wn.2d 769, 775-776, 888 P.2d 155 (1995). If the intent is clear and the legislature authorizes “cumulative punishments” under two different statutes, “then double jeopardy is not offended” and the court’s double jeopardy analysis is at an end. State v. Freeman, 153 Wn.2d at 771.

Here, the statutes at issue are RCW 9A.56.200 (the robbery statute making the crime one of the first degree with a corresponding greater punishment based on the element of a deadly weapon) and RCW 9.94A.533(3) (the firearm enhancement statute adding additional time to the underlying sentence based on committing the crime while armed with a firearm). RCW 9.94A.533, part of the Hard Time for Armed Crime Act of 1995 (Initiative 195), was designed to provide increased penalties for criminals using or carrying guns, to “stigmatize” the use of weapons, and to hold individual judges accountable for their sentencing on serious crimes. Laws of 1995, ch. 129 sec. 1 (Findings and Intent). In enacting this statute, voters intended longer sentences and greater punishment for those who participate in crimes where a principal or an accomplice is armed with a firearm. Overlooked by the voters, apparently, was the problem of redundant punishment created when a firearm enhancement

imposed under this statute is added to a crime that already requires a firearm as an element. Simply pointing to the language of RCW 9.94A.533(3)(f) in which the legislature exempted certain crimes from the imposition of a firearm enhancement as indicative of legislative intent to impose “cumulative punishments” does not satisfy double jeopardy concerns of multiple punishments where a weapon is an element of a crime (raising that crime to a greater degree and corresponding increased sentence) and a sentence enhancement for that very same weapon is also imposed.

Of great significance is the fact that the Hard Time for Armed Crime Act was passed before Ring and Blakely. *See Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-605, 122 S. Ct. 2428, 153 L. Ed. 2d 18 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476-77 n. 19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Jones v. United States, 526 U.S. 227, 243, 119 S. Ct. 1215, 153 L. Ed. 2d 311 (1999). These cases make clear that the relevant determination is now what label the fact has been given by the legislature or its placement in the criminal sentencing code, but rather the effect it has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. Succinctly stated:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring, 536 U.S. at 605; *see also* Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (while case decide on Sixth Amendment bases, noting there is “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy).

Therefore, because a firearm enhancement acts as an element of a higher crime, RCW 9.94A.533 simply adds a redundant element of use of a firearm for crimes where the use of a firearm was already an element in violation of double jeopardy principles.

The second step in double jeopardy analysis is the “same elements” test under Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Where the same act or transactions constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one, is whether each provision requires proof of a fact which the other does not. Id.; *see also* State v. Calle, 125 Wn.2d at 777.

Here, Contreras’s robbery conviction was the same in fact and law as his accompanying firearm enhancement. Factually, each involves the

same criminal act as well as the same victims. Moreover, the jury found Contreras was armed with a firearm by special verdict pursuant to RCW 9.94A.533(3) but the robbery couldn't have been committed as alleged without Contreras being armed with a firearm. Contreras was given an additional 60-months on his sentence for the firearm enhancement. The effect was to essentially sentence him for robbing another with a firearm while armed with a firearm, and was thus convicted and punished twice for the use of the weapon in violation of double jeopardy principles. This court should vacate the firearm enhancement and remand the matter for resentencing.

(6) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE FIREARM ENHANCEMENT WHERE A VERDICT OF "NOT UNANIMOUS" IS A THIRD POSSIBLE FINAL VERDICT WHICH ERROR IS REFLECTED IN THE WORDING OF THE SPECIAL VERDICT FORM.

As instructed in Instruction No. 63 and set forth in the special verdict form, the jury was told that they had to be unanimous to return a verdict on the firearm enhancement. [CP 94-97, 108]. But the instruction and special verdict form are incorrect. As explained in Goldberg, unanimity is not required for a special verdict to be final. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.2d 1083 (2003). Unanimity is required if a jury is to answer "yes" or "no" to a special verdict. Id.

Because there is a third possible answer to a special verdict, that of “not unanimous,” it was error to not instruct jury as such and include this third option on the special verdict as such under the facts of this case.

Consider a similar situation—the penalty phase in a death penalty case. In such cases, after guilt has been established, the jury then determines whether to impose a death sentence based on whether there were sufficient mitigating factors to warrant leniency. *See* WPICs 31.05, 31.06, 31.08. The jury is instructed that the proof must be beyond a reasonable doubt and that they must be unanimous to impose a death sentence; there are two other possibilities: 1) the jury is unanimous not to impose death or 2) they are not unanimous and life without the possibility of parole is the sentence. *See* WPICs 31.05, 31.06, 31.08. More importantly, the special verdict form specifically sets forth the three options of “yes,” “no,” and “no unanimous agreement.” *See* WPIC 31.09.

Like the penalty phase in a death penalty case, the firearm enhancement is only considered by the jury once guilt has been found. Like the penalty phase in a death penalty case, the firearm enhancement must be proved beyond a reasonable doubt. Like the penalty phase in a death penalty case, the jury must be unanimous in order for the firearm enhancement to be imposed. Based on these similarities, there is no reason why the jury is not instructed when considering a firearm

enhancement that “not unanimous” is a valid verdict as the jury is instructed in a death penalty case.

This seems to be particularly true here where the jury was told that did not need to be unanimous on elements 5(a) and 5(b) of the robbery to-convict instruction. [CP 47-48]. Alternative 5(a) allows the jury to convict if they find the principal or an accomplice was armed with a deadly weapon during the commission of the crime or in the flight therefrom. Alternative 5(b) allows the jury to convict if a principal or accomplice displayed was appeared to be a firearm or other deadly weapon during the commission of the crime or in flight therefrom. In this case, there was evidence of both alternatives. Molnar testified that he had seen a gun. Swofford testified that she had not seen a gun but what could have been a gun. Because unanimity was not required on this element, we do not know if the jury was unanimous or split on elements 5(a) and 5(b).

The State will likely counter by arguing that the jury must have unanimously found element 5(a) as they unanimously answered “yes” on the special verdict form. [CP 108]. But the question remains if the jury would have been unanimous if they knew that they did not have to be to put and end to their deliberations on the firearm enhancement. First, there was the inconsistent testimony between Molnar and Swofford. Second, Molnar testified that the shotgun admitted as evidence, Exhibit No. 25,

was not the gun he had seen. Third, there was certainly a question about shotgun's operability as argued above in section (4). Finally, the wording of the special verdict form itself is confusing and states that the jury found that Contreras not an accomplice was armed with a firearm and there was absolutely no evidence presented that Contreras ever handled a firearm. Based on this, certainly, there could be at least one juror among the twelve with a reasonable doubt given all the issues in the case and reasonable doubt equates to a "not unanimous" verdict. The jury should have been told "not unanimous" was an option regarding the firearm enhancement and that choice should have been reflected on the special verdict form.

- (7) CONTRERAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE FIREARM ENHANCEMENT WHERE A VERDICT OF "NOT UNANIMOUS" IS A THIRD POSSIBLE FINAL VERDICT AND IN FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to object to the court instructing the jury that it had to be unanimous before returning a verdict on the firearm enhancement where a verdict of "not unanimous" is a third possible final verdict (Instruction No. 63) and the wording of the

special verdict form, [CP 94-97, 108], and/or by failing to propose an accurate instruction and special verdict form on the firearm enhancement that the jury could return a verdict of “not unanimous,” then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Here, both prongs of ineffective assistance are met. First, the record does not, reveal any tactical or strategic reason why trial counsel would have failed to object to Instruction No. 63 and the special verdict

form that is not accurate nor propose an instruction and special verdict form that the jury could be “not unanimous,” and had counsel done so, the trial court would have properly instructed the jury regarding the sentence enhancement.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding section, had counsel properly objected to Instruction No. 63 and the special verdict form and/or proposed an accurate instruction and special verdict form there is every likelihood that the jury would have been “not unanimous” as to the firearm enhancement particularly where there was no evidence that Contreras ever handled a firearm and the special verdict form specifically stated that Contreras had to be armed not an accomplice was armed. With the entry of a “not unanimous” verdict, the sentence enhancement could not have been imposed.

(8) THE TRIAL COURT VIOLATED CONTRERAS’S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

A criminal defendant has a constitutional privilege against self-incrimination. Fifth Amendment to United States Constitution; Fourteenth Amendment to the United States Constitution. This includes a constitutional right to remain silent pending sentencing. *In re Post*, 145

Wn. App. 728, 758, 187 P.3d 803 (2008), *citing* Mitchell v. United States, 526 U.S. 314, 325, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) and Estelle v. Smith, 451 U.S. 454, 462-63, 101 S. Ct. 1866, 68 L. Ed.2d 359 (1981).

Here, prior to hearing the State's or Contreras's defense counsel's sentencing recommendation, the court questioned Contreras regarding whether he had reviewed his criminal history. [2-19-09 RP 3]. In doing so the court violated Contreras right to remain silent pending sentencing and ostensibly shifted the burden from the State to Contreras to establish his criminal history. The court's actions were improper and the matter should be remanded for resentencing.

Moreover, the State bears the burden of proving an offender's criminal history, and does not meet its burden through "bare assertions, unsupported by evidence." State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). Effective June 12, 2008, the legislature amended RCWs 9.94A.500 and 9.94A.530. Under current RCW 9.94A.500(1) applicable to the instant case as the crimes were committed on November 18, 2008, "[a] criminal history summary relating to the defendant from the prosecuting authority...shall be prima facie evidence of the existence and validity of the convictions listed therein." Prior to this amendment, a Prosecutor's Statement of Criminal History (the very evidence provided by the State in the instant case to establish Contreras priors for his

offender score calculation, [CP 124-127]) was insufficient to establish an offender's criminal history. State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Given this change, the sentencing court may rely on information that is "acknowledged in a trial at the time of sentencing,"³ and "[a]cknowledgment includes...not objecting to the criminal history presented at the time of sentencing." Current RCW 9.94A.530(2).

These legislative changes fail to recognize that any summary provided by the State is nothing more than a bare assertion unsupported by evidence (a list) the accuracy of which cannot be guaranteed, i.e. what if a crime is listed as a felony when in fact it is a misdemeanor (not an unheeded of occurrence). In addition, these legislative changes shift the State's burden of proof at sentencing to the defendant to object and disprove the State's bare assertions contrary to the holding in Ford that "an offender's failure to object to such assertions [does not] relieve the State of its evidentiary obligations." State v. Ford, 137 Wn.2d at 482. As the State Supreme Court has held, requiring the offender to object when the State presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." Id. The legislative amendments to

³ Contreras stipulated to having a prior felony conviction at trial. [CP 22; Vol. III RP 397].

RCWs 9.94A.500 and 9.94A.530 violate the Fifth and Fourteenth Amendments.

This matter should be remanded to the trial court for resentencing.

- (9) THE CUMMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF CONTRERAS'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 Contreras'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 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

- (10) PURSUANT TO RAP 10.1(g), CONTRERAS ADOPTS AND INCORPORATES ARGUMENTS APPLICABLE TO HIS CASE AS RAISED BY HIS CO-DEFENDANTS/CO-APPELLANTS ANDERSON, BAXTER, WINTER, AND WOODS.

RAP 10.1(g) provides:

Briefs in Consolidated Cases and in Cases Involving Multiple Parties. In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more of the other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another.

[Emphasis added].

Pursuant to this rule, Contreras adopts and incorporates by this reference those arguments presented by his co-defendants/co-appellants Anderson, Baxter, Winter, and Woods applicable to his case. In particular but not limited to Winter's Arguments II and IV; and Baxter's Argument 2.

E. CONCLUSION

Based on the above, Contreras respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 28th day of August 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28th day of August 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 28th day of August 2009.

Patricia A. Pethick
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